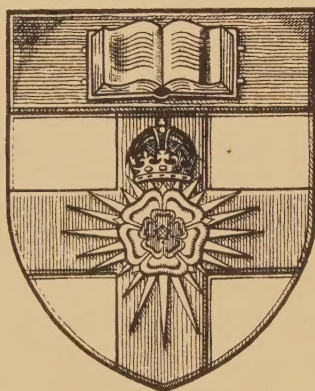


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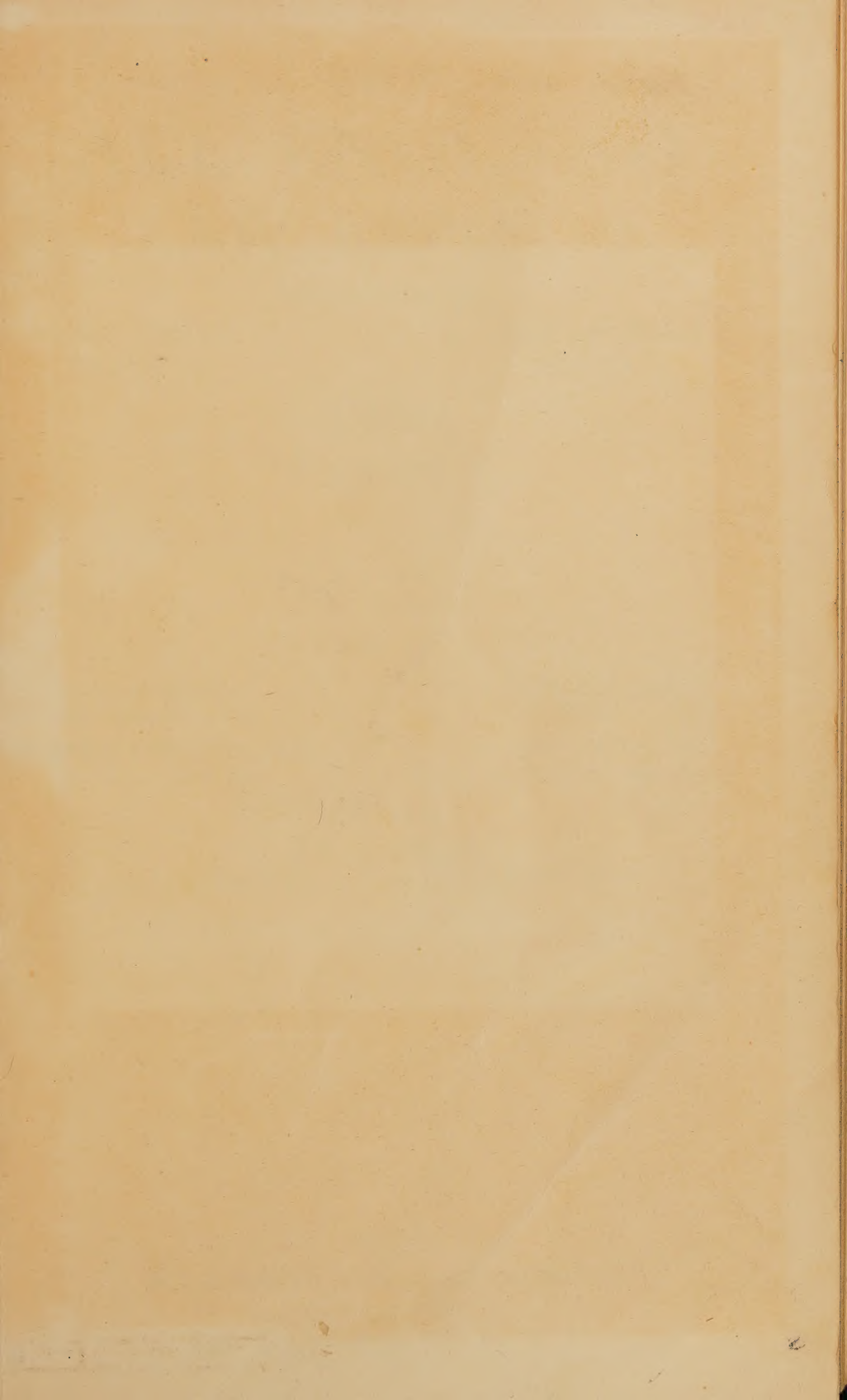
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The reference 2 HALSBURY'S LAWS (3rd Edn.) 20, para. 48, refers to paragraph 48 on page 20 of Volume 2 of the third edition of Halsbury's Laws of England, of which Viscount Simonds is Editor-in-Chief.

HALSBURY'S LAWS OF ENGLAND, HAILSHAM EDITION

The reference 34 HALSBURY'S LAWS (2nd Edn.) 30, para. 26, refers to paragraph 26 on page 30 of Volume 34 of the second edition of Halsbury's Laws of England, of which Viscount Hailsham was Editor-in-Chief.

HALSBURY'S STATUTES OF ENGLAND, SECOND EDITION

The reference 26 HALSBURY'S STATUTES (2nd Edn.) 138, refers to page 138 of Volume 26 of the second edition of Halsbury's Statutes.

ENGLISH AND EMPIRE DIGEST

The reference 24 DIGEST 602, 6028, refers to case No. 6028 on page 602 of Volume 24 of the Digest.

There are three cumulative supplements to the Digest, described as Digest Supp., 2nd Digest Supp. and 3rd Digest Supp.; of these the first two include cases up to December 31, 1939, and December 31, 1951, respectively.

The reference 31 DIGEST (Repl.) 244, 3794, refers to case No. 3794 on page 244 of Digest Replacement Volume 31.

HALSBURY'S STATUTORY INSTRUMENTS

The reference 12 HALSBURY'S STATUTORY INSTRUMENTS 124, refers to page 124 of Volume 12 of Halsbury's Statutory Instruments, first edition.

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The reference 15 ENCY. FORMS & PRECEDENTS (3rd Edn.) 938, Form 231, refers to Form 231 on page 938 of Volume 15 of the third edition of the Encyclopaedia of Forms and Precedents.

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- p. 212. G. H. RENTON & CO., LTD. v. PALMYRA TRADING CORPORATION OF PANAMA. Counsel for the defendants: read "*Eustace Roskill, Q.C., T. G. Roche, Q.C., and A. J. Bateson*" instead of as printed.
- p. 246. CUNDY v. CUNDY. Line C.2: for "*terms*" read "*promise*".
- p. 299. HALL & CO., LTD. v. PEARLBERG. Counsel for the defendant: for "*I. S. Warren*" read "*E. Dennis Smith*".
- p. 442. WATERS v. WATERS. Solicitors for the husband: for "*Collins, Dryland & Thorowgood, Reading*", read "*Brain & Brain, Reading*".

THE ALL ENGLAND LAW REPORTS

INCORPORATING THE
LAW TIMES REPORTS
AND THE
LAW JOURNAL REPORTS

VINE v. NATIONAL DOCK LABOUR BOARD.

[COURT OF APPEAL (Singleton, Jenkins and Parker, L.JJ.), November 28, 29, 30, 1955.]

Employment—Regulation—Registration of workers—Dismissal of worker pursuant to decision of statutory tribunal—Action for declaration of invalidity of dismissal and damages—Whether damages sufficient remedy—Dock Labour Board—Delegation of quasi-judicial disciplinary powers—Dock Workers (Regulation of Employment) Order, 1947 (S.R. & O. 1947 No. 1189), cl. 16 (2) (c).

Declaration—Discretionary remedy—Damages a sufficient remedy—Dock worker's irregular dismissal.

The plaintiff was a registered dock worker employed by the defendants, the National Dock Labour Board. The national board was set up under the Dock Workers (Regulation of Employment) Order, 1947, to administer the scheme provided by the order with power to delegate to local boards constituted by the order certain disciplinary functions. By cl. 16 (2) (c) of the scheme the local boards were given power to give seven days' notice of termination of employment to any registered dock worker who failed to comply with any provision of the scheme. The plaintiff failed to comply with a provision of the scheme (in fact, to obey a valid order to report for work) and the local board instructed their disciplinary committee which consisted of only two members of the local board to consider his case. The dock labour scheme contained no provision for the delegation of a disciplinary matter by a local board. The disciplinary committee, having considered the case, decided that the plaintiff should be given seven days' notice of termination of employment and their decision was upheld by the appeal tribunal. The plaintiff having been given seven days' notice under cl. 16 (2) (c), left the employment of the defendants as from about Nov. 22, 1952. He brought an action against the defendants in February, 1953, in a county court claiming £136 damages for wages lost; this having been transferred to the High Court he claimed by his statement of claim delivered on Jan. 12, 1954 (i) a declaration that his purported dismissal was invalid, and (ii) damages; and pleaded that as from Nov. 22, 1952, he ceased to be in the employment of the defendants. By amendment in May, 1954, the plaintiff pleaded in his statement of claim that he elected to treat the contract as discharged by repudiation by the defendants and "alternatively the plaintiff elected to treat the contract as subsisting". The plaintiff having been granted the declaration and damages, the defendants appealed.

Held: (i) the local board had no power to delegate its disciplinary powers conferred by cl. 16 (2) (c) of the scheme to a disciplinary committee consisting of two of its members, and the purported dismissal of the plaintiff and the subsequent proceedings before the appeal tribunal were, therefore, illegal, ultra vires and invalid.

Barnard v. National Dock Labour Board ([1953] 1 All E.R. 1113) followed.

(ii) (JENKINS, L.J., dissenting) the declaration should not have been granted because

(a) the plaintiff by delivering his statement of claim in January, 1954, had elected to treat the contract between him and the defendants as repudiated and to claim damages for wrongful dismissal, and this election was final so that the plaintiff could not thereafter maintain that he was entitled to relief (i.e., the declaration) on the footing that the contract was subsisting (see p. 6, letter I, and p. 13, letter A, post) and

(b) even if the plaintiff had not so elected, the granting of a declaration was discretionary and the present case was one in which damages were an adequate and the only proper remedy (see p. 8, letters B to D, and p. 13, letter F, post).

Barnard v. National Dock Labour Board ([1953] 1 All E.R. 1113) distinguished on the question of the relief to be granted.

Observations on putting the plaintiff to election between relief on the footing that the contract was repudiated and relief on the footing that it was subsisting (see pp. 6, 7, post, and p. 12, letters D to F, post).

Appeal dismissed, but declaration struck out.

[**Editorial Note.** The present case turned, so far as the decision on invalidity of the dismissal is concerned, on the absence of any provision in the legislation enabling a local board to delegate disciplinary functions. Attention was drawn by DENNING, L.J., in *Barnard v. National Dock Labour Board* ([1953] 1 All E.R. at pp. 1118, 1119) to the possibility of a local board's having a quorum of two members for disciplinary matters, as distinct from constituting and purporting to delegate to a disciplinary committee of that number. PARKER, L.J., agrees that the decision of such a quorum would be the decision of the local board (see p. 11, letter C, post), i.e., that there would not be delegation. The procedure adopted in the present case, however, was not that and amounted to a purported delegation.

On the question of the plaintiff's being bound by an election to treat the contract of employment as repudiated, the present case may be compared with those where a plaintiff has to elect between suing in tort or contract, see 8 HALSBURY'S LAWS (3rd Edn.) 248, 249; and as to election to accept a repudiation and rescind, see *ibid.*, 203, 204.

As to the control of statutory tribunals and the delegation of judicial functions, see 9 HALSBURY'S LAWS (3rd Edn.) 581, para. 1352.

As to the discretionary power to make declaratory judgments, see 19 HALSBURY'S LAWS (2nd Edn.) 215, para. 512; and for cases on the subject, see 30 DIGEST (Repl.) 169, 208 et seq.

A summary of the Dock Workers (Regulation of Employment) Order, 1947 (S.R. & O. 1947 No. 1189) will be found in 7 HALSBURY'S STATUTORY INSTRUMENTS 142.]

Case referred to:

(1) *Barnard v. National Dock Labour Board*, [1953] 1 All E.R. 1113; [1953] 2 Q.B. 18; 3rd Digest Supp.

Appeal.

The defendants, the National Dock Labour Board, appealed from an order of ORMEROD, J., dated July 28, 1955, at Winchester Assizes, whereby he awarded the plaintiff £250 damages and granted him a declaration that the action of the defendants in dismissing him was ultra vires and invalid.

A The plaintiff, Mr. Vine, was at all material times a registered dock worker under the Dock Workers (Regulation of Employment) Order, 1947, made by the Minister of Labour pursuant to the Dock Workers (Regulation of Employment) Act, 1946, s. 2. The National Dock Labour Board, the defendants, were established under cl. 3 (1) of the Order of 1947. The order laid down a scheme for the employment of registered dock workers which it was the duty of the

B defendants to administer. Those registered dock workers who were not under regular contracts of employment with registered employers were placed, under the scheme, in the reserve pool. Clause 8 (2) provided:

"A registered dock worker in the reserve pool who is available for work shall be in the employment of the national board."

C Clause 8 (4) provided:

"A registered dock worker available for work in the employment of the national board shall carry out the directions of the local board . . ."

The local dock labour boards were set up under cl. 5 of the scheme and by cl. 3 (3) it was made the duty of the national board to delegate to these local boards a number of its functions. By cl. 15 (3) a dock worker who failed to comply with

D any lawful orders given by his employers might be reported to the local board. Clause 16 (2) of the scheme provided:

"Where a registered dock worker available for work fails to comply with any of the provisions of the scheme . . . the local board may take any of the following steps as regards that dock worker—it may (a) determine that for such period as it thinks proper he shall not be entitled to any payment under cl. 14 hereof; (b) suspend him without pay for a period not exceeding seven days; (c) give him seven days' notice of termination of employment; (d) dismiss him summarily."

E

Clause 17 provides:

"(1) The employment of a registered dock worker in the reserve pool who is available for work shall not be terminated except—(a) by summary dismissal in the case of serious misconduct; or (b) by the giving of seven days' notice in writing; or (c) so as to enable the worker to be employed in accordance with the provisions of the scheme. (2) A registered dock worker in the reserve pool who is available for work shall not leave his employment with the national board except by giving seven days' notice in writing to the local board or so as to be employed in accordance with the provisions of the scheme. (3) Where the employment of a registered dock worker by the national board has been terminated under para. 1 (a) or (b) or under para. 2 hereof after notice given by him, his name shall forthwith be removed from the register or record."

F

G

H Clause 18 (1) provided, inter alia, that if a registered dock worker had been suspended from the scheme, he might within three days lodge an appeal with the appeal tribunal. No express power to delegate the powers contained in cl. 16 (2) was given to the local board by any provision of the scheme.

On Oct. 29, 1952, the plaintiff, who was in the reserve pool, was told to report for work to a company of stevedores. He did not so report and the company notified the defendants by letter dated Oct. 30. On the same day the complaint was passed on to the plaintiff by the defendants who asked for his explanation. The plaintiff gave an explanation and the defendants then notified him that "a disciplinary committee will be considering this case . . . on Nov. 13, 1952 . . . Please arrange to be in attendance". Two members of the local board who had been appointed by the local board as a disciplinary committee sat to consider the plaintiff's case. One member represented the employers and one member represented the employees. On Nov. 13, the disciplinary committee agreed to give the plaintiff seven days' notice to terminate his employment with

I

the defendants. The plaintiff then appealed to the appeal tribunal which dismissed his appeal. The plaintiff left the employment of the defendants on Nov. 22, 1952.

In February, 1953, the plaintiff commenced proceedings against the defendants in Southampton County Court, where he stated his claim as follows "The plaintiff claims damages, wages £136, costs £3". The defendants objected to the jurisdiction and the county court made an order for the transfer of the action to the High Court. On Jan. 12, 1954, the plaintiff delivered his statement of claim in which he claimed (i) a declaration that his purported dismissal was illegal, ultra vires and invalid, and (ii) damages. In para. 3 of the statement of claim the plaintiff alleged that as from Nov. 22, 1952, he ceased to be employed by the defendants. In May, 1954, para. 3 of the statement of claim was amended to read that as from Nov. 22, 1952, the plaintiff ceased to perform duties for or on behalf of or at the request of the defendants and they ceased to pay wages to the plaintiff; and a new para. 6 was added to the statement of claim in which it was pleaded that the defendants repudiated their contract of employment with the plaintiff, that the plaintiff elected to treat the contract as discharged and that "alternatively the plaintiff elected to treat the said contract as still subsisting". The case was heard on July 15, 16, 1955 before ORMEROD, J., who delivered judgment on July 28.

ORMEROD, J., held that there had been non-compliance with the scheme by the defendants, in that the local board had no power under the scheme to delegate its functions to a disciplinary committee, and that the proceedings before the committee were, therefore, a nullity. He granted the declaration sought by the plaintiff and awarded him £250 damages.

Harold Brown, Q.C., and G. W. Willett for the defendants.

Phineas Quass, Q.C., and T. O. Kellock for the plaintiff.

SINGLETON, L.J.: The defendants appeal to this court and raise three points—first, that the judgment was wrong in that judgment ought to have been entered for the defendants; secondly, that if the judgment of ORMEROD, J., was right he ought not to have granted a declaration in the circumstances of this case; and thirdly, that, in any event, the damages were too high.

The regulations contained in the scheme were the subject-matter of consideration by this court in 1953 in *Barnard v. National Dock Labour Board* (1) ([1953] 1 All E.R. 1113). The court in that case held that the local board had no power, express or implied, to delegate its quasi-judicial disciplinary functions to the port manager or to ratify his purported exercise of those functions, and the original notice of suspension was, therefore, a nullity and the decision of the appeal tribunal based on them was equally a nullity. It is claimed on behalf of the plaintiff in this case that the decision of the disciplinary committee was void and of no effect by reason of the fact that the local board had no power to delegate its powers to a disciplinary committee. It is common ground in this case that certain powers given to the local board were delegated to the two members of the disciplinary committee who sat on the plaintiff's case. When the defendants took disciplinary action against the plaintiff they purported to be acting under cl. 16 of the scheme. [HIS LORDSHIP read the clause* and continued:] The powers are given to the local board, and as this court said in *Barnard v. National Dock Labour Board* (1), those powers are either of a judicial or of a quasi-judicial character, and the local board to whom they are given cannot delegate them. In *Barnard v. National Dock Labour Board* (1), the delegation was to the port manager. In the present case the delegation was to two members of a disciplinary committee. It was pointed out to the learned judge that there was no power to delegate those powers to the disciplinary committee; it was the duty of the local board to exercise them itself. ORMEROD,

* The relevant terms of the clause are printed at p. 3, letter D, ante.

A J., followed the decision of this court in *Barnard v. National Dock Labour Board* (1), and held that that delegation was wrong and that, there having been no decision of the local board, the whole proceeding was null and void; he held further that, although there was an appeal to the appeal committee, the effect of the appeal was also a nullity.

B It appears to me that that is right in view of the decision in *Barnard v. National Dock Labour Board* (1). It would be of great convenience if the local board, who have many duties, were able to delegate certain matters to some of their members, but by doing that which they did in this case they excluded from sitting those members of the local board who were not nominated to sit. The minutes show that on Oct. 2, 1947, a disciplinary committee was set up. The minute reads:

C "In order to implement cl. 15, 16 and 17 of the scheme it was decided to appoint a disciplinary committee at each port consisting of one member representing the dock workers and one member representing the employers. At Southampton these duties would be undertaken by the local members in turn and the cases at Poole would be dealt with by Messrs. Gapper and Way, and at Weymouth by Messrs. Salmon and Vine."

D That practice was followed, and it was approved by the national board. The scheme, however, does not provide for it. The scheme provides for the national board to delegate many of its duties to the local boards, but there is no provision for a delegation by the local board of a disciplinary matter such as this; the local board is not given power to delegate. If there is a disciplinary proceeding under cl. 16 (2) it must be according to the terms of the scheme, and if, by reason of such delegation as was the practice, other members are excluded from sitting on the local board there is no decision of the local board. It follows from what E I have said that the appeal against the judgment in favour of the plaintiff fails.

F It was said by counsel on behalf of the defendants that cl. 17 of the scheme came into play. Clause 17 deals with a registered dock worker in the reserve pool, whereas cl. 16 is not limited to a reserve pool man, nor does it exclude, on the face of it, a reserve pool man. [HIS LORDSHIP read the provisions of cl. 17* and continued:] Under cl. 18 of the scheme there are rights of appeal in respect of action taken under most parts of cl. 16 and cl. 17. Counsel said that the engagement of the plaintiff was terminated by seven days' notice in writing. That could be given under cl. 17; therefore there is no need to call in cl. 16; and as the plaintiff's engagement was terminated by the giving of seven days' G notice in writing, he had a right of appeal which he exercised. Counsel said that the matter could be treated as something done under cl. 17 against which there was an appeal, and regarded as properly done. The answer to that appears to me to be a simple one. Action was not taken under cl. 17 but was taken under cl. 16 which has the marginal note "Disciplinary procedure". If a body such as this takes action on a matter of discipline and sets up a committee to deal with that matter the body cannot afterwards say that it did not act under cl. 16; but gave seven days' notice under cl. 17. That will not do. They purported to act in a disciplinary matter; their procedure was wrong, and the learned judge was right so to hold. They cannot say thereafter that they might have given notice under cl. 17 and it is the same thing. It is not the same thing. The employers, whom I have taken for this purpose to be the national board, might I have acted under cl. 17 in certain circumstances; but they did not do so in this case.

Now I come to the second question. The learned judge proceeded to deal with the nature of the remedy to which the plaintiff was entitled. He said:

"The difficult question here, as I see it, is the question of the appropriate relief to be granted to the plaintiff in this case. The further contention of

* These are printed at p. 3, letter F, ante.

the defence is that, even if the board was acting outside its powers and therefore the dismissal of the plaintiff was something which should be treated as a nullity, the plaintiff himself acquiesced in it, in that subsequent to his dismissal he has found other employment and is, indeed, at present employed by the Southampton Co-operative Society. I fail to find any real force in that argument. He was prevented from following his employment by the act of the dock labour board, and under those circumstances was left with no alternative but to try to find other employment in order to earn a living, at least until this matter could be decided one way or the other, and under those circumstances I think it is clear that there must be a finding here that the decision of the dock labour board suspending him as from Nov. 22, 1952, should be void and of no effect."

Then the learned judge considered whether a declaration should be granted or whether there was a sufficient remedy in damages in the circumstances of the case. He referred to certain passages from the judgment in *Barnard v. National Dock Labour Board* (1), about which I must say a word. In *Barnard v. National Dock Labour Board* (1) a number of dock labourers raised questions as to their rights under the scheme, questions of a kind which were considered in this case. They did not ask for damages. They had been suspended for a week, and considered that their suspension was wrong. If all they had wanted had been a week's wages, they might well have resorted to the county court, but they desired that a question of importance to both sides as to the interpretation of parts of the scheme should be determined. This court allowed the appeal and granted the declaration asked for by each of the men. It was said, after long argument on the main issue, that there was no power in the court to grant a declaration in such a case: the remedy which the men had was to ask for an order of certiorari. In fact the time for doing that had gone, and both parties desired the question under the scheme to be determined. This court determined it, and the only way the court could put the matter in order was to grant the declarations sought. The court did so, indicating that that form of remedy ought to be used sparingly. ORMEROD, J., pointed out that the same kind of question arose in this case.

The learned judge dealt first with the question whether or not he should grant a declaration. He then proceeded to deal with the question of damages. In my judgment the question ought to have been put to the plaintiff as to what remedy he sought. If he had said that he sought both damages and a declaration, he might have been asked to elect. If that had been done there would probably have been argument whether or not it was either necessary or desirable to grant a declaration. Counsel for the defendants told the court that that question was not argued. Whenever a declaration is asked for consideration should be given to the circumstances in order to determine whether it is a remedy necessary to establish the plaintiff's rights. This was an action for damages for wrongful dismissal of a workman by his employers; damages were claimed on that basis. The first claim of the plaintiff was in the Southampton County Court where he sought damages for wrongful dismissal and loss of wages. That action was transferred to the High Court, the statement of claim was delivered on Jan. 12, 1954, and para. 3 was in these terms:

"As from Nov. 22 [1952] the plaintiff ceased to be employed by the defendants."

At that time it appears to be clear that the plaintiff was treating himself as wrongfully dismissed by the defendants. He was accepting their repudiation of the contract, and that would have given him a right to damages. He should be regarded as having elected on that date, if he had not so done before, to treat the contract as repudiated and as at an end. At a later stage, in May, 1954, para. 3 of the statement of claim was amended to read:

"As from Nov. 22 the plaintiff ceased to perform duties for or on behalf

A of or at the request of the defendants and the defendants ceased to pay wages to the plaintiff."

A new para. 6 was added to the statement of claim, which read:

B "By the said notice the defendants repudiated their contract of employment with the plaintiff. The plaintiff elected to treat the said contract as discharged by the defendants' said repudiation. Alternatively the plaintiff elected to treat the said contract as still subsisting."

C Where that takes one I am not clear; but I am sure that it ought not to take one both ways. The plaintiff ought to have been put to his election, and if he had been, the case would have been much clearer than it is today. Counsel for the defendants told the court that para. 6, which is in alternative form, was added to the statement of claim on the suggestion of a judge in chambers. I think that it is embarrassing to the defendants. I am not sure how far it was considered by ORMEROD, J. What then is the position? If the judge was asked to give damages once and for all, he could have done so and the breach of contract of which the plaintiff complains could have been remedied by awarding the plaintiff the damages which he suffered through that breach, namely, through the defendants' wrongful dismissal. It is said that by reason of that which took place, and by reason in particular of cl. 17 (3) and of earlier parts of the scheme, the plaintiff's name was removed from the register, and he ceased to be a member of the reserve pool. He had been a dock labourer for twenty or thirty years, and his future would be affected if he could not work as a dock labourer. As I have said already, it looks from the original statement of claim as though he had decided that his employment was terminated; as if he accepted that and wanted damages. In such a case, if the judge was giving damages as the sole remedy, he would have to fix the damages having regard to the nature of the plaintiff's loss when he was wrongfully dismissed.

E There are some complications in this case. In the first place the plaintiff was uncertain what his position would be, and it is said that he was entitled to consider the question open until the case was heard. I think, for the reason I have given, that he had made up his mind that he was not going back to the defendants in any event. He obtained other employment; he did not ask to be taken back even after the judgment of ORMEROD, J., so far as I know. Thus I wondered at an early stage during the hearing of this appeal what was the purpose of granting both damages and a declaration and I thought that damages alone could be a satisfactory remedy for the plaintiff. I asked counsel for the plaintiff whether it was any use to him, and he said that it was of great use to him because he wanted to go back to work in the docks. I think it is much to be regretted that this question was not discussed before the learned trial judge.

G In my judgment the wrong done to the plaintiff can be sufficiently compensated by an award of damages. There is here something more than the case of an ordinary master and workman, because of the value to a man of his being within the scheme. That value depends, however, on the man himself. The report of the hearing before the disciplinary committee and some of the documents before us show that the plaintiff had been troublesome. The value of his position in the reserve pool was probably not as great to him as it would be to a man with a clean record. On the other hand, there was, as I read the scheme, the right on the part of the employers under cl. 17 (1) (b) to give him seven days' notice and he had some protection if they did so, for he could under cl. 18 appeal to the appeal tribunal, and they would have to consider the matter anew. Bearing in mind the fact that the plaintiff was on a weekly wage, I should consider the sum of £250 damages much too high if it was a sum assessed by the learned judge up to the date of the trial only. Some two and a half years had elapsed since his dismissal. Here was a fit man of fifty-two who had been a dock labourer, and he claimed that he could not get work, and he was awarded £250 damages. Counsel for the defendants was inclined to argue that the judge's assessment

was as general damages to cover all time. I am not clear that that is so from the judgment, but unfortunately the point was not developed before the learned judge as it might have been. If the assessment of damages was only up to the date of trial, I should be inclined to yield to the submission of counsel that the damages ought to be reduced. A

Having heard full argument on both sides, I am satisfied that a declaration ought not to have been granted in the circumstances of this case. I state my reasons. The granting of a declaration is discretionary; the discretion is one to be exercised by the judge, and this court will seldom interfere with the exercise of a judge's discretion on such a matter. I feel, however, that the question of a declaration was not fully developed before the learned judge, and had it been, I do not think that he would have granted a declaration. There is no reason, so far as I see it, why damages should not be sufficient remedy for a plaintiff in a case such as this; he has been awarded damages; he desires to keep the declaration. For what purpose? So that he can go back and say to the defendants, "I am on the pool; now please employ me"? And if they say that they would prefer not to employ him, he may commence an action claiming damages again. He has had the advantage of legal aid in this case in order to bring his claim. It has been a great help to him, I have no doubt; but I do not think that it would be right in the circumstances of this case to prolong the issue between these parties or to give encouragement to fresh proceedings. The object of the scheme was to promote harmony in working and to bring about regularity as far as possible. The wrong done to the plaintiff can be met adequately by awarding him damages. B C D

I am satisfied that it is in everyone's interest that this court should say that the declaration granted to the plaintiff should be set aside. Over and above that, I am satisfied that the sum of £250 awarded as damages is well sufficient to cover anything that could properly be awarded to the plaintiff if damages were assessed once and for all. For those reasons it seems to me that the appeal generally should be dismissed, except that the grant to the plaintiff of the declaration should be set aside. E

JENKINS, L.J.: I agree with my Lord that the learned judge was right in holding that the plaintiff's purported dismissal by the defendants as from Nov. 22, 1952 was illegal, *ultra vires* and invalid, but if the matter rested with me I would be disposed, differing in this respect from my Lord, to hold that the learned judge was also right, having stated the legal position to be as I have said, in granting a declaration to that effect. As my Lord has said, the granting of a declaration is a matter of discretion, and the learned judge, in the exercise of his discretion, thought fit to make a declaration in this case. Further, his decision in the exercise of his discretion should not be disturbed unless this court can be satisfied that he proceeded on some wrong principle. For my part I am unable to discern any application of a wrong principle by the learned judge in this matter; on the contrary, for my part I would agree with the conclusion at which he arrived. F G H

It is said that this scheme is comparable, for the present purpose, to a contract between master and servant, and it was pointed out in argument that nobody had ever heard of a case of wrongful dismissal where the relief claimed, or the relief granted, included a declaration that the plaintiff had been invalidly dismissed. It was said that that precedent or analogy should be followed in this case. I In the ordinary case of master and servant, however, the repudiation or the wrongful dismissal puts an end to the contract, and a claim for damages arises. It is necessarily a claim for damages and nothing more. The nature of the bargain is such that it can be nothing more. In this case, however, we are concerned with a statutory scheme which has given a number of rights and imposed a number of obligations going far beyond any ordinary contract of service. I find in cl. 10 (1) this:

A "No person other than a registered employer shall engage for employment or employ any worker on dock work nor shall a registered employer engage for employment or employ a worker on dock work unless that worker is a registered dock worker."

B The scheme thus restricts the employment of dock workers to those who are registered under the scheme. That makes exclusion or inclusion in the scheme vital to any person who wishes to pursue the trade or calling of a dock worker. Then I find in cl. 8 (2):

"A registered dock worker in the reserve pool who is available for work shall be in the employment of the national board."

C There one has what amounts to a statutory enactment to the effect that the dock worker is to be in the employment of the national board so long as certain conditions are fulfilled, that is to say so long as he is a registered dock worker in the reserve pool available for work. All these conditions were satisfied in the plaintiff's case. Under cl. 17 (1):

D "The employment of a registered dock worker in the reserve pool who is available for work shall not be terminated except—(a) by summary dismissal in the case of serious misconduct; or (b) by the giving of seven days' notice in writing; or (c) so as to enable the worker to be employed in accordance with the provisions of the scheme."

E I should add that cl. 18 gives certain rights of appeal against termination of employment. I think that the force of these provisions is not in any way affected by the circumstance that the dock worker himself is given the right to terminate his employment by seven days' notice in writing on his part. If there was no such right, this scheme would be oppressive indeed for it would involve every dock worker in compulsory continuance in the scheme without any opportunity of getting out of it. In the face of those provisions, to my mind it becomes plain that no analogy to this case can be found in the case of master and servant. If the learned judge was right in the conclusion to which he came on the question of the purported termination of the plaintiff's employment, if the plaintiff's dismissal was indeed illegal, ultra vires and invalid then, so far as I can see, the position now must be that the plaintiff's name was never validly removed from the register and that he was never validly dismissed. The conditions stated in cl. 17 (1) were not fulfilled, and as I see it, in the eye of the law, he must be considered as having continued in the employment of the national board, as the scheme said he was to continue. What objection is there? Why should it be wrong, those being the plaintiff's rights, for the court to make a declaration to the effect that his purported dismissal was ultra vires and invalid if in law he is to be regarded as still in the employment of the national board? Why should he not be entitled to have his rights vindicated and made known to the world by a declaration? For my part I can see no reason. It is said that a declaration would tend to produce further litigation. I cannot agree. I asked counsel for the defendants, and I think that he agreed, that if a declaration were made in this form the defendants would comply with its terms without any question whatever. What then would result? The plaintiff having gained his declaration would return physically to the employment of the defendants, in which he has in the eye of the law continued ever since his purported dismissal. His name would be restored to the register from which it should never have been removed and he would take his place in the pool. From then onwards the matter would take one of two courses. Either the plaintiff would prove more co-operative in the future than he has in the past, in which case the local board would have the advantage of the services of another willing and competent dock worker; or else he would revert to his old habits, in which case it seems probable that before long an opportunity would arise for the justifiable termination of his employment by seven days' notice. If that were done and the grounds

of the notice were held to be adequate on appeal, then the plaintiff would be validly dismissed and would have no more to say. There would be no question either way of any repeated claim for damages. A

It is said that damages would be an adequate remedy for the wrong which the plaintiff has suffered. Speaking for myself, I cannot follow that. Here is a man who had been employed in the docks as a dock worker for thirty years or more. It was his life's work; it was a trade which he had pursued from boyhood. Why should he be removed from that employment if he wishes to continue in it? B
Why should it not be a consideration, in deciding whether damages are an adequate remedy or not, that a man prefers one way of life to another? I can see no reason for holding that damages here are necessarily an adequate remedy. On the other hand a declaration would necessarily be an adequate remedy, for by definition it would exactly fit the legal rights of the parties. The inconvenience of a declaration in a case of this sort can, I apprehend, be exaggerated. The declaration here would merely mean that this man would once more be a dock worker in the pool, under an obligation to hold himself in readiness for, and to report for, any employment that might be found for him under the scheme. I cannot see that there is a serious prospect of any real inconvenience from his returning to that position. Then it was said that the plaintiff showed no desire to go back to dock work. In my view it does not lie in the mouth of the defendants to avail themselves of that point. It was through their wrongful act, unwittingly wrongful it is true, but wrongful nevertheless, that this man was excluded from their employment. If he considered that as a state of affairs to which he had no option but to bow, and he went elsewhere and sought other employment, how can it fairly or properly be said that he acquiesced in his exclusion? For my part I cannot see how. It was said further that the plaintiff has in some way elected not to ask for reinstatement, which was what a declaration would amount to. In my view no fair reading of the pleadings could lead to that conclusion. It is said that in the statement of claim, as originally delivered, the plea was C
D
E

"As from Nov. 22 [1952] the plaintiff ceased to be employed by the defendants." F

But the next paragraph reads

"The purported termination of the plaintiff's employment was illegal, ultra vires and invalid in that the said employment was not terminated by the local board as required by cl. 16 of the said Dock Workers (Regulation of Employment) Order, 1947, embodied in the said order." G

That is the essence of the case. That is the issue stated in plain terms, and the consequences that might or might not ensue from this purported but invalid termination were matters of law. If they were in some respects imperfectly stated in the pleading as originally delivered, I do not think that the plaintiff should be prejudiced by that. It would be a sad day if litigants were bound hand and foot by every ill-advised phrase or argument or submission that may find its way into their pleadings as settled by counsel. For the reasons I have endeavoured to express, which I express with diffidence, I for my part would be disposed to hold that the declaration granted by the learned judge should stand. H
But if that view were to prevail, I should add that I would be disposed to agree with my Lord that the sum of £250 damages, considered as relief given in addition to the declaration, to cover the period down to the trial, was too high. I

PARKER, L.J.: I agree with the conclusion reached by my Lord. The decision to dismiss the plaintiff by giving him seven days' notice was a decision, it is said, of a body called the disciplinary committee, not the decision of the local board which under cl. 16 alone could give him seven days' notice. In these circumstances the plaintiff claims that the notice was a nullity, and reliance is placed in particular on the decision of this court in *Barnard v. National Dock Labour Board* (1). Counsel for the defendants points out that the position here

A is somewhat different. In *Barnard v. National Dock Labour Board* (1) there was a clear delegation to an outside person, the port manager, whereas here the delegation was to two members of the board itself. Counsel puts it in this way: he says that it is just as if the local board had decided that for certain purposes, namely for the purposes of discipline, a quorum of two should suffice; and he adds that the local board in appointing the committee, were doing no more
B than anticipate what DENNING, L.J., said in a passage of his judgment in *Barnard v. National Dock Labour Board* (1) ([1953] 1 All E.R. at p. 1118):

C “It was suggested that it would be impracticable for the board to sit as a board to decide all these cases, but I see nothing impracticable in that. They have only to fix their quorum at two members and arrange for two members, one from each side, employers and workers, to be responsible for one week at a time.”

The position, as it seems to me, is this. I agree with counsel that there would be nothing wrong in a local board having a different quorum (say a quorum of two) for disciplinary matters against the quorum of seven which they fix for normal business. That means no more than this, that the local board is the
D party to decide disciplinary matters, although only two will suffice to form a quorum; and if that were the position here (and I think it was the position which DENNING, L.J., had in mind in *Barnard v. National Dock Labour Board* (1), [1953] 1 All E.R. at pp. 1118, 1119), it could not be said that the decision of the disciplinary committee was not that of the local board. But in the present case the disciplinary committee is to consist of two persons. In other words, it is
E not the decision of the local board. No other members of the local board may attend, and the committee is to consist, and to consist only, of two. In those circumstances it seems to me that the position is exactly as in *Barnard v. National Dock Labour Board* (1) the local board having no powers, express or implied, of delegation in what is admittedly a quasi-judicial matter.

The matter does not end there, because counsel for the defendants advances a
F further argument based on the wording of cl. 16, 17 and 18. I find it unnecessary to go through those clauses in detail. It is sufficient to say that the argument runs in this way. It is said that cl. 17 refers expressly to the termination of employment of a person in the reserve pool, as undoubtedly the plaintiff was in this case, whereas under cl. 16 (2) there is no reference to a registered dock worker in the reserve pool. He further draws attention to cl. 18, where the appeal
G in respect of a dismissal by a seven days' notice is an appeal from a decision under cl. 17 and not under cl. 16. In those circumstances counsel advances what is certainly an attractive argument, namely that cl. 16 (2) must be dealing with somebody other than a person in the reserve pool; and he suggests that the powers given to the local board in cl. 16 to terminate the employment by a seven days' notice, or to dismiss a worker summarily, are referring to the engagement
H or employment of the worker by the employer to whom he is allocated and not a termination of his employment by the National Dock Labour Board. I find it unnecessary to come to a conclusion on the matter. Suffice it to say that as at present advised I find it almost impossible to accede to counsel's argument. There is no limitation in cl. 16 (2) as to the nature of the employment that is to be terminated. He further concedes that so far as the powers under cl. 16 (2) (a)
I are concerned they apply, and can apply only, to somebody in the reserve pool. Finally it is to be observed that the powers given by cl. 16 (2) are powers given without prejudice to, and in addition to, the powers conferred by cl. 15. Without reading cl. 15 it is enough to say that that clause clearly refers to workers in the reserve pool, in part at any rate. However that may be, it seems to me that the real answer to counsel's contention is this, that whether the disciplinary committee were acting under cl. 16 or under cl. 17 they were undoubtedly acting in a disciplinary matter, and clearly their functions were quasi-judicial. If they were acting under cl. 17, then again, if the local board is the person who may

terminate the employment under that clause, the delegation to the disciplinary committee was invalid. Equally, if it is the National Dock Labour Board itself who alone can terminate under cl. 17, it cannot be said that a disciplinary committee was a body to whom the powers under cl. 17 were validly delegated by the National Dock Labour Board, because by cl. 3 (3) of the scheme the National Dock Labour Board could only delegate to local boards. Accordingly, it seems to me that the decision to give this notice to the plaintiff was invalid.

The real difficulty that I have felt in this case, and I think a difficulty which the learned judge felt, was the question what is the appropriate relief. The position as it was when the learned judge came to deal with it was that by para. 6 of the amended statement of claim the plaintiff put his case in two ways. He said by para. 6

"By the said notice the defendants repudiated their contract of employment with the plaintiff. The plaintiff elected to treat the said contract as discharged by the defendants' said repudiation. Alternatively the plaintiff elected to treat the said contract as still subsisting."

Particulars were asked for under both heads of that plea, and particulars were given. Apparently the plaintiff was never asked at the trial what he wanted. He was never put to his election; and it is clear that, if the matter was argued at all, it was but scantily argued. No doubt the questions as to the true interpretation of the clauses of the scheme were the matters really debated, and little attention appears to have been paid to the position of the plaintiff, namely whether he was electing to treat his contract with the defendants as subsisting, claiming damages only up to the date of trial, or whether he had treated the notice as a repudiation of the contract and was claiming only damages. However, I think the learned judge clearly proceeded on the former basis. It is true that there are passages in his judgment where it looks as if he was dealing with a case of damages for wrongful dismissal alone; but I think on reading the judgment as a whole it is plain that the learned judge was treating the plaintiff as having elected to treat the contract as still subsisting, and that when he came to award damages he was dealing only with damages up to the date of trial. What seems to me to have been overlooked is the fact that, before the date of trial the plaintiff had made his election and had clearly elected to treat the breach as a repudiation of the contract and to claim damages. The action commenced in the county court. The plaintiff himself made out his claim in simple form:

"Claim for loss of wages and damages the sum of £136 due to me, wrongful dismissal from the scheme."

As I have said, that was made out by the plaintiff himself, and I would be the last to hold that against him. He went to look for work, and whatever attitude he was going to take up that was the proper course to take. But when the action was transferred to the High Court the statement of claim was clearly, as it seems to me, on the basis, and can only be on the basis, that the claim was a claim for wrongful dismissal only. By para. 3 the pleader says:

"As from Nov. 22 [1952] the plaintiff ceased to be employed by the defendants."

It was only at a late stage that the statement of claim was amended and para. 6 inserted in the terms which I have already read. When that had been done the defence to the amended statement of claim was put in, in which by para. 8 the defendants, having denied that they repudiated the contract, said:

"Alternatively if the defendants failed to terminate validly the said contract of employment as alleged herein and if the purported termination amounted to a repudiation thereof the defendants admit that the plaintiff elected to treat the said contract of employment as discharged."

- A In my view the plaintiff cannot say one thing one moment and one thing another. If he makes his final election as to the course he will pursue, he cannot thereafter claim on a different basis. The position when the matter came for trial was that the plaintiff had already elected, and the case fell to be dealt with, and fell to be dealt with only, as one for damages for wrongful dismissal. Assuming, however, that I am wrong and that it was open to the plaintiff to treat
- B the contract as still subsisting and to claim a declaration and damages up to the date of trial, I confess that for my part I do not think that a declaration ought to have been granted in this case. It is a discretionary remedy. It is to be granted sparingly, and although it is a remedy within the discretion of the learned judge in this case he approached the matter, in part at any rate, on a wrong reading of the decision in *Barnard v. National Dock Labour Board* (1). He failed to appreciate
- C that unless a declaration were given in *Barnard v. National Dock Labour Board* (1) it was impossible to adjudicate on the point which had arisen. Men had been suspended only for seven days—there was no question of their contracts being terminated—and they had put in no claim for monetary relief. The defendants having taken the view that they were entitled to act as they did, and having argued that case throughout, the only way in which the matter could be decided
- D was by the granting of a declaration. So far as a contract between master and servant is concerned, it would be quite impossible, whatever a servant said he desired, to grant a declaration that in effect he was still in the employment of the master, and counsel for the plaintiff recognised that that would be an impossible position. He rightly says, however, both that in this case there is something more than the contract between master and servant, and that the plaintiff has
- E a status under this scheme, which was set up under an Act of Parliament. He says that the position is very much the same as if a man were wrongly expelled from his trade union or a member from his club, in which case the appropriate remedy might well be, and perhaps could only be, by way of a declaration. Nevertheless, as it seems to me, there is here an element, to say the least, of master and servant between the parties. It is true, as I have said, that there is
- F something more, but that something more can well be reflected in any damages which are awarded, and looked at in that way damages are an adequate remedy, and the only remedy, which in such a case should be allowed.

G So far as damages are concerned, I have nothing to add to what my Lord has said. It seems to me that the sum of £250 and no more should be awarded to the plaintiff as damages, not merely up to the date of trial but as damages for all time, on the basis of a wrongful dismissal.

Appeal dismissed, except that the declaration granted to the plaintiff was to be struck out of the order. Leave to appeal to the House of Lords refused.

Solicitors: *Bell, Brodrick & Gray* (for the defendants); *White & Leonard*, agents for *Geoffrey Wells & Woodford*, Southampton (for the plaintiff).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

SANDERSON AND OTHERS *v.* INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Lord Morton of Henryton, Lord Porter, Lord Radcliffe, Lord Tucker and Lord Cohen), November 22, December 19, 1955.]

Estate Duty—Valuation of shares in company—Gift inter vivos by way of settlement—Shares notionally passing on settlor's death—Finance Act, 1940 (3 & 4 Geo. 6 c. 29), s. 55 (1).

By a deed dated July 27, 1942, the deceased settled four hundred shares in a private limited company on trust for the benefit of his son and daughter. On Dec. 30, 1943, the deceased died. By virtue of the Finance Act, 1894, s. 2 (1) (c)*, estate duty was leviable on the shares since they were "deemed to pass" on the deceased's death under that enactment. On a summons to determine whether the principal value of the shares should be estimated in the manner prescribed by the Finance Act, 1940, s. 55*, or in the manner prescribed by s. 7 (5)* of the Act of 1894,

Held: the shares must be valued in accordance with the provisions of the Finance Act, 1940, s. 55 (1), because that section, which was a valuation section and not a section bringing property into charge to estate duty, applied equally to property passing on death within s. 1 of the Finance Act, 1894, and property deemed so to pass under s. 2 of that Act, having regard both to the words "for the purposes of estate duty" in s. 55 (1) and to the fact that Part 4 of the Act of 1940 (which included s. 55) was to be construed as one with the Act of 1894.

Decision of the COURT OF APPEAL (sub nom. *Re Hall's Settlement* [1954] 3 All E.R. 435) affirmed.

[**Editorial Note.** The Finance Act, 1940, s. 55, for which, see 9 HALSBURY'S STATUTES (2nd Edn.) 483, has been amended by the Finance Act, 1952, s. 72, and the Finance Act, 1954, s. 29, s. 30, s. 35 and Sch. 6, but the amendments are not relevant to the decision in this case.]

The effect of a statute being construed as one with another Act is explained in 31 HALSBURY'S LAWS (2nd Edn.) 489, para. 616.]

Cases referred to:

- (1) *A.-G. v. Milne*, [1914] A.C. 765; 83 L.J.K.B. 1083; 111 L.T. 343; 21 Digest 46, 296.
- (2) *Cowley (Earl) v. Inland Revenue Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 21 Digest 7, 27.
- (3) *A.-G. v. Dobree*, [1900] 1 Q.B. 442; 69 L.J.Q.B. 223; 81 L.T. 607; 64 J.P. 24; 21 Digest 17, 97.
- (4) *Nevill v. Inland Revenue Comrs.*, [1924] A.C. 385; 93 L.J.K.B. 321; 130 L.T. 802; 21 Digest 22, 128.

Appeal.

Appeal by trustees of a settlement and personal representatives of the deceased from an order of the Court of Appeal, dated Oct. 28, 1954, and reported sub nom. *Re Hall's Settlement*, [1954] 3 All E.R. 435, affirming an order of UPJOHN, J., dated June 30, 1954, and reported [1954] 2 All E.R. 679, on an adjourned summons to determine whether the principal value of certain shares settled by the deceased, Harold Hall, on his son and daughter within three years of his death, should be estimated in accordance with the provisions of the Finance Act, 1940, s. 55, or in accordance with the provisions of the Finance Act, 1894, s. 7 (5). The deceased, Harold Hall, was at all material times up to the date of the settlement the owner of 2,951 shares in a private company known as Thomas Hamling & Co., Ltd., that holding representing over fifty-per cent. of the total

* The relevant provisions are printed at pp. 15, 16, post.

A issued shares of the company. By deed dated July 27, 1942, he settled four hundred of the shares on trusts for the benefit of his son and daughter. On Dec. 30, 1943, he died. It was agreed that the shares were liable to estate duty under the Finance Act, 1894, s. 2 (1) (c), being "deemed to pass" on the deceased's death by virtue of that enactment. It was agreed that, if the principal value of the shares was to be estimated by reference to the net value of the assets of the company, in accordance with the Finance Act, 1940, s. 55, the value would be £90 10s. per share. If the value of the shares was to be estimated in accordance with the Finance Act, 1894, s. 7 (5), i.e., at their open market value, the value was thought to be approximately £22 10s. per share, but there was no agreement as to the exact figure. UPJOHN, J., held that, for the purposes of estate duty, the shares which notionally passed on the deceased's death were property passing on his death within the meaning of the Finance Act, 1940, s. 55 (1), and therefore, that their value was to be estimated in accordance with the provisions of that section.

The first three appellants were the trustees of the settlement and the first, third and fourth appellants were the legal personal representatives of the deceased.

D *Charles Russell, Q.C., F. N. Bucher, Q.C., and J. A. Armstrong* for the appellants.
B. L. Bathurst, Q.C., and E. B. Stamp for the Crown.

The House took time for consideration.

Dec. 19. The following opinions were read.

E **LORD MORTON OF HENRYTON:** My Lords, Harold Hall died on Dec. 30, 1943. By a settlement dated July 27, 1942, he had settled four hundred shares in a private company, named Thomas Hamling & Co., Ltd., on trusts for the benefit of his son and daughter. It is admitted by the appellants that estate duty became payable on the death of the settlor in respect of these shares, under s. 2 (1) (c) of the Finance Act, 1894, and the only question arising on this appeal is whether these shares should be valued, for the purposes of estate duty, in the manner prescribed by s. 55 (1) of the Finance Act, 1940, or in the manner prescribed by s. 7 (5) of the Finance Act, 1894. UPJOHN, J., and the Court of Appeal took the view that the former section applied to the present case.

The statutory provisions which are directly relevant to the issue are as follows: Finance Act, 1894, s. 1:

G "In the case of every person dying after the commencement of this Part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty', at the graduated rates hereinafter mentioned, and the existing duties mentioned in Sch. 1 to this Act shall not be levied in respect of property chargeable with such estate duty."

H Finance Act, 1894, s. 2 (1):

I "Property passing on the death of the deceased shall be deemed to include the property following, that is to say:— . . . (c) Property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom; . . ."

Finance Act, 1894, s. 7 (5):

"The principal value of any property shall be estimated to be the price which, in the opinion of the commissioners, such property would fetch if sold in the open market at the time of the death of the deceased; . . ."

Finance Act, 1940, s. 55 (1):

"Where for the purposes of estate duty there pass, on the death of a person dying after the commencement of this Act, shares in or debentures of a company to which this section applies, then if— . . ."

Here follow certain conditions which were, admittedly, satisfied in the present case, and the section proceeds—

"the principal value of the shares or debentures, in lieu of being estimated in accordance with the provisions of s. 7 (5) of the Finance Act, 1894, shall be estimated by reference to the net value of the assets of the company in accordance with the provisions of the next succeeding sub-section."

The next succeeding sub-section contains provisions for ascertaining the "net value of the assets of the company", and is not material for the present purpose. Section 65 (5) provides that:

"Part 4 of this Act shall be construed as one with Part 1 of the Finance Act, 1894."

The result is that s. 55 of the Act of 1940 is to be construed as one with s. 7 of the Act of 1894.

It appears that, in the present case, a valuation under s. 55 (1) of the Act of 1940 would result in a much higher figure than a valuation under s. 7 (5) of the Act of 1894, and it is suggested, on behalf of the appellants, that this will be so in every case. The first three appellants are the trustees of the settlement of 1942, and the first, third and fourth appellants are the legal personal representatives of the settlor Harold Hall. The legal personal representatives are interested parties, because the four hundred shares have to be aggregated, for the purposes of estate duty, with the settlor's free estate, and a higher value put on the four hundred shares would, or might, increase the rate of estate duty payable on the free estate.

The question for decision turns on the opening words of s. 55 of the Act of 1940—

"Where for the purposes of estate duty there pass, on the death of a person . . . shares . . ."

Counsel for the appellants contended that the four hundred shares did not pass on the death of the settlor, in the ordinary meaning of the word "pass"; secondly, that in this statute, in the absence of the words "for the purposes of estate duty", the words "pass on the death" would not apply to the four hundred shares; and thirdly, that the words "for the purposes of estate duty" did not have the effect of bringing the shares within the section.

My Lords, I accept counsel's first proposition. The shares passed to the trustees on the execution of the settlement of 1942, and there was no further passing, in the ordinary sense of the word, on the death of the settlor. As to his second proposition, he concedes that, in the Finance Acts, in the case of sections of general application, the words "pass on the death" are generally construed to include property which is deemed to pass by virtue of s. 2 of the Finance Act, 1894. He submits, however, that s. 55 of the Act of 1940 is not a mere valuation section, but imposes a "supercharge" of estate duty by greatly increasing the sum which will be payable in the special circumstances mentioned in the section. He relies on *A.-G. v. Milne* (1) ([1914] A.C. 765), as being in some degree a parallel case.

My Lords, the question whether the four hundred shares would have been caught by s. 55 if the words "for the purposes of estate duty" had been absent, does not arise for decision, but, as the nature of s. 55 was discussed in the judgments below, I think it right to say that, in my view, it is simply a valuation section. It lays down that certain property, in respect whereof estate duty is payable under the existing law, shall be valued in a particular way, and it does

A not bring any new species of property within the charge of estate duty. For this reason, *A.-G. v. Milne* (1) is of no assistance to the appellants. Moreover, as s. 55 is to be “ construed as one ” with s. 7 of the Act of 1894, it is, in substance, merely a “ rider ” or proviso to the general rule laid down in s. 7 (5) as to the manner in which the value of “ property ” is to be estimated; and it was rightly
B includes both property which actually passes and property which is deemed to pass.

Finally, to my mind the words “ for the purposes of estate duty ” remove any doubt which might otherwise have existed, and make it clear that the section applies equally to property which “ passes on the death ” within s. 1 of the Finance Act, 1894, and to property which is “ deemed ”, by s. 2 of the
C same Act, to be “ included ” in property passing on the death. Each type of property is, in my view, properly described as property which, *for the purposes of estate duty*, passes on the death. Further, I can see no good reason why the legislature should have wished the section to apply only to the former type of property, and I think it likely that the relevant words were inserted for the purpose of making it clear that both types of property were included.

D I would dismiss the appeal.

My noble and learned friend, **LORD TUCKER**, who is unable to be present this morning, has asked me to say that he agrees with my view that the appeal should be dismissed.

LORD PORTER: My Lords, I concur.

E **LORD RADCLIFFE:** My Lords, I do not feel any doubt that this appeal ought to be dismissed. The proposition which the appellants invite your Lordships to affirm is that the valuation rules which s. 55 (1) of the Finance Act, 1940, requires to be applied to certain estate duty assessments, are not to be used where the property in question “ passes ” by virtue of s. 2 of the Finance Act, 1894, and would not have “ passed ” had s. 1 of that Act been enacted
F without the supplement of s. 2. The opening words of s. 55 (1)

“ Where for the purposes of estate duty there pass, on the death of a person dying after the commencement of this Act . . . ”

are said to cover only cases of what is called “ actual passing ”, or “ passing in the natural sense of the word ”, and not to cover what is called “ notional passing ”. In my view, this proposition is unmaintainable. My sole reason for saying something more than is said in the judgment of **JENKINS, L.J.**, in the Court of Appeal, is that I think that the reason for rejecting it is more soundly based on the general relation of s. 55 of the Finance Act, 1940, to the estate duty system inaugurated by the Finance Act, 1894 (of which system this section is to be treated as a part), than on any special significance to be attributed to the use
H of the words “ for the purposes of estate duty ” at the beginning of that s. 55.

Estate duty is not charged by the Act on two different kinds or classes of property, property which passes in the natural sense and property which is deemed to pass by virtue of special statutory provision. Strictly speaking, as has often been pointed out, no property at all is “ deemed to pass ” under the Act. What s. 1 provides is that estate duty is to be charged on all property
I passing on death, whether real or personal, settled or not settled. It offers no other clue as to the meaning to be attached to those words. What s. 2 provides is that property passing on death is to be deemed to include certain kinds of property or, perhaps more accurately, certain property in certain situations, and is not to be deemed to include certain property in other situations. I have never known it disputed that the exclusion provision, which is contained in s. 2 (3), applies to all property passing, whether it passes under s. 1 simpliciter, or under s. 1 as enlarged or interpreted by s. 2 (1). But the result of this is that

it is s. 1, and no other section, that imposes the charge of estate duty, that the charge so imposed is imposed on property that passes on death and no other property, and that the effect of s. 2 (1) is to give to the word "passes", in s. 1, a meaning wider and, if you please, less natural than it would have had if s. 2 (1) had not been enacted. Personally, I find this approach to the general purport of the Act a more satisfactory method than that of dividing the property charged by the Act into two categories, consisting in the one case of property actually passing and in the other of property notionally passing, categories which the Act itself does not employ. After all, it is worthwhile to remember that the word "pass" was not a word of art when the Act of 1894 was introduced. Casual uses of it can be found in one or two places in the Succession Duty Act, 1853, and the Customs and Inland Revenue Act, 1881, but, generally speaking, it is true to say that the makers of the Act of 1894 were free to give as wide or as limited a meaning to the word "pass" as the scheme of their Act required. And since Acts are passed, and even drafted, as a whole and not in successive stages of time, it is reasonable to suppose that the makers of the Act did not draw up s. 1 without knowing what was contained, or to be contained, in s. 2, and, for that matter, in s. 22 (1) (l). Consequently, it seems a somewhat barren inquiry to ask what meaning would have been attributable to the word "passes" in s. 1, if that section had stood, as it did not, by itself, or isolated from one or more of the various other sections that make up the context of the Act.

All this leads me to regard with some scepticism any argument that is founded on the supposition of some essential difference between property which actually or naturally passes, and property which passes notionally. For I think it clear that, with one exception, the makers of the Act attached no weight to such a distinction. Once s. 1 and s. 2, aided by s. 22, had established what was meant by "passing" for the purposes of the Act, the rest of the Act, e.g., s. 3 (exception for transactions for money consideration), s. 4 (aggregation), s. 5 (settled property), s. 6 (collection and recovery of duty), s. 7 (value of property), s. 8 (supplemental provisions), refers exclusively to property that "passes" or property "passing", and I can trace no reference to any separate category of property styled property that is "deemed to pass." Yet, except for the provisions as to settlement estate duty contained in s. 5, on which special considerations have been brought to bear, it seems indisputable that these sections are dealing with property which passes by virtue of s. 2 (1), as well as property which would have been held in any event to pass even if s. 1 had stood alone.

One of these sections which recognise no such distinction is s. 7, and sub-s. (5) of that section prescribes the method of estimating "the principal value of any property" for the purposes of estate duty valuation. Again, it is not disputed that the provisions of that sub-section are applicable to property which passes by virtue of s. 2 (1) (c), and not otherwise. Yet, if that is so, I cannot see what is left of the appellants' argument: for s. 55 of the Finance Act, 1940, as its own contents show, merely substitutes another method of estimating value for purposes of estate duty, which method, if the prescribed conditions are satisfied, is to be used instead of the general method laid down in the original s. 7 (5). If s. 7 (5) applies to property which passes by virtue of s. 2 (1) (c), it seems to me inescapable that s. 55 of the later Act, which takes its place in certain cases, should also apply to property so passing.

I have not forgotten, of course, that, in *A.-G. v. Milne* (1) ([1914] A.C. 765), this House decided that the word "passes", in s. 5 (1), did not extend to a passing of property which a deceased had settled during his life but within the statutory period, and which, therefore, fell within the provisions of s. 2 (1) (c), and that, consequently, settlement estate duty was not exigible on the deceased's death. But the present case does not raise that point in any form. We are dealing here with a valuation section, alternative to s. 7 (5), not with a section which imposed an additional and supplementary duty in exchange for a resulting

A exemption. Secondly, s. 5 was so drawn that, quite apart from any special significance in the word "passes", it was incapable of applying to a settlement made inter vivos on a living life tenant, which was the case in point; and this circumstance weighed as much as anything else with the members of the House who formed the majority (see, for instance, the speeches of LORD ATKINSON and LORD PARKER OF WADDINGTON, [1914] A.C. at pp. 771, 778). And, lastly,
B a dismissal of the present appeal would do nothing to support the view which has been decisively rejected by this House, both in *A.-G. v. Milne* (1) and in *Earl Cowley v. Inland Revenue Comrs.* (2) ([1899] A.C. 198), that s. 2 is to be regarded as a "definition section". Plainly, if I may say so, it is not.

C I do not see that our decision can be said in any way to conflict with those earlier cases. The most that can be said in that connection is that it will leave unexplained what exactly LORD MACNAGHTEN meant in *Earl Cowley v. Inland Revenue Comrs.* (2) when he said of s. 1 and s. 2 ([1899] A.C. at p. 212) "The two sections are mutually exclusive", or what VISCOUNT HALDANE, L.C., meant in *A.-G. v. Milne* (1) by the words ([1914] A.C. at p. 769):

"Section 2 is thus not a definition section, but an independent section operating outside the field of s. 1."

D But, as LORD MACNAGHTEN's words have been a matter of inquiry since the year 1900 (see *A.-G. v. Dobree* (3), [1900] 1 Q.B. at p. 450, per CHANNELL, J.), and since LORD HALDANE himself gave a substantially different explanation of the relation of the two sections in *Nevill v. Inland Revenue Comrs.* (4) ([1924] A.C. at p. 389), when he said:

E "The principle is contained in s. 1. Section 2 combines definitions of such property with the extension of the application of the principle laid down in s. 1 to certain cases which are not in reality cases of changing hands on death at all . . .",

I think that we may safely resign these passages to the list of the many minor mysteries of the law.

F LORD COHEN: My Lords, I have had the opportunity of reading in print the speech delivered by the noble and learned Lord, LORD MORTON OF HENRYTON, and agree with him that the appeal should be dismissed, for the reasons he has given.

Appeal dismissed.

Solicitors: *Peacock & Goddard*, agents for *Sanderson & Co.*, Hull (for the appellants); *Solicitor of Inland Revenue*.

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

MINISTER OF NATIONAL REVENUE v. ANACONDA AMERICAN BRASS, LTD.

[PRIVY COUNCIL (Viscount Simonds, Lord Oaksey, Lord Reid, Lord Keith of Avonholm and Lord Somervell of Harrow), November 15, 16, 17, 21, December 13, 1955.]

Privy Council—Canada—Income tax—Excess profits tax—Profits—Stock-in-trade—Valuation—Cost of metals used during year—Closing inventory of metals—Last-in-first-out method or first-in-first-out method—Excess Profits Tax Act, 1940 (S.C. 1940 c. 32), s. 3—Income War Tax Act, (R.S.C. 1927 c. 97).

The respondent company carried on the business of purchasing metals and manufacturing them into sheets, rods and tubes which they sold. The prices charged by the company for its products were closely related to the prices paid by it to replace the metals used in manufacture, and it was constantly purchasing metals to replace those that were being used. It maintained in stock metals equalling about one-third or one-quarter of its annual requirements. The company did not keep records from which the actual metals used during the year could be identified, or the amounts paid for those metals determined, but it kept records of the quantities of metals (a) in its inventory at the beginning of the year, (b) purchased during the year, and (c) in its inventory at the end of the year, and also records of the prices paid for the metals purchased from time to time. In 1947 (a year in which there had been large increases in the prices of metals), the company made a return for income tax purposes, and, in computing its net taxable income for that year, adopted a system known as L.I.F.O., or last-in-first-out, which it had used for some years for its own corporate purposes. Under this system, the cost per pound of metal most recently purchased and added to stock was the cost per pound of metal content charged against the next sale of processed metal products. Under that method of accountancy the company's closing inventory for 1947 showed the stock as including a large amount of metal purchased in 1936. As it was not possible to ascertain from the company's records the precise cost to the company of the metals used during the year, the appellant, the Minister of National Revenue, in ascertaining the company's income for the assessment of the company to income tax and excess profits tax for 1947, adopted a system known as F.I.F.O., or first-in-first-out, in which it was assumed that the metals used during the year were those which had been longest in the company's inventory. In view of the higher prices charged by the company in 1947 for its goods to cover the greatly increased costs of metals in that year, the F.I.F.O. method of accounting showed a much larger profit as having been earned by the company in 1947 than was shown by the L.I.F.O. method. It was accepted that in Canada, the L.I.F.O. method was, in certain conditions, a proper and generally accepted method of business accountancy.

Held: the L.I.F.O. method was not an appropriate method of accountancy for the purposes of income tax in the present case because it failed to observe the principle that what was to be ascertained at the beginning and end of the accounting period was for tax purposes to be taken to be the actual stock so far as it could be ascertained; the method involved the deliberate disregard of facts which could be ascertained and must be given their proper weight such as the facts that metals purchased during the last month of 1947 could hardly have been processed during 1947, and that so large a quantity of metal purchased in 1936 was not likely still to be in stock in 1947.

Per CURIAM: the fact that a particular new method of accountancy is the most appropriate method is not conclusive that it should be adopted for income tax purposes; the question remains whether it conforms to the prescription of the Income Tax Act (see p. 26, letter D, post).

Appeal allowed.

[As to stock-in-trade in the computation of profits for English income tax purposes, see 17 HALSBURY'S LAWS (2nd Edn.) 122-124, paras. 227-232; and for cases on the subject, see DIGEST Supplement.]

Cases referred to:

- (1) *Sun Insurance Office v. Clark*, [1912] A.C. 443; 81 L.J.K.B. 488; 106 L.T. 438; 6 Tax Cas. 59; 28 Digest 58, 295.
- (2) *Whimster & Co. v. Inland Revenue*, 1926 S.C. 20; 12 Tax Cas. 813; Digest Supp.
- (3) *Russell v. Town & County Bank*, (1888), 13 App. Cas. 418; 58 L.J.P.C. 8; 59 L.T. 481; 53 J.P. 244; 2 Tax Cas. 321; 28 Digest 45, 227.
- (4) *Lucas v. Kansas City Structural Steel Co.*, (1930), 281 U.S. 264; 50 S. Ct. 263.
- (5) *Patrick v. Broadstone Mills, Ltd.*, [1954] 1 All E.R. 163; 35 Tax Cas. 44; 3rd Digest Supp.

Appeal.

Appeal by the Minister of National Revenue by special leave from a judgment of the Supreme Court of Canada, dated Nov. 1, 1954, affirming a judgment of the President of the Exchequer Court of Canada, dated June 7, 1952, allowing an appeal by the respondent company from an assessment to excess profits tax made in respect of its profits during 1947 pursuant to the provisions of the Canadian Excess Profits Tax Act, 1940.

The facts appear in the judgment of the Board,

C. F. H. Carson, Q.C., *W. R. Jackett, Q.C.*, *Allan Findlay, Q.C.* (all of the Canadian Bar) and *F. N. Bucher, Q.C.*, for the appellant.

K. Diplock, Q.C., *A. S. Pattillo, Q.C.*, and *A. J. Macintosh* (both of the Canadian Bar) for the respondent company.

VISCOUNT SIMONDS: This appeal from a judgment of the Supreme Court of Canada, which dismissed an appeal from a judgment of the President of the Exchequer Court of Canada, raises a question of novelty and importance. The appellant is the Minister of National Revenue, the respondent a limited company, Anaconda American Brass, Ltd.

The Minister, on the assessment of the respondent company to income tax and excess profits tax for 1947, increased the amount of taxable income declared by the company by \$1,611,756.43, with the result that its excess profits tax for that year was increased by about \$241,000, and its income tax by about \$483,000. Against this assessment the company appealed to the Exchequer Court. The learned President of the court allowed the appeal and, as already stated, the Supreme Court dismissed the Minister's appeal from his judgment. It is only the excess profits tax with which this appeal is concerned. The excess profits tax is levied under the provisions of the Excess Profits Tax Act, 1940, which, by s. 3, provides that, in addition to any other tax or duty payable under any Act, there shall be assessed, levied and paid a tax in accordance with the rate set out in Sch. 2 thereto on the excess profits of every corporation or joint stock company residing or ordinarily resident in Canada or carrying on business in Canada. The rate set out in Sch. 2 is fifteen per cent. of the excess profits in the case of corporations or joint stock companies. "Profits" in their case is by the same Act defined to mean for any taxation period the amount of net taxable income for

the same period as determined under the provisions of the Income War Tax Act. Under the latter Act, income is, so far as is relevant, defined as meaning the annual net profit or gain ascertained and capable of computation as being the profits from a trade or commercial or financial or other business. A

The question, then, is whether the Minister correctly assessed the annual net profit or gain of the company for 1947 or, to state the question more accurately, whether the company has established that his assessment was incorrect. B

The material facts of the case are not in dispute. The company carries on the business of purchasing metals, manufacturing them into sheets, rods and tubes and selling the manufactured metals. About ninety-eight per cent. of the metals purchased by the company consist of copper (over eighty per cent.) and zinc (about fifteen per cent.). The other principal metals are lead, tin and nickel. The prices which the company charges for its products are closely related to the prices paid by it to replace the metals used in manufacturing its products, and, when market prices of purchased metals are increased, it at once correspondingly increases the prices of its products. The company is constantly purchasing metals to replace those that are being used. Its practice is to make an estimate at the beginning of each month of the quantity of metals which will be used during the next month, and to order from its suppliers the same quantity to replace such metals. It maintains an inventory or stock of metals at all times of about one-third to one-quarter of its annual requirements, so that it turns over its inventory three or four times a year. About two-thirds of the copper and zinc inventory is continuously in process in the plant. This indicates that the average time in process is about eight weeks. The company did not keep records from which the actual metals used during the year could be identified or the amounts paid for those metals determined. But it kept records of the quantities of metals (a) in its inventory at the beginning of the year, (b) purchased during the year and (c) in its inventory at the end of the year. It also kept records of the prices paid for the metals purchased from time to time. C D E F

Thus, in the year 1947, the company knew what stock it had in hand at the beginning, what stock it had purchased during the year, and what stock it had in hand at the end of it. It also knew what prices it had paid during the year for the metals it purchased. But it did not know, and could not ascertain, either in respect of all the metals which it used during the year what price had been paid for them, or in respect of all the metals which it had in stock at the end of the year what price had been paid for them. Yet, in order to determine its annual profit or gain for 1947, it is necessary to ascribe the proper cost to the metals used, and the proper cost or value to the metals remaining in stock. In the absence of knowledge, an assumption or estimate must be made, and it is at this stage that the difference between the parties arises. G H

It is convenient first to explain the manner in which the company made up its return for 1947, stating by way of premise only that, whereas the prices of raw materials had for some time before that year been comparatively stable, in that year, as the result of the relaxation and then the removal of war-time controls, there had been large increases of price, for example of copper on Jan. 22 from 11·5 cents per pound to 16·625 cents per pound, and on June 10 to 21·5 cents per pound. It was in these circumstances that in 1947, for the first time, the company made a return for income tax purposes in which a system known as L.I.F.O., or last-in-first-out, was adopted. It was a system which it had used for its own corporate purposes for some time previously in respect of copper but neither it nor any other taxpayer in Canada had adopted it for taxation purposes. It must now be briefly explained. I

It must, in the first place, be explained that L.I.F.O. does not mean that the

A metal last to be received into stock is, in fact, the first to be processed and sold. On the contrary, the actual physical flow of the raw material is regarded as irrelevant; that which was purchased in previous years and was in stock at the opening of the relevant financial year, or that which was purchased during that year, may have been processed and the products sold during that year; this is of no account. It is to cost that L.I.F.O. looks, and, in the simplest terms, it means that the cost per pound of the metal most recently purchased and added to stock is the cost per pound of metal content to be charged against the next sale of processed metal products. It is the necessary corollary of this that to the stock which is, in fact, in hand at the end of the year there must be attributed the cost of metal which has not yet been exhausted by the cost attributed to metal consumed; this has been called the unabsorbed residue of cost. Thus, in the case under appeal, the stock of copper in hand at the close of the year 1947 (the "closing inventory" as it is conveniently called) consisted of 14,291,007 pounds; and, under the L.I.F.O. system, it was treated as follows: (A) 6,500,000 pounds were regarded as having a cost of 7·5 cents per pound (the average cost of the copper in the inventory when L.I.F.O. was adopted in 1936) amounting to \$487,500; (B) 802,697 pounds were regarded as having a cost of 9·466 cents per pound (the average price paid in 1936) amounting to \$75,983.30; (C) 17,577 pounds were regarded as having a cost of 11·191 cents per pound (the average price paid in 1937) amounting to \$1,967.04; (D) 639,807 pounds were regarded as having a cost of 10·443 cents per pound (the average price paid in 1938) amounting to \$66,847.04; (E) 973,477 pounds were regarded as having a cost of 11·036 cents per pound (the average price paid in 1939) amounting to \$107,432.92; (F) 3,151,684 pounds were regarded as having a cost of 11·5 cents per pound (the price paid in 1945) amounting to \$362,443.66; (G) 2,205,765 pounds were regarded as having a cost of 11·5 cents per pound (the price paid in 1946) amounting to \$253,662.97.

The total cost of the 14,291,007 pounds of copper in the closing inventory was thus assumed to have been \$1,355,836.93 and this was the figure attributed to the closing inventory in the return for income tax. It is to be observed that the price attributed by the company to nearly half its inventory was 7·5 cents per pound, a price less than any price prevailing since 1935. The result is obvious. By attributing the higher cost to the metals processed and the lower cost to those retained in stock the company was able to show far lower profits than if it had followed the accustomed and traditional method of return. The question is whether the new method is permissible for income tax purposes. It is necessary to emphasise the words "for income tax purposes". For a large part of the argument on this appeal, and throughout the proceedings, has been devoted to showing that, in Canada, the L.I.F.O. method is, in certain conditions, a proper and generally accepted method of accountancy, and that those conditions are conspicuously present in the case of the respondent company. This was the view accepted by the learned President of the Exchequer Court of Canada and by the Supreme Court. It is accepted unreservedly also by their Lordships.

The appellants Minister took the view that, however appropriate the L.I.F.O. method might be for the corporate purposes of the company, it did not truly reflect its profit for income tax purposes. He accordingly increased the assessable income by the sum of \$1,611,756.43. In doing so, he adopted the method known as the F.I.F.O., or first-in-first-out method, which assumes that the metal first purchased is the metal first used. On this assumption, the metal in stock at the end of 1947 was the metal most recently purchased, and, inasmuch as it appeared that, during 1947, the company purchased no less than 63,268,555 pounds of copper and more than 14,291,007 pounds (the quantity in the closing inventory) had been purchased at the price of 21·5 cents per pound in the last

three months of the year, he determined the cost of the copper in the closing inventory at \$3,072,566.50. This figure may be contrasted with the \$1,355,836.93 appearing in the company's return. A

At this point it is possible to define more closely the position of the parties. The Minister concedes that, in the absence of physical identification, some assumption about the material in fact used during the financial year must be made. He does not dispute that there may be in the closing inventory some metal which had been purchased in previous years. But he contends that the method which he has adopted attains more nearly the result postulated by LORD LOREBURN, L.C., in *Sun Insurance Office v. Clark* (1) (1912) (6 Tax Cas. at p. 77) B

"that the true gains are to be ascertained as nearly as it can be done". C

He urges that it is a principle of income tax law which has been adopted from commercial accounting practice that the values of the stock-in-trade at the beginning and end of the period covered by the account should be entered at cost or market value, whichever is the lower, and he says that, for this purpose, the actual stock in hand must be regarded, and its actual cost so far as possible ascertained, and that an assumption or estimate is necessary only so far as ascertainment is not possible. On this basis, he says that the F.I.F.O. method more nearly than the L.I.F.O. method represents the facts and supports that contention by reference not only to the large purchases of metal during the last months of 1947, which can hardly have been processed during that year, but also to the fact that the L.I.F.O. method involves the assumption of 6,500,000 pounds of copper purchased in or before 1936 being still in stock at the end of 1947. He says, therefore, that his assessment has not been displaced by any evidence that the L.I.F.O. method more nearly represents the true income of the company. He is not concerned to contend that the company (or some other taxpayer) may not be able to establish that some other method than F.I.F.O. more accurately represents the income for tax purposes where the raw material used is homogeneous and no substantial part of it can be identified. Nor is it necessary for their Lordships to determine whether some other method, as, for instance, the "average cost" method, may not, in some circumstances, be properly adopted for tax purposes. What the Minister urges is that the L.I.F.O. method does not more nearly than F.I.F.O. produce the true income in the present case, and that is the question for their Lordships' decision. D E F

The company, on the other hand, contends that, inasmuch as the Income War Tax Act does not contain any definition of "annual net profit or gain", nor any directions how profits or cost of sales are to be ascertained, these matters can only be determined by the application of ordinary commercial principles, except where such principles are expressly excluded by the Act. It then says that it is a question of fact what are ordinary commercial principles, and that the learned President of the Exchequer Court has found as a fact, and the majority of the Supreme Court has concurred in his finding, that the company's return had been made in accordance with those principles. The contention, in short, is that annual income for income tax purposes is determined by accepted accountancy practice unless the Act otherwise provides, and that, in the present case, the learned President has found not only that L.I.F.O. was an acceptable accounting method but that it was the most acceptable method, and that the method adopted by the Minister was not a proper one. G H

These contentions of the company have been, in their Lordships' opinion, rightly rejected by the minority of the Supreme Court (KERWIN, C.J., and ESTEY, J.). The income tax law of Canada, as of the United Kingdom, is built on the foundations described by LORD CLYDE (Lord President) in *Whimster &* I

A *Co. v. Inland Revenue* (2) (1926) (12 Tax Cas. 813), in a passage cited by the Chief Justice which may be here repeated (*ibid.*, at p. 823):

B “In the first place, the profits of any particular year or accounting period must be taken to consist of the difference between the receipts from the trade or business during such year or accounting period and the expenditure laid out to earn those receipts. In the second place, the account of profit and loss must be made up for the purpose of ascertaining that difference must be framed consistently with the ordinary principles of commercial accounting, so far as applicable, and in conformity with the rules of the Income Tax Act, or of that Act as modified by the provisions and schedules of the Acts regulating excess profits duty, as the case may be. For example, the ordinary principles of commercial accounting require that in the profit and loss account of a merchant's or manufacturer's business the values of the stock-in-trade at the beginning and at the end of the period covered by the account should be entered at cost or market price, whichever is the lower; although there is nothing about this in the taxing statutes.”

D For many years before, and ever since, this decision, what is to be valued at the beginning and end of the accounting period has, for tax purposes, been taken to be the actual stock so far as it can be ascertained. It is, in fact, so far as tax law is concerned, a novel, and even revolutionary proposal, that the physical facts should, even where they can wholly or partly be ascertained, be disregarded for the purpose of the opening and closing inventory, and a theoretical assumption made which is based on a supposed “flow of cost” and an “unabsorbed residue of cost”. An expert witness called for the company observed that he did not imagine any of the company's witnesses would claim for a minute that there was a quantity of metal then on hand acquired in 1936 equal to the quantity which was valued at the then cost. Yet there was no less than six and a half million pounds of copper in the 1947 closing inventory to which the 1936 cost was ascribed. He might have added that, year by year, the same thing would happen so long as the business went on and existing stocks were not seriously diminished; in 1987 as in 1947 the closing inventory would carry stock to which 1936 costs would be ascribed. This illustrates clearly the L.I.F.O. method, and shows how far it has travelled from the conception which has prevailed in the assessment of income for tax purposes.

G It was strongly pressed by the company that, in dealing with homogeneous material, the actual user test, if it could be applied by identification of parcels purchased at varying prices, would lead to capricious and illogical results. Assuming that this is so, and that actual user should not in some cases be regarded as the final test, this does not, in their Lordships' opinion, establish the case for H L.I.F.O. It might be that, in such cases, though their Lordships do not decide it, the average cost method could properly be adopted, for that method, like the F.I.F.O. method, brings in to the account the cost of every purchase in its order. But the present case shows that, under the L.I.F.O. method, if the business continues and stock is carried forward, substantial purchases may never come into the profit account at all.

I Their Lordships do not question that the L.I.F.O. method, or some variant of it, may be appropriate for the corporate purposes of a trading company. Business men and their accountant advisers must have in mind not only the fiscal year with which alone the Minister is concerned. It may well be prudent for them to carry in their books stock valued at a figure which represents neither market value nor its actual cost, but the lower cost at which similar stock was bought long ago. A hidden reserve is thus created which may be of use in future years. But the Income Tax Act is not in 1947 concerned with the years 1948

or 1949; by that time the company may have gone out of existence and its assets been distributed. Nearly seventy years ago, LORD HERSCHELL said, in *Russell v. Town & County Bank* (3) (1888) (2 Tax Cas. at p. 327):

"The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts."

This is only one of many judicial observations in which it is implicit that no assumption need be made unless the facts cannot be ascertained, and then only to the extent to which they cannot be ascertained. There is no room for theories as to flow of costs; nor is it legitimate to regard the closing inventory as an unabsorbed residue of cost rather than as a concrete stock of metals awaiting the day of process. It is, in their Lordships' opinion, the failure to observe, or, perhaps it should be said, the deliberate disregard of, facts which can be ascertained and must have their proper weight ascribed to them, which vitiates the application of the L.I.F.O. method to the present case. It is the same consideration which makes it clear that the evidence of expert witnesses that the L.I.F.O. method is a generally acceptable, and, in this case, the most appropriate method of accountancy, is not conclusive of the question that the court has to decide. That may be found as a fact by the Exchequer Court and affirmed by the Supreme Court. The question remains whether it conforms to the prescription of the Income Tax Act. As already indicated, in their Lordships' opinion it does not.

The history of the adoption of the L.I.F.O. method in Canada by the company and, presumably, by other companies, is of some interest. The method appears to have originated in the U.S.A. and there to have been adopted by an American corporation which was the parent of the respondent company some time before 1938. But it was only by an amendment of the existing revenue law that it was in that year permitted to be adopted for tax purposes. In 1939, further amendments were made, and the method is now permitted, subject to statutory conditions which are summarised in the judgment of ESTEY, J. ([1954] S.C.R. at p. 752), in the Supreme Court. The many differences which exist between the revenue laws of the U.S.A. and Canada do not permit too much weight to be given to the fact that it is sought to do in Canada without legislation what in the U.S.A. is only permissible with statutory safeguards. But it at least supports the view that new theories of accountancy, though they may be accepted and put into practice by business men, do not finally determine a trading company's income for tax purposes. Again, though their Lordships recognise that this appeal must be determined by reference to Canadian law, they notice that, in the U.S.A., in a case in which the so-called "base stock" method was under discussion, BRANDEIS, J., used words which are apt to describe the L.I.F.O. method also.

"In years of rising prices, the base stock method causes an understatement of income; for it disregards the gains actually realised through liquidation of low price stock on a high price market . . . This method may, like many reserves which business men set up in their books for their own purposes, serve to equalise the results of operations during a series of years."

(see *Lucas v. Kansas City Structural Steel Co.* (4) (1930), 281 U.S. at p. 268). In this passage, the distinction is nicely made between what is permitted for tax purposes and what prudent business men may think fit to do.

So, also, in the United Kingdom, an attempt has been vainly made to uphold the base stock method for income tax purposes. In the recent case of *Patrick v. Broadstone Mills, Ltd.* (5) ([1954] 1 All E.R. 163), SINGLETON, L.J., in words

A that are equally apt, if applied to the L.I.F.O. method, declined to accept the base stock method as conformable to income tax law, though it might be approved by accountancy practice.

B In the result, their Lordships are of opinion that this appeal must be allowed, the judgments of the Supreme Court and the Exchequer Court set aside and the appeal of the respondent company from the Minister's assessment rejected, and they will humbly advise Her Majesty accordingly. They repeat that they have reached this conclusion not because they dissent from any finding of fact by the learned President of the Exchequer Court, of whose lucid and exhaustive judgment no criticism can from this aspect fairly be made, but because his findings of fact do not offer a complete solution of the question. The respondent company must pay the costs of this appeal and of the proceedings in the courts of Canada.

Appeal allowed.

Solicitors: *Charles Russell & Co.* (for the appellant); *Beaumont & Son* (for the respondent company).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

Re WILBY (*deceased*).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), November 23, December 14, 1955.]

G Adoption—Foreign adoption—Adoption in accordance with law of country of domicile of all parties—Change of domicile of adoptive parents and adopted person—Adopted person dying intestate domiciled in England—Whether adoptive mother entitled to administration—Adoption Act, 1950 (14 Geo. 6 c. 26), s. 13 (1).

H On Apr. 27, 1926, the deceased was adopted by the applicant and her husband in accordance with the law of Burma, where they were all domiciled at that time. In 1935 the applicant, her husband and the deceased became, and thereafter remained, domiciled in England. The applicant's husband died in 1946. The deceased died in 1954, intestate, a spinster and without issue. She left surviving her three lawful brothers and one lawful sister. Her estate comprised only personal property. The applicant applied as the I lawful mother by adoption for a grant of letters of administration to the deceased's estate, and the deceased's brothers and sister consented to the application. Under s. 13 of the Adoption Act, 1950, the property of a person adopted by an adoption order (i.e., an adoption order made by a court having jurisdiction under that Act) would devolve as if the adopted child were born in lawful wedlock.

Held: although the adoption in Burma would be recognised as valid in England for some purposes, it did not entitle the adoptive mother to succeed to the deceased's estate on her death, because the law of intestate succession

applicable was the law of the deceased's domicile at the date of her death, viz., English law, and the adoption of the deceased in Burma was not an adoption to which s. 13 of the Adoption Act, 1950, applied; accordingly the application would be dismissed. A

Re Wilson ([1954] 1 All E.R. 997) considered.

[As to adoption and succession to property in relation to the conflict of laws, see 7 HALSBURY'S LAWS (3rd Edn.) 129, para. 232. B

As to succession to movables being governed by the law of domicile at the time of death, see 7 HALSBURY'S LAWS (3rd Edn.) 53, para. 103, note (r); and for cases on the subject, see 11 DIGEST (Repl.) 393, 394, 505-511.

For the Adoption Act, 1950, s. 13 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 477.] C

Cases referred to:

- (1) *Re Wilson*, [1954] 1 All E.R. 997; [1954] Ch. 733; 3rd Digest Supp.
- (2) *Re Goodman's Trusts*, (1881), 17 Ch.D. 266; 50 L.J.Ch. 425; 44 L.T. 527; 3 Digest 372, 135.
- (3) *Enohin v. Wykie*, (1862), 10 H.L. Cas. 1; 44 Digest 577, 3962. D

Summons.

By this summons the applicant, Mary Kathleen Wilby, widow, applied as the lawful mother by adoption of the deceased and the only person entitled to the deceased's estate for a grant of letters of administration to that estate. The deceased left surviving her three lawful brothers and one lawful sister who consented to the application. The summons was adjourned into open court. E

The facts appear in the judgment.

M. E. F. Corley for the applicant.

Cur. adv. vult.

Dec. 14. **BARNARD, J.**, read the following judgment: The deceased was born in Burma on July 14, 1924, and her parents were a Mr. and Mrs. Skinner, Mr. Skinner being a brother of the applicant. I am satisfied on the evidence put before me that throughout their lives both Mr. and Mrs. Skinner were domiciled in Burma and that the applicant and her husband were also domiciled in Burma until the year 1933, when they settled in this country. The applicant and her husband had no issue of their marriage and on Apr. 27, 1926, they adopted the deceased in accordance with the law of Burma. There can, therefore, be no doubt that at that time both the applicant, her husband, and the deceased, were all domiciled in Burma. A further deed of adoption was entered into on Sept. 6, 1930, between Mr. Skinner and the applicant's husband whereby the latter adopted Mary Rose Skinner the lawful sister of the deceased, and the deceased. No explanation was forthcoming why the deceased was included in this deed of adoption, in view of the fact that she had already been legally adopted by both the applicant and her husband. In 1933 the applicant and her husband paid a visit to this country and decided to settle here, and in 1935 both adopted daughters joined their adoptive parents in England and became domiciled in England and so remained at all times thereafter. Both Mr. and Mrs. Skinner pre-deceased the deceased, as also did the applicant's husband who died in 1946. On May 31, 1954, the deceased purported to make a will leaving everything to her adoptive mother, the applicant, but expressing the wish that something should be given to her two nephews and niece. That document is entirely in the handwriting of the deceased and signed by her but unfortunately not witnessed. The deceased's estate is only of the value of about £568 gross, and consists solely of personalty. F

In view of the fact that the deceased died intestate and domiciled in England the law governing succession to her estate is English law, and the question which I have to decide is whether the applicant, as the adoptive mother of the deceased, G

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A can be regarded as the lawful mother so as to succeed to her estate. In all cases of intestacy, the distribution of the estate is regulated by the Administration of Estates Act, 1925, as amended by the Intestates' Estates Act, 1952, the Legitimacy Act, 1926, and the Adoption Act, 1950. Section 13 (1) of the Adoption Act, 1950, provides:

B "Where, at any time after the making of an adoption order, the adopter or the adopted person or any other person dies intestate in respect of any real or personal property (other than property subject to an entailed interest under a disposition made before the date of the adoption order), that property shall devolve in all respects as if the adopted person were the child of the adopter born in lawful wedlock and were not the child of any other person."

C The adoption order referred to is clearly an order under that Act: see s. 1 (1) and s. 45 (1). The only authority to guide me is a decision of VAISEY, J., in *Re Wilson* (1) ([1954] 1 All E.R. 997). In that case spouses who were British subjects and domiciled in England, when on a visit to Canada adopted an infant in Montreal in accordance with the law of the province of Quebec, and on the death of the husband intestate, VAISEY, J., held that the adopted child was not entitled to succeed under the intestacy as his child. The difference between that case and the present is that in the present case the adopters were domiciled in the country in which the adoption was completed, whereas in *Re Wilson* (1) they were not, and VAISEY, J., in the course of his judgment said ([1954] 1 All E.R. at p. 1000):

E "What the position would have been if the adopters . . . as well as the infant, had been domiciled in Quebec I need not inquire."

Towards the end of his judgment he said (*ibid.*, at p. 1001):

"In my judgment, if the testator had been domiciled in Quebec at the time that the infant defendant was adopted, the case of the latter would have been different and very much stronger."

F The problem I have to decide is whether or not in those circumstances the present case is strong enough to succeed. I have been referred to most of the authorities to which VAISEY, J., was referred, and with which he deals in detail in his judgment (*ibid.*, at p. 1001). VAISEY, J., stated (*ibid.*, at p. 1000) that they did not afford any clear guidance on the point which he had to consider; nor do I think that they afford me any clear guidance on the point which I have to consider. I respectfully agree with VAISEY, J., that legitimation cases, as *Re Goodman's Trusts* (2) (1881) (17 Ch.D. 266) must be applied with extreme caution, if at all, for in contrast to adoption the meaning of legitimation is plain and unambiguous. Moreover, adoption constitutes an artificial relationship, its conditions, its aims and its effect differ widely in the various countries and under the various types of civilisation. In eastern Asia, for instance, adoption serves to maintain ancestor worship. Methods of adoption also vary greatly and WOLFF'S PRIVATE INTERNATIONAL LAW (2nd Edn.), at p. 398, gives some striking examples.

H The adoption of the deceased on Apr. 27, 1926, was an agreement between Mr. Skinner, the deceased's father, who was at that time a widower, and the applicant and her husband, whereby the former handed over the deceased to the latter, and resigned his rights and duties as a parent, which the latter accepted. This agreement was registered on the same date. There was no order of any court either confirming or approving this agreement, but none the less it constitutes a valid adoption by the law of Burma. VAISEY, J., refers in his judgment ([1954] 1 All E.R. at p. 1000) to THEOBALD ON WILLS (11th Edn.), at p. 282, where it is pointed out that adoption is, in the absence of statutory provision, governed by the law of the domicile of the adopter and of the child, but that it does not follow that that law will determine whether an adopted child can succeed to

property as a child of the adopter. The adoption in the present case would no doubt be recognised as valid in this country for some purposes. I have to decide, however, whether it entitles the adoptive mother to succeed to the deceased's estate on an intestacy. If I were to accede to this application, it would have to be on the basis that the English courts recognised any foreign adoption, provided that the adopter and the adopted were domiciled in the country where the adoption was completed, for the purpose of succession to property under English law. For it could not, in my view, be left to a judge to grant or refuse an application such as I have before me, according to how close the law of adoption in such foreign country approximated to our law of adoption. Such a task would be an impossible one as VAISEY, J., points out in his judgment (*ibid.*, at p. 1000).

The present would seem to be a hard case, for the applicant was an aunt of the deceased, and since the adoption in April, 1926, they lived together as mother and daughter until the death of the latter. Moreover if the deceased had died domiciled in Burma, the courts of this country would have followed the law of the deceased's domicile: see *Enohin v. Wylie* (3) (1862) (10 H.L. Cas. at p. 13). No hardship, however, need be caused, and the deceased's wishes as expressed in her unexecuted will of May 31, 1954, can be carried out by her sister, who is now Mrs. Davey, and who resides in this country, applying for a grant to her estate, as the lawful sister and one of the persons entitled to share on an intestacy, and having obtained the grant, Mrs. Davey can, with the consent of her three brothers, hand over the property to the applicant. I have come to the conclusion that the Administration of Estates Act, 1925, as amended by the Adoption Act, 1950, must be construed strictly. By s. 13 (4) of the latter Act, the references to an adoption order in the preceding sub-sections include references to an adoption order made in Northern Ireland. With the sole exception of orders made in Northern Ireland, the adoption orders referred to in the Act are orders made by the courts in this country and in Scotland. I therefore find it impossible to bring an adoption made under some foreign jurisdiction within the scope of s. 13 of the Act, and this summons must be dismissed.

Application dismissed.

Solicitors: *Pedley, May & Fletcher* (for the applicant).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

JEFFERSON v. JEFFERSON.

[COURT OF APPEAL (Denning, Hodson and Morris, L.J.J.), November 8, 30, 1955.]

Divorce—Maintenance of wife—Small maintenance payments—Order for payment of maintenance “free of tax.”—Meaning—Such sum as after deduction of tax at standard rate would produce the sum ordered—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 206 (1).

Husband and Wife—Maintenance—Small maintenance payments—Order should not refer to income tax—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 206 (1).

On a decree of divorce being made absolute, the Divorce Court made an order for maintenance of the wife “at and after the rate of £52 per annum free of tax the said sum to be payable weekly”. The husband paid £4 6s. 8d. each calendar month regularly but subsequently the wife claimed that the payment should have been at the rate of £1 a week grossed up so as to include tax at the standard rate, and issued a judgment summons on which the husband was ordered to pay £90 0s. 5d. for arrears and costs.

Held (Denning, L.J., dissenting): on its true construction the order for maintenance, being for the payment of maintenance at the yearly rate of £52 “free of tax”, required the husband to pay annually such a gross sum as after deduction of tax at the standard rate would leave £52 (dictum of SIR RAYMOND EVERSHED, M.R., in *Whiteside v. Whiteside* [1949] 2 All E.R. at p. 915 citing *Burroughes v. Abbott* [1922] 1 Ch. 86, and dictum of UPJOHN, J., in *Stokes v. Bennett* [1953] 2 All E.R. at p. 315 citing also *Spilsbury v. Spofforth* [1937] 4 All E.R. 487, applied), and the provisions of s. 205, s. 206 and s. 207 of the Income Tax Act, 1952, did not alter the meaning and effect of the order, although the sums ordered to be paid were within the category of small maintenance payments which, by s. 206 (1), must be paid without deduction of tax; accordingly, the arrears were recoverable.

Per CURIAM: orders for small maintenance payments should not be expressed as orders for payment of sums “free of tax” but should be made for sums stated without any reference to income tax. Tax should have been taken into consideration in assessing the stated sums. (See p. 34, letter C, post; p. 37, letter E, post, and p. 39, letter H, post.)

Appeal dismissed.

[Editorial Note.] The present case is decided on an order for payment of a small maintenance payment, but the judgments touch on considerations affecting orders for larger sums. Income tax may not be deducted from small maintenance payments, but where larger payments are made a payor will be under an obligation to deduct tax (see Income Tax Act, 1952, s. 169, s. 170 and 12 HALSBURY’S LAWS (3rd Edn.) 447), accounting to the Revenue for the amount so deducted if the payment is not made out of profits or gains brought into charge to tax (s. 170 (2)). In such cases the payee is entitled to recover tax overpaid by deduction (see 12 HALSBURY’S LAWS (3rd Edn.) 449), but, on the question whether there is any obligation on the payee to refund to the payor the whole or any of sums so recovered, dicta in the present case support the view that there is no such obligation in the ordinary case of payment of maintenance under an order (see at p. 33, letter I, lines 7 and 8, post, where DENNING, L.J., stated the views of other members of the court, and contra at p. 33, letter I, lines 2 and 3, post) nor where the payment is a small maintenance payment, see per MORRIS, L.J., at p. 42, letter I, lines 4 and 5, post).

As to small maintenance payments and income tax thereon, particularly the payer’s right to deduct the amounts in computing total income, see 12 HALSBURY’S LAWS (3rd Edn.) 449, 450, paras. 1011, 1013.

For the Income Tax Act, 1952, s. 205, s. 206, s. 207, see 31 HALSBURY'S STATUTES (2nd Edn.) 197-199.]

Cases referred to:

- (1) *Inland Revenue Comrs. v. Cook*, [1945] 2 All E.R. 377; [1946] A.C. 1; 114 L.J.P.C. 69; 173 L.T. 211; 2nd Digest Supp.
- (2) *Re Pettit*, [1922] 2 Ch. 765; 91 L.J.Ch. 732; 127 L.T. 491; 39 Digest 167, 587. B
- (3) *Re Lyons*, [1952] 1 All E.R. 34; [1952] Ch. 129; 3rd Digest Supp.
- (4) *Stokes v. Bennett*, [1953] 2 All E.R. 313; [1953] Ch. 566; 34 Tax Cas. 337; 3rd Digest Supp.
- (5) *J. v. J.*, [1955] 2 All E.R. 617; [1955] P. 215.
- (6) *Burroughes v. Abbott*, [1922] 1 Ch. 86; 91 L.J.Ch. 157; 126 L.T. 354; 28 Digest 68, 358. C
- (7) *Whiteside v. Whiteside*, [1949] 2 All E.R. 913; [1950] Ch. 65; 2nd Digest Supp.
- (8) *Dayrell-Steyning v. Dayrell-Steyning*, [1922] P. 280; 91 L.J.P. 210; 127 L.T. 846; 28 Digest 68, 354.
- (9) *Spilsbury v. Spofforth*, [1937] 4 All E.R. 487; 21 Tax Cas. 247; Digest Supp.
- (10) *Wallis v. Wallis*, [1941] 2 All E.R. 291; [1941] P. 69; 110 L.J.P. 38; 166 L.T. 58; 105 J.P. 324; 2nd Digest Supp. D
- (11) *Re Kingcome*, [1936] 1 All E.R. 173; [1936] Ch. 566; 105 L.J.Ch. 209; 154 L.T. 462; Digest Supp.

Appeal.

On Jan. 4, 1952, a decree of divorce obtained by the wife was made absolute and the Divorce Court made an order for the payment to the wife of maintenance "at and after the rate of £52 per annum free of tax the said sum to be payable weekly". The wife claimed that the amount due under the order was £1 a week grossed up so as to include tax at the standard rate (i.e., 9s. from Apr. 5, 1953, to Apr. 5, 1955, and 8s. 6d. thereafter) and she issued a judgment summons claiming arrears from Apr. 5, 1953, to May 13, 1955, calculated on this basis. The husband contended that, as the order was for a small maintenance payment within s. 205, s. 206, and s. 207 of the Income Tax Act, 1952, from which tax could not be deducted, it should be construed as an order to pay a gross sum of £52 a year. On Sept. 13, 1955, the court upheld the wife's contention and made an order for payment of £90 0s. 5d. arrears, and costs, at the rate of £5 a month. The husband appealed. E F

J. F. Taylor for the husband.

J. D. F. Moylan for the wife. G

Cur. adv. vult.

Nov. 30. The following judgments were read.

DENNING, L.J.: The parties were husband and wife until they were divorced by a decree absolute dated Jan. 4, 1952. I will for convenience still speak of them as "the husband" and "the wife". On the decree being made absolute, the Divorce Court made an order for maintenance H

"at and after the rate of £52 per annum free of tax the said sum to be payable weekly."

The wife's solicitors suggested that the simplest means of payment would be for the husband to give a standing order to his bankers to pay £4 6s. 8d. per calendar month into the wife's account. That is, of course, equivalent to £1 a week. The husband gave the standing order as they asked, and ever since the money has been paid regularly into the wife's account. I

Three years later, in December, 1954, the wife's solicitors claimed that, in order to comply with the order, the husband ought to pay to the wife, not the £1 a week (for which they had originally asked), but £1 16s. 4d. a week. The reason

A was because they said that “£1 free of tax” in the order meant “£1 grossed up so as to include tax at the standard rate”, which was then 9s. in the £, making £1 16s. 4d. a week. Accordingly they suggested that the husband should increase the standing order from £4 6s. 8d. to £7 17s. 7d. a month. The husband refused to do this. The wife’s solicitors then took out a judgment summons claiming that the husband ought from the beginning to have paid to the wife £1 16s. 4d. a week until Apr. 5, 1955 (whilst the standard rate of tax was 9s.), and thereafter £1 14s. 9d. a week, because the standard rate was then reduced to 8s. 6d. The judge has upheld the wife’s contention and has held that the husband has made default in payment of £88 12s. 5d., and he has ordered that the husband is to be committed to prison unless he pays off that sum at the rate of £5 a month in addition to the current payments. The husband appeals to this court.

C The first thing to notice is that, whatever be the correct figure, the weekly sum is under £2 and comes within the small maintenance provisions of the Income Tax Act, 1952, s. 205 to s. 207. As such, the husband is not entitled to deduct the tax at source. He must pay his wife the proper weekly sum in full, and leave her to pay her own tax direct to the Revenue. Her tax will not be calculated, however, at the standard rate of 9s. (now 8s. 6d.) in the £. The wife goes out D to work and earns £4 to £5 a week. She is, of course, taxed on her earnings, but the tax does not come to very much because she is entitled to her personal allowance and other reliefs, and even on the balance she is liable only to the reduced rate of tax, not the full rate. If the husband is liable to pay her £1 16s. 4d. a week (as the judge says he is) she would have to pay tax on it, but this tax would be only a few shillings a week, say 5s., and she would have the E balance, say £1 11s. 4d. a week, in her pocket free of tax, whereas all that she is entitled to under the order is £1 free of tax. This leads me to think that there must be something wrong with the judge’s order.

In order to determine this case, it is useful to consider the effect of a large order or agreement for maintenance, say £5 10s. a week free of tax. Such a sum comes within s. 169 and s. 170 of the Income Tax Act, 1952, and the husband F is entitled or bound to deduct tax at source at the standard rate of 9s. (now 8s. 6d.) in the £. In such a situation, the law is clear. If an order or agreement is made for “£5 10s. a week free of tax”, this means that the husband must pay his wife such a sum as will, after payment of her tax on it, leave her with £5 10s. a week clear to spend for her personal behoof; see *Inland Revenue Comrs. v. Cook* (1) ([1945] 2 All E.R. 377). In order to arrive at the figure when the G standard rate of tax is 9s. in the £, the husband must, in the first instance, put on one side a gross sum of £10. He must pay £5 10s. of it to his wife, and £4 10s. to the Revenue, being the tax on £10 at 9s. in the £. That satisfies the husband’s obligations under the Income Tax Acts.

But it must be remembered that the income which the wife receives is her own income, and the tax has been paid by him on her account. If she is earning little H or nothing, so that she is not liable to pay as much as 9s. in the £, then she can recover from the Revenue the amount that has been overpaid on her account; see *Inland Revenue Comrs. v. Cook* (1), but she ought, I think, straightway to pay this amount over to her husband. The reason is because it is then clear that the husband has paid more tax on her account than he was bound to pay. I He was bound to see that she got £5 10s. clear to spend for her own personal behoof, no more and no less. He does this by paying all the tax to which she is liable. When she gets a repayment on the ground that she was not liable, she ought to pay it over to him. The reasoning in *Re Pettit* (2) ([1922] 2 Ch. 765) and all the cases which follow it, such as *Inland Revenue Comrs. v. Cook* (1), and *Re Lyons* (3) ([1952] 1 All E.R. 34), applies to an order of the court for maintenance just as it does to a bequest of an annuity.

I understand that my brothers think that the wife would not be bound to pay anything back. Assume this to be so, nevertheless it does not alter the

fact that all that the husband has to pay her in cash is £5 10s. Test it by asking what is to happen if in such a case the husband does not pay the wife the £5 10s., nor the Revenue the £4 10s. What can the wife claim against the husband by action at law? Can she sue him for the gross sum of £10, or only the net sum of £5 10s.? She can, I think, sue him only for the net sum of £5 10s. If she were to sue for the gross sum of £10, she would be met by the defence that the husband was entitled or bound to deduct the £4 10s. before paying her; see s. 169 and s. 170 of the Income Tax Act, 1952, and *Stokes v. Bennett* (4) ([1953] 2 All E.R. 313), by UPJOHN, J. (at p. 317). The wife gets her £5 10s., and leaves the Revenue to collect the £4 10s. from her husband. If the husband did not pay, the wife could issue a judgment summons for only £5 10s., not for £10.

Such being the law in connection with large money payments, what is the position with small money payments which come under the small maintenance provisions? Sections 205 to 207 make it clear that the husband is not allowed to deduct any tax at source, nor to pay any tax to the Revenue on account of his wife. He must pay her the full amount to which she is entitled, and leave her to pay the tax on it herself. In these circumstances, no court ought to order a small money payment "free of tax". The court ought to order a stated cash sum; but, in assessing the figure, it should remember that the wife may have to pay tax on it, the amount of tax depending on her circumstances. That is the proper course in the case of large payments; see *J. v. J.* (5) ([1955] 2 All E.R. 617). All the more so in the case of small money payments. We are faced now with an order which has been improperly made for £1 free of tax. I take it that, by this order, the registrar intended that the wife should receive £1 a week clear to spend for her personal behoof, no more and no less. In order to achieve that result, the registrar should have ordered £1 3s., or whatever the appropriate sum should be, so that, after she had paid her tax, she would be left with £1 in hand. He has not, however, made such an order.

What then is to be done? I think that the wife's solicitors ought to have gone back to the registrar and asked him to vary the order so as to bring it into accord with the law, and to give effect to his intentions, whatever they were. That is indeed what her solicitors originally intended to do, but they seem to have changed their minds. They issued a judgment summons against the husband on the footing that he ought to have paid £1 16s. 4d. a week to the wife. That was a mistake. The order for maintenance did not say that the husband was to pay £1 16s. 4d. to the wife. It said £1 free of tax. The appropriate sum would be £1 plus an unknown amount which the husband had no sure means of calculating. She might perhaps have brought an action for the amount, but not a judgment summons. A judgment summons must be for a sum certain. It cannot be based on an unknown quantity. The only certain figure was the £1 a week which the husband had paid. No judgment summons should, therefore, have been issued against him.

I think the appeal should be allowed, and the judgment summons dismissed.

HODSON, L.J.: This is an appeal from a suspended committal order made by His Honour JUDGE TUCKER in respect of a judgment debt of £90 0s. 5d., being arrears of maintenance due under an order of the Divorce Court dated Jan. 4, 1952, and costs. The order, which was made in invitum, was as follows:

"It is ordered that Frederick Jefferson the respondent do pay or cause to be paid to Edith Jefferson the petitioner during their joint lives and until further order as from the date on which the decree nisi herein was made absolute, to wit Jan. 4, 1952, maintenance at and after the rate of £52 per annum free of tax the said sum to be payable weekly."

This is not the ordinary case of an order made on a judgment summons against a recalcitrant debtor, seeing that there was a bona fide dispute between the parties as to the amount due, but it appears to have been thought that

A procedure by way of such a summons was the cheapest and most convenient way of deciding the question at issue between the parties. Indeed, if the order was enforceable as a judgment, as I think, it was reasonable for the wife to take the course which she did.

B The question may be shortly stated: Do the words "£52 per annum free of tax" bear the construction contended for by the wife; that is to say, are they equivalent to "such a sum as after deduction of income tax at the standard rate for the time being will leave £52 a year"; or do they mean, as the husband contends, that, if and so long as he pays £52 a year to the wife without making any deduction for tax (as he has done), he complies with the order? The learned judge decided the question in favour of the wife, and the husband has appealed.

C The accepted construction of this form of order is, I think, that contended for by the wife. This is shown by *Burroughes v. Abbott* (6) ([1922] 1 Ch. 86) a decision of P. O. LAWRENCE, J., which was cited and tacitly approved in the Court of Appeal in *Whiteside v. Whiteside* (7) ([1949] 2 All E.R. 913). SIR RAYMOND EVERSHED, M.R., there said of LAWRENCE, J.'s decision (*ibid.*, at p. 915):

D "In *Burroughes v. Abbott* (6) an order had been made by the Divorce Court which, though expressed to be that the husband should pay £x per annum free of tax, was held to mean and intend that, by whatever form the order was implemented, the obligation should be to pay such a sum as, after deduction, would leave £x."

E In *Burroughes v. Abbott* (6) an order had been made to secure maintenance "free of tax", and the deed drawn in pursuance of the order was rectified by the court so as to provide for the payment of such a sum in every year as, after the deduction of the tax for the time being payable in respect thereof, would leave a clear sum. To the same effect is the decision of UPJOHN, J., in *Stokes v. Bennett* (4) ([1953] 2 All E.R. at p. 315).

F There is a possible alternative construction of the order which I would mention, viz., that it confers on the wife freedom from the tax which would otherwise be payable by her rather than freedom from tax at the standard rate. This last construction would no doubt have carried out the intention of SIR HENRY DUKE, P., as expressed in *Dayrell-Steyning v. Dayrell-Steyning* (8) ([1922] P. 280) and corresponds in effect with the construction placed on the provision for payment of an amount free of tax out of a trust fund by ROMER, J., in *Re Pettit* (2), a decision which has been followed in similar cases up to the present time. This construction provides for a fixed increase in spendable income after an annuitant's liability to income tax has been satisfied.

G *Dayrell-Steyning v. Dayrell-Steyning* (8) has not, however, been followed, and the construction indicated thereby was rejected by FINLAY, J., in *Spilsbury v. Spofforth* (9) ([1937] 4 All E.R. 487). There the respondent to the appeal had obtained a decree absolute of divorce and an order for the payment of maintenance at the rate of £120 per annum payable monthly free of tax. At the end of the tax year she obtained a certificate that tax had been deducted, the amount on the certificate being arrived at by grossing up the net payments of £10 a month. She claimed repayment of the tax. The payments had been allowed as deductions against the income of the divorced husband as a charge on his income. It was held that she was entitled to the repayment claimed, and effect was not given to *Dayrell-Steyning v. Dayrell-Steyning* (8). *Re Pettit* (2) was distinguished, as I understand it, because the payments to the wife were charges on the husband's income and deductible accordingly; compare also *Wallis v. Wallis* (10) ([1941] 2 All E.R. 291). The matter is, I think, correctly stated in RAYDEN ON DIVORCE (6th Edn.), at p. 563:

"An order in these terms [i.e., free of tax] requires payment of such a

gross sum as after being taxed at the full standard rate will amount to the named sum."

In a footnote on p. 566 it is stated, also I think correctly, that:

"It is otherwise in the case of amounts paid free of tax out of a trust fund."

Reference is there made to *Re Kingcome* (11) ([1936] 1 All E.R. 173), a decision of BENNETT, J., in which *Re Pettit* (2) was applied. In my opinion, therefore, the order must in the first instance be construed in the way contended for by the wife.

The husband contends that, as the order with which we are concerned is a small maintenance payment within the meaning of the Finance Acts, now governed by s. 205, s. 206 and s. 207 of the Income Tax Act, 1952, the order should be construed as if it were an order to pay a gross sum of £52 a year. I cannot accept that these provisions have any such effect. Section 205 (1) provides:

"In this chapter, 'small maintenance payments' means payments under an order made by a court in the United Kingdom—(a) to or for the benefit of a woman for her maintenance . . . being payments which—(i) are for the time being required by the order (whether as originally made or as varied) to be made weekly at a rate not exceeding the amount per week specified in sub-s. (3) of this section; and (ii) would, apart from this section, fall within chapter 1 of this Part of this Act (which provides for the deduction of tax from interest, annuities and other annual payments), and 'small maintenance order' means an order providing for the making of small maintenance payments."

Section 205 (3) (a) provides that the specified amount is:

"in the case of payments to or for the benefit of a woman for her maintenance, £5 if the payments are payments pursuant to an order made in accordance with para. (c) of s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, and otherwise £2."

It is clear that this is an order for a small maintenance payment within the meaning of s. 205.

Section 206 provides:

"(1) Notwithstanding anything in chapter 1 of this Part of this Act, small maintenance payments shall be made without deduction of tax. (2) Any sums paid in or towards the discharge of a small maintenance payment shall be chargeable under Case III of Sch. D, but the tax shall be computed in all cases on the payments falling due in the year of assessment, so far as paid in that or in any other year. (3) A claimant shall be entitled, in computing his total income for any year of assessment for any of the purposes of this Act, to deduct sums paid by him in or towards the discharge of any small maintenance payments which fall due in that year, and effect shall be given to this deduction by reducing any assessment made on him or by repayment, as the case may require, and for the purposes of proviso (b) to sub-s. (1) of s. 101 of this Act and of s. 221 of this Act (which provide that relief is not to be given in respect of charges on income) any amount which can be deducted under this sub-section in computing the total income of a person shall be treated as if it were income the tax on which that person is entitled to charge against another person."

Section 207 deals with the duty of the court to give information to the Inland Revenue Commissioners as to small maintenance orders.

These sections provide a code which was introduced by the Finance Act, 1944, to avoid cases where the husband of moderate means might be ordered in effect to pay tax at the full rate which would be reclaimed subsequently by his

- A wife. In this way labour and circuity can in many cases be avoided. Were it not for the small maintenance payment provisions, s. 169 of the Income Tax Act, 1952, would apply to this case and the husband would have had to treat the sum named in the order as grossed up by adding thereto the appropriate tax. He would then have been entitled, in making the payments out of profits and gains already taxed, to deduct the tax on making the payments to the wife.
- B In my opinion the machinery provided by the Act for small maintenance payments has no effect on the construction of the order.

Reliance was placed by the husband on s. 206 (1), under which small payments have to be made without deduction of tax. This does not mean that the order containing the words "free of tax" is to be construed as if those words did not appear. It is first necessary to ascertain what is the gross sum before giving effect to the section. Thus the sum payable is in this case not £1 a week but £1 16s. 4d., from which the section demands that no deduction of tax is to be made.

- C The practical effect of the small maintenance payment machinery is simply that the husband is entitled to deduct the gross payment from his total assessable income and the money comes into the hands of the wife as taxable income in her hands. It is quite true that the actual amount by which the wife may benefit from the order varies with the amount of tax which she is liable to suffer, but this is a feature common to all orders where income tax is in question.
- D I can see no justification for treating the machinery of small maintenance payments as a reason for construing the order in such a way that the £52 is regarded as a gross sum. It would not in all cases lead to a fair result, for, if

- E the £52 is to be treated as a gross sum, and the order is therefore complied with by the payment of £52 and no more, this means that, if the wife is liable to tax, she will get less than £52, for s. 206 (2) will apply to any payment she may receive, and she will be assessable to tax accordingly under Sch. D, Case III. We were told that the practice in making small maintenance payments orders is to omit all reference to tax and that this order is an anomaly. I am satisfied
- F that the regular practice is correct, and ought to be followed in future.

- In making all maintenance orders the court must necessarily consider the incidence of income tax as it falls on either or both of the parties, and must make the best assessment it can so as to leave in the hands of the recipient of payments such a sum as it thinks right. Orders are subject to variation under s. 28 of the Matrimonial Causes Act, 1950, and, if too much has been left in the hands of the recipient after tax adjustments have been made, application can be made for variation and a fresh order made. I express no opinion as to the prospects of success of such an application in this case. It has been contended before us on the part of the wife that there is no justification for the view that she is either receiving too much on the merits or more than the court intended she should have; but the figures have not been fully investigated, and in any event the matter is not for consideration on this appeal.
- G
- H

So far as the past is concerned the order stands and is in my judgment enforceable as the commissioner found, so that the appeal should be dismissed.

- I **MORRIS, L.J.:** On Nov. 22, 1951, the wife was granted a decree nisi of dissolution of marriage against the husband. The decree was made absolute on Jan. 4, 1952. On that date an order for maintenance was made. It was in the following terms:

"It is ordered that Frederick Jefferson the respondent do pay or cause to be paid to Edith Jefferson the petitioner during their joint lives and until further order as from the date on which the decree nisi herein was made absolute, to wit Jan. 4, 1952, maintenance at and after the rate of £52 per annum free of tax the said sum to be payable weekly."

The solicitors of the parties (who may conveniently be referred to as the husband and the wife) arranged that payment should be made by monthly payments of £4 6s. 8d. per calendar month to the credit of a banking account of the wife, and the wife's solicitors asked that the husband's inspector of taxes should be informed of the order

"so that the necessary adjustment is made in his P.A.Y.E. code for our client to be able to claim the necessary repayment of tax in due course"; (see letter of Jan. 9, 1952). The husband's solicitors wrote on Jan. 10, 1952, and stated that they had already written a letter themselves to the appropriate inspector of taxes.

Payments were made to the petitioner of £4 6s. 8d. a month, and, pursuant to the intention expressed in January, 1952, the wife made a successful claim for the recovery by her of tax paid by the husband referable to the maintenance payments. In 1954 certain difficulties were experienced by the husband, whose solicitors accordingly wrote on Sept. 7, 1954, to the wife's solicitors as follows:

"You will recollect this matter in which your client, Mrs. Jefferson, was awarded maintenance at the rate of £1 per week by the district registrar at Cambridge. Our client has been having considerable difficulty with his inspector of taxes with reference to this payment, and the matter has also been handled by his accountants, Messrs. C. J. Vane & King of Birmingham. Their contention is that so far as income tax is concerned, this order is a small order within the meaning of the Finance Acts, and therefore that Mr. Jefferson should pay his wife £1 per week, and should not be liable for income tax thereon in addition. It was certainly our intention, when we offered the sum of £1 per week, that that sum should be our client's total liability, having regard to all the circumstances, and if in fact our client is forced to pay tax on this sum in addition, his liability would be nearly twice that amount. The argument has now reached the stage where the inspector of taxes has asked us to obtain Mrs. Jefferson's interpretation in writing of the order and for your information we enclose herewith a copy of the letter addressed to our client on July 27. Perhaps you would kindly let us hear from you."

The wife's solicitors wrote in reply on Sept. 8 as follows:

"We thank you for your letter of yesterday's date. Both to ourselves and our client there has never been any doubt as to the interpretation of the order made by the district registrar which was an order for £52 per annum free of tax i.e. the sum ordered to be paid was to be 'grossed up', that is to say, increased to the amount which, after being taxed at the full rate, would leave the sum ordered. With reference to the fourth paragraph of your letter you will recall that the order was made by the registrar after time for consideration, and was not in any way an order by consent, and no offer of £1 per week was made by you. We advised our client that she would in effect be in receipt of approximately 38s. per week from her husband, £1 a week being received from her husband directly and the remainder obtained by recovery of tax paid by him. If you will kindly refer to the final paragraphs of our letters to you of Dec. 22, 1951, and Jan. 9, 1952, and your reply of Jan. 10, you will see that the position was fully appreciated at the time the order was made."

They also addressed a letter dated Sept. 29, 1954, to the inspector of taxes, the first two paragraphs of which read:

"We act for Mrs. Jefferson . . . who obtained a decree absolute of divorce against her husband, Mr. F. Jefferson . . . in January, 1952. At that time application was made to the court for an order for the wife's maintenance and an order was made by the registrar of the district registry of the High Court at Cambridge of £52 per annum free of tax payable weekly.

A We have no doubt that you have seen a copy of this order. At the time the order was made we advised our client that she would in effect be in receipt of approximately 38s. per week from her husband, £1 a week being received from her husband directly, and the remainder obtained by recovery of tax paid by him i.e. the sum ordered to be paid was to be 'grossed up', that is to say, increased to the amount which, after being taxed at the full rate, would leave the sum ordered. The maintenance payments have been made monthly by banker's order to our client's bank, Barclays Bank, Ltd., Benet Street, Cambridge and our client has endeavoured to obtain repayment of the tax paid by her husband. We understand that last year she was successful in this and received the sum of £30 19s. in respect thereof. She has now complained to us that she is unable to recover this tax for the current year, and we understand that the reason is that your office are not satisfied as to the true interpretation of the order made, and that you require a signed statement by Mr. Jefferson and our client that they are ad idem as to the interpretation of the order."

The inspector of taxes replied on Nov. 23, 1954, in the following terms:

D "Thank you for your letter of Sept. 29. I am sorry I have not been able to reply until now. It would seem that the interpretation of the court order of Jan. 4, 1952, is open to doubt and is primarily a matter to be settled by the court and the parties concerned. The payment for the maintenance of the wife may be regarded as either (a) £1 per week, or (b) such a sum as after deduction of tax at the standard rate leaves £1 per week. (For 1953-54 the amount would be £1 16s. 4d.—£94 10s. 11d. for the year.) In either case the weekly sum is within the limits prescribed by s. 205-s. 207 Income Tax Act, 1952, the payments are ordered to be made weekly, and they would appear to be 'small maintenance payments', tax not being deductible on payments. The total amount exigible (£1 or £1 16s. 4d.) is assessable in the former wife's hands (in this case Mrs. Jefferson) under Case III, Sch. D and the payer is entitled to a deduction from his total income accordingly. In view of this, will you please obtain a statement from your client indicating whether she considers she is entitled to £1 weekly or £1 16s. 4d. weekly? In either case no tax is deductible, and assessments will be necessary under Sch. D Case III. As you state a repayment has been made to Mrs. Jefferson for each of the years 1951-52 and 1952-53. This was in fact made in error",

G and then the writer asks for the solicitors' observations.

A reference to the correspondence which I have read shows how the question which is before the court has arisen. The question is what are the meaning and the effect of the order of the court. The views of the parties can have no persuasive effect as to this. The way in which the question has arisen, and the difficulties which have been created for both parties, demonstrate how undesirable it was that the order should have been made in the form in which it was made. It seems clear also that there was an omission to have in mind the provisions relating to small maintenance payments. These provisions were introduced by the Finance Act, 1944 (see s. 25) and are now contained in s. 205, s. 206 and s. 207 of the Income Tax Act, 1952. In his judgment in *Wallis v. Wallis* (10) ([1941] 2 All E.R. 291), LORD MERRIMAN, P., pointed to the undesirability of making "tax free" orders for maintenance, and he said (*ibid.*, at p. 295):

I ". . . since the combination of higher taxation with the implications of the tax-free order was so plainly declared by FINLAY, J., in *Spilsbury v. Spofforth* (9), so far from the tax-free order being the practice of this Division, it is the rarest possible thing for a registrar or a judge to make an order free of tax."

Since, however, an order of the court was made in the terms recited above, it becomes necessary to decide what is its meaning and effect. In my view, the question can be approached by considering first what would be the position apart from the statutory provisions relating to small maintenance payments, and secondly what is the consequence of the application of those provisions. A

We are not concerned to decide whether any and what adjustments in the income tax position of either party may have to be made. In the period down to April, 1953, the wife received payment from her husband of £1 per week, and claimed and received from the Inland Revenue a sum of money by way of repayment of tax paid by her husband. The claim that she now makes is limited to the period from Apr. 5, 1953, to May 13, 1955, which was presumably the date of the summons. Allowing for tax at 9s. in the £, the gross sum required to produce £1 would be £1 16s. 4d.; at 8s. 6d. in the £ (the rate as from Apr. 5, 1955) the gross sum would be £1 14s. 9d. The arrears of £88 12s. 5d. represent two years at 16s. 4d. per week, and five weeks at 14s. 9d. per week. B C

The operative words of the order provide that the maintenance is to be

“at and after the rate of £52 per annum free of tax the said sum to be payable weekly.”

As a matter of construction, I think that “the said sum” probably refers to the stated sum of £52; but “the said sum” might be and could be the gross sum denoted by the phrase “maintenance at and after the rate of £52 per annum free of tax”. It would be an unnatural construction if the result were that the wife should receive £52, and should then be possibly liable to pay tax on the £52. The benefit accruing to the wife under the order is that her husband must “pay or cause to be paid” to her maintenance which is “at and after the rate of £52 per annum free of tax”. In order to pay her “at the rate of £52 per annum free of tax” he could, apart from any statutory provisions, pay her such gross sum as would, after deduction from it of tax at the current rate, yield the sum of £52; but statutory provisions might require him or permit him to pay the tax and to pay the net sum to his wife. Alternatively the words of the order might mean, as a matter of construction, that payment is to be made so that whatever the wife’s tax position may be, she is to receive a clear additional sum of £52 a year. D E F

Apart from construing the words used, there is a well-settled and well-recognised understanding as to the meaning and effect of an order made in the Probate Division for the payment of a sum “free of tax”.

The decision in *Burroughes v. Abbott* (6) arose out of an order made by the Divorce Court in 1907 that Mr. Burroughes should secure by deed to be settled by one of the conveyancing counsel of the court the payment of certain sums to his wife free of income tax. The deed as drawn and made contravened certain prohibitions of the Income Tax Acts. It was held that the wife was entitled to have the deed rectified, and in the substituted form as approved by the court ([1922] 1 Ch. at p. 99) the wording was G

“... such a sum in every year ... as after the deduction of the income tax for the time being payable in respect thereof will leave a clear sum of ...” H

The words “income tax for the time being payable in respect thereof” must, I think, denote the current or standard rate of income tax. No disapproval of the result in *Burroughes v. Abbott* (6) was expressed when that case was considered by this court in *Whiteside v. Whiteside* (7). In *Spilsbury v. Spofforth* (9) an order had been made in the Divorce Court in favour of a wife for maintenance I

“at and after the rate of £120 per annum (free of tax), the said sum to be payable monthly.”

At the end of the tax year she obtained from her husband a certificate that tax had been deducted by him from an amount arrived at by grossing up the net payments of £10 per month, and she claimed repayment of the tax on the basis

A that she had suffered tax by deduction. The payments had in fact been allowed as deductions against the income of the husband, and had been treated as a charge on his income. The wife was held entitled to receive repayment of the tax which had been deducted. FINLAY, J., in the course of his judgment, said ([1937] 4 All E.R. at p. 489):

“ . . . it is an order of the court that she is to have £120 free of tax.

B In order to carry out that intention of the court, it is, I think, necessary that her present claim should succeed. The commissioners have decided that it does succeed, and I agree with them, and, in agreeing with them, also on the admission of the Attorney-General, I think that, quite clearly, we are carrying out what must have been the intention of those who made the order.”

C It may be noted that although FINLAY, J., mentioned in his judgment that his attention had been called to *Re Pettit* (2), no suggestion was made in the case that the wife would have to pay over to the husband the tax that she recovered. Indeed it is difficult to see how the husband could assert such a claim, since he had been given relief in respect of the payments, the maintenance being treated as a charge on his income, and allowed as a deduction in arriving at his income tax liability; the certificate that he gave showed that he had grossed up the net payment of £120 per annum and paid tax on the grossed up figure.

D That there is a well-settled understanding as to the meaning and effect of an order made in the Divorce Division for the payment of a sum by way of maintenance “ free of tax ” is illustrated by the judgment of LORD MERRIMAN, P., in *Wallis v. Wallis* (10). The learned President, if I may say so, makes the matter very clear. He said ([1941] 2 All E.R. at p. 294):

E “ I refer to the decision of FINLAY, J., in *Spilsbury v. Spofforth* (9). That case decided—and I think it was really only declaring the law as it was known to be and applying it more particularly to maintenance orders of this character—that, when the wife has obtained a maintenance order declared to be free of tax, it is she alone who can recover the income tax, and she alone who can recover it on her own behalf. To put it into practical form, on such an order as this, with the tax at the rate of 10s. in the £ . . . the husband as a matter of practice has to pay the tax on £4 of income—that is, 10s. in the £—producing £2 of tax, to leave the net £2 for the wife. However, assuming that the wife has no separate income, or . . . that she has not exhausted her reliefs under the Income Tax Acts—she can then . . . demand repayment of the tax as tax paid upon her own income (as, indeed, the annuity is), so that she receives the £2 net and recovers on her own behalf the tax thereon which the husband has had to pay . . . The unfortunate man . . . suffers all the detriment. Whether or not that was recognised before it was so plainly declared by FINLAY, J., it has been very plainly recognised in this Division since the decision of FINLAY, J.; and, while *Dayrell-Steyning v. Dayrell-Steyning* (8) . . . laid down what SIR HENRY DUKE, P., thought would be the proper practice in this Division in the circumstances then prevailing, it has, to my certain knowledge, ceased to govern the practice of this Division for some years past.”

H In *Stokes v. Bennett* (4), the wife obtained against her husband an order for maintenance

I “ at and after the rate of £22 per month free of tax the said sum to be payable monthly.”

In his judgment UPJOHN, J., said ([1953] 2 All E.R. at p. 315):

“ Both sides agree, however, that, having regard to *Spilsbury v. Spofforth* (9) and the earlier case of *Burroughes v. Abbott* (6), an order in that form is to be construed as an order to pay a gross sum of such amount as after deducting income tax for the time being payable in respect thereof will leave the clear monthly sum of £22.”

The matter was neatly, and as I think accurately, summarised in the argument in that case of counsel for the Crown when it was said that:

"The net sum of £22 is the yardstick used to measure the gross sum ordered by the Divorce Division."

In *J. v. J.* (5), a case in this court, not being one in reference to a small maintenance payment, HODSON, L.J., said ([1955] 2 All E.R. at p. 623):

"The words 'free of tax' attached to a net figure, or 'less tax' attached to a gross figure, have no material effect, since the result in each case is to order a gross sum of which part must be paid to the payee and part to the Revenue."

I reach the conclusion, therefore, that in the present case the order of the court was an order on the husband to pay such gross sum in every year as, after the deduction of income tax at the current standard rate, would leave the clear sum of £52 a year.

What then is the effect of the provisions of s. 206 of the Income Tax Act, 1952? Sub-section (1) provides:

"Notwithstanding anything in Chapter 1 of this Part of this Act, small maintenance payments shall be made without deduction of tax."

The result is that as the gross sum is in this case under £2, the husband must not deduct tax, but must pay the gross sum over to his wife. How does the matter thereafter stand on the wife's part and on the husband's part? As to the wife the position is governed by s. 206 (2) which provides:

"Any sums paid in or towards the discharge of a small maintenance payment shall be chargeable under Case III of Sch. D, but the tax shall be computed in all cases on the payments falling due in the year of assessment, so far as paid in that or in any other year."

As to the husband, the position is governed by s. 206 (3), which provides:

"A claimant shall be entitled, in computing his total income for any year of assessment for any of the purposes of this Act, to deduct sums paid by him in or towards the discharge of any small maintenance payments which fall due in that year, and effect shall be given to this deduction by reducing any assessment made on him or by repayment, as the case may require, and for the purposes of proviso (b) to sub-s. (1) of s. 101 of this Act and of s. 221 of this Act (which provide that relief is not to be given in respect of charges on income) any amount which can be deducted under this sub-section in computing the total income of a person shall be treated as if it were income the tax on which that person is entitled to charge against another person."

The liability of the husband was fixed by the order of the court, and in my judgment authority shows that the court imposed on the husband a liability to pay such sum as after the deduction of income tax at the current standard rate would leave the clear sum of £52 a year. The sum for which the husband was made liable is a sum that is within the statutory definition of a small maintenance payment. The provisions of s. 205, s. 206 and s. 207 of the Income Tax Act, 1952, do not have any bearing on the meaning and effect of the order which the court made in this case, but they bring about the result that the husband may not deduct tax. He must pay to the wife the sum which the order of the court denotes. That sum is assessable for tax in the wife's hands. The husband can deduct the amount of it from his total income so as to arrive at the figure of his income in reference to which his tax liability will be assessed.

The result of this is that there is in my view no room for an application of the principle laid down in *Re Pettit* (2). In that case a testator had given an annuity free of income tax. The annuitant was able, because of reliefs that were applicable, to obtain a refund of income tax paid in excess of the amount properly payable by the annuitant. It was held that the trustees of the will, for the

A benefit of the residuary estate, were entitled to such proportion of the tax repaid as the annuity bore to the total income of the annuitant. In that case the annuity was paid out of income that had already been brought into charge to tax, the tax having been deducted at source before the income was received by the trustees. ROMER, J., pointed out in his judgment the effect of the provision that an annuity of £1,000 "free of duty and income tax" was to be paid. He said ([1922] 2 Ch. at p. 770):

B "In the year 1918-19, for instance, when the ordinary rate of income tax was 6s. in the £ the trustees would have had in the first instance to set aside £1,428 11s. 5d. and to pay £428 11s. 5d. to the Revenue and the balance to the annuitant. But this sum might in the end prove to be too little or too much. If the annuitant were liable to pay super tax it would be too little and the proper proportion of her super tax referable to her annuity would, when ascertained, have to be paid to her by the trustees and would so go to reduce the income payable to the residuary legatees."

C It seemed only right that, if the trustees had to pay such amount of tax as would enable the annuitant to receive £1,000 and might be liable to pay tax at more than the standard rate, they should have any refund that might result from the fact that tax at less than the standard rate was payable. The position in the present case is, in my view, in a number of respects different. In the first place, an order for maintenance is only made after a consideration of the financial position of the parties, and with knowledge of the current rate of taxation. Secondly, the terminology used in orders for maintenance has acquired well recognised meaning; and orders may be varied from time to time. Thirdly, in the case of small maintenance payments, there must not be any deduction of tax. Payment must be made in full: the full or gross amount of the payment is chargeable to tax in the wife's hands and is deducted from the husband's income for the purpose of his assessment to tax.

D In the result I think that the learned judge came to a correct conclusion. Though the husband was not recalcitrant, he had for wrong reasons refused to pay sums, the exact figures of which would be calculated, which the court had ordered him to pay. Consideration was shown to him by fixing the instalment payments of the arrears at amounts and at times which were suggested on his behalf as being convenient. In my view, the appeal should be dismissed.

E *Appeal dismissed.*

Solicitors: *Rivington & Son*, agents for *Rabnett, Conway & Co.*, Birmingham (for the husband); *Field, Roscoe & Co.*, agents for *Ginn & Co.*, Cambridge (for the wife).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

MEAD v. CLARKE CHAPMAN & CO., LTD.

[COURT OF APPEAL (Singleton, Jenkins and Parker, L.J.J.), December 5, 1955.]

Fatal Accident—Damages—Infant child of deceased—Re-marriage of widow—Financial position of deceased and child's stepfather similar—Whether child's dependency ceased on mother's re-marriage.

On Jan. 15, 1951, the deceased was killed during the course of his employment with the defendants who admitted their liability for negligence. At the date of his death the deceased had an infant daughter aged four months. On Sept. 17, 1951, the plaintiff, the widow of the deceased, re-married. Her second husband was in a financial position similar to that of the deceased (he earned £8 10s. weekly) and treated his stepchild with kindness and generosity. In an action for damages under the Fatal Accidents Acts, 1846 to 1908, on behalf of the plaintiff and the child, the child was awarded damages (£36) in respect only of the period between her father's death and her mother's re-marriage on the ground that the dependency of the child ceased wholly on the plaintiff's re-marriage. On appeal,

Held: (i) if the defendants were to escape liability for damages to the child in respect of any period after the wife's re-marriage the burden was on them to show that in all reasonable probability the child could not thereafter suffer damage as result of her father's death, and

(ii) the defendants had not discharged this burden because the moral obligation of a stepfather to provide for the child was not the financial equivalent of the legal obligation of a father so to provide and because of other possibilities, such as an increase of the family and consequent financial claims on the stepfather of his own children; accordingly the damages awarded in respect of the child would be increased from £36 to £200.

Peacock v. Amusement Equipment Co., Ltd. ([1954] 2 All E.R. 689) considered.

Appeal allowed.

[As to voluntary advantages to be taken into consideration in assessing damages under the Fatal Accidents Acts, see 11 HALSBURY'S LAWS (3rd Edn.) 240, para. 408, and 23 HALSBURY'S LAWS (2nd Edn.) 698, para. 986.

For the Fatal Accidents Act, 1846, s. 2, see 17 HALSBURY'S STATUTES (2nd Edn.) 5.]

Cases referred to:

- (1) *Baker v. Dalgleish S.S. Co., Ltd.*, [1922] 1 K.B. 361; 91 L.J.K.B. 392; 36 Digest (Repl.) 223, 1191.
- (2) *Peacock v. Amusement Equipment Co., Ltd.*, [1954] 2 All E.R. 689; [1954] 2 Q.B. 347; 3rd Digest Supp.
- (3) *Redpath v. Belfast & County Down Ry.*, [1947] N.I. 167; 2nd Digest Supp.

Appeal.

The plaintiff appealed from an order of DONOVAN, J., dated June 29, 1955, whereby he awarded the plaintiff's infant daughter £36 by way of damages under the Fatal Accidents Acts, 1846 to 1908, in respect of the death of her father.

The facts appear in the judgment of SINGLETON, L.J.

L. G. Scarman for the plaintiff.

John Russell for the defendants.

SINGLETON, L.J.: Mr. Alexander Scott was a welder employed by the defendants, Clarke Chapman & Co., Ltd., who are engineers. On Jan. 15, 1951, while he was working at a power station which was in the course of construction at Naval Row, Poplar, he fell from a height and was killed. The defendants recognise that his death was caused by their negligence and that they are responsible in damages to his widow, the plaintiff. This action was brought by

A the plaintiff on behalf of herself and her infant daughter. The daughter was born on Sept. 24, 1950. On Sept. 27, 1951, the plaintiff re-married. She claimed damages under the Fatal Accidents Acts, 1846 to 1908. Section 2 of the Fatal Accidents Act, 1846, provides that:

B “Every such action* shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought...”

C The plaintiff claims that she and her infant daughter were entitled to damages under the Fatal Accidents Acts, 1846 to 1908. There was also a claim for damages by the widow under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the loss of expectation of life of her husband. DONOVAN, J., awarded the plaintiff the sum of £400 under the Law Reform (Miscellaneous Provisions) Act, 1934, and a further sum of £35 in respect of funeral expenses.

D The question of difficulty which arose was as to the damages to be awarded under the Fatal Accidents Act. Mr. Scott was twenty-three years old and he was earning £8 10s. a week as a welder when he was killed. The plaintiff's second husband, Mr. Mead, is a lorry driver and at the date of the trial he was earning £8 10s. a week. That is precisely the same sum as the first husband was earning—but there is four and a half years' difference in time. However, it was taken

E without objection that the earnings of the first husband were the same as the earnings of the second husband. It was submitted to the judge on behalf of the defendants that dependency of the wife on the husband who was killed ceased when she re-married, and that no damages should be given to her in respect of any time subsequent to her re-marriage, for there was no financial loss thereafter. That was accepted by the learned judge and he awarded damages to the plaintiff

F in respect of the thirty-six weeks' period between the death of her first husband and her marriage to Mr. Mead. She said in her evidence that her first husband had given her £6 10s. a week; the judge calculated that the loss to the family was £5 a week for thirty-six weeks, and thus he awarded £180 damages under the Fatal Accidents Act. He apportioned that amount in this way: £36 to the infant and the balance, viz., £144, to the plaintiff. I have said already that he

G awarded damages to the plaintiff as administratrix of her husband's estate under the Law Reform (Miscellaneous Provisions) Act, 1934. Strictly, the damages awarded under the one should be set off against those awarded under the other,† but that was not done and no question is raised on it on this appeal.

H The amount of £36 awarded by way of damages to the child, who was four months old at the time of her father's death, is very small, and was given in respect of the period up to the second marriage of her mother. The plaintiff was asked:

I “Q.—Would it be right to say that really, so far as the way you live is concerned, you are living very much the same as when your husband was alive? A.—Yes. Q.—Is your present husband fond of Christine? A.—Yes, very fond. Q.—He looks after her nicely? A.—Yes. Q.—He is a lorry driver? A.—Yes.”

It is said on behalf of the defendants that the right of the child Christine to damages ceased to be effective when her mother married again, by reason of the fact that the second husband, her stepfather, was kind to her and looked after her and treated her well. The learned judge yielded to that argument and gave

* I.e., an action under s. 1 of the Fatal Accidents Act, 1846, which makes an action maintainable where the death of a person has been caused by negligence.

† For authority for this see 11 HALSBURY'S LAWS (3rd Edn.) 257, para. 429.

no damages to the child in respect of any time after the second marriage of her mother. And from that the plaintiff appeals. Counsel on behalf of the plaintiff submitted that the judge should have paid no regard to the fact that the daughter had a stepfather, as the benefit from that quarter did not accrue to the daughter as the result of the death. Secondly and alternatively, he submitted that, if he was wrong in his first submission, the learned judge was wrong in holding that the dependency wholly ceased when the daughter acquired a stepfather. A

The award of damages under the Fatal Accidents Act, 1846, leads to questions of some nicety. It is clear that the damages to be awarded must be based on pecuniary loss or expectation of pecuniary loss. I do not propose to go through the authorities which have been cited to us, one of the most useful of which is *Baker v. Dalglish S.S. Co., Ltd.* (1) ([1922] 1 K.B. 361) and in particular the judgment of SCRUTTON, L.J., at pp. 371, 372 and 373. It is sufficient for my purpose to refer to *Peacock v. Amusement Equipment Co., Ltd.* (2) ([1954] 2 All E.R. 689). In that case the question arose as to the measure of damages under the Fatal Accidents Acts. There was a sum of money which had been paid by stepsons to their stepfather, which money they had received from their mother's estate. Their handing a portion of the money they had received to their stepfather was a voluntary act; and it was held that the amount received by the stepfather from his stepsons ought not to be deducted from the amount awarded under the Fatal Accidents Act, 1846, as damages in respect of the death of the plaintiff's wife. SOMERVELL, L.J., in the course of his judgment, cited words of SCRUTTON, L.J., in *Baker v. Dalglish S.S. Co., Ltd.* (1) as follows ([1954] 2 All E.R. at p. 691): B

"SCRUTTON, L.J., also said ([1922] 1 K.B. at p. 372): '... the same principle applies to voluntary benefits conferred in consequence of the death. Just as in assessing the loss by the death the probability of voluntary contribution destroyed by the death of the contributor may be included to swell the claim, so the probability of voluntary contribution bestowed in consequence of the death may be used to reduce the claim by showing what loss the claimant has in fact sustained by the death'. I think that is a useful sentence... There is another aspect of this matter which is very well stated in *Redpath v. Belfast & County Down Ry.* (3) ([1947] N.I. 167). That was not a case under the Fatal Accidents Acts, although one or two of the fatal accident decisions were referred to. There had been a railway accident which was caused by the negligence of the railway company's servants. A number of people had been killed or injured, and the public had subscribed to a fund which was used to help those who had been injured as well as the dependants of those who had been killed. The defendants sought to interrogate the plaintiff as to what payments if any he had received from the fund. The learned Lord Chief Justice of Northern Ireland held that that was an irrelevant matter and could not be brought into account. After referring to some of the fatal accident cases ANDREWS, L.C.J., said ([1947] N.I. at p. 175): 'In these circumstances common sense and natural justice appear to me to rise in revolt against the proposition that the money so subscribed should be diverted from the objects whom the subscribers intended to benefit in order to be applied in reduction of the damages properly payable by the wrongdoer as compensation to the victims for their loss. Why, one may well ask, should the defendants' burden be lightened by the generosity of the public?' I think one can say in the same way in this case, why should the burden on the defendants be lightened by the generosity of the stepchildren? I realise, of course, that a defendant may find his burden lightened for instance, by the fact that the deceased, usually a husband, has saved money which goes to his wife as a result of the death." C

In the present case it is submitted that the burden on the defendants, the wrongdoers, should be lightened because the child has a good stepfather. Up D

A to a point, that may be right, but in my view it cannot be taken that, because the child has, and for some four years has had a good stepfather, the burden on the defendants is removed altogether. They are responsible as tortfeasors, and

“in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought.”

B We are dealing with an action brought for the benefit of a very young child. It is admitted that the child was entitled to damages from the defendants in respect of the period from the date of the death of her father up to the re-marriage of her mother, but it is submitted by counsel for the defendants that no damages ought to be paid in respect of any period after the date of the second marriage.

C I do not think that it is right to say that no regard should be paid to the fact that the child has a stepfather who is kind and good to her. It is the duty of the judge in assessing damages, to pay regard to all relevant facts and, as far as we know, the child did not suffer any damage between the time of the second marriage and the date of trial, but it should not be assumed that of necessity the position will remain the same for all time. If the defendants are to escape

D liability after the date of the plaintiff's second marriage, it appears to me that the onus is on them to show that in all reasonable probability the child cannot suffer any pecuniary loss or damage in the future; in other words, that she is provided for during the rest of the time for which she might have been dependent on her father. I do not think that the defendants have shown that. One does not know what the future will bring. One hopes that the stepfather will continue

E to be fond of his stepchild and to treat her well, and that she will go short of nothing in so far as he can provide; but there are many things to be considered, and it is not right that a child of this age should be cut off from any possibility of damages against a wrongdoer because she has been treated well up to the date of trial. There might be a large family in years to come. The stepfather might be pressed for money. He might not be able to look after this child as

F well as her own father would have done. Those are reasons why it seems to me that it is not right to say that she is not entitled to damages in respect of the period after her mother married a second husband.

The learned judge pointed out that she had lost a father who would be legally bound to maintain her until such time as she could earn her own living. He said:

G “There is no actual loss here due to the advent of a stepfather in place of a father. I am asked, however, to compensate for a prospective loss, and on these grounds: Had the child's father not been killed, and during some part of the child's infancy had failed to maintain her, he could have been made to do so; if the like situation should occur now, the stepfather could not be made to do so . . . The child is being well looked after by its step-

H father, who is very fond of it. The child has now a half-brother born of the re-marriage and the two are growing up together. There is no evidence that the stepchild is being discriminated against in any way, nor is there evidence of any prospect of it. The only difference in the stepchild's position is that

I it now has to rely on the good moral sense of the stepfather to maintain it without any legal sanction in the background. The stepfather has shown every sign of fulfilling the moral obligation, and it would be wrong and unjust (and perhaps unfortunate) to suggest that he might cease to do so in the future.”

I do not suggest that he will cease to do the right thing in the future, but there is a difference between a father and a stepfather, in that the father can be forced to support his child if he fails to do so, while the stepfather cannot*. Over and

* See the National Assistance Act, 1948, s. 42 (1); 16 HALSBURY'S STATUTES (2nd Edn.) 968.

above that, when the child is getting a little older, the father may well be willing to do something for his own child to help it forward in education or in some other way, a burden which a stepfather might not be willing to undertake. A

I do not accept the first proposition of counsel for the plaintiff. At the same time, I do not consider it was right to say that no damages after the date of the second marriage should be given in respect of the child's claim. How much the damages ought to be, is not a simple matter; but, taking all the factors into consideration, I feel that it is right that the claim in respect of the child should be allowed at the sum of £200, and I would allow the appeal accordingly. B

JENKINS, L.J.: I am of the same opinion. In this case the court has to ask itself, and endeavour to answer as at the time of the trial, the question: How much worse off financially is the child Christine than she would have been if her father had not been killed? On making this comparison, one finds on the one hand that the child lost from the time of her father's death the financial benefits in the form of maintenance, and so forth, which he used to provide for her, but, on the other hand, that the child's mother has re-married and that her second husband has so far proved himself to be an excellent stepfather who is maintaining and looking after the child as though she were his own child. C

In this state of affairs, counsel for the plaintiff invites us to hold that all we should regard is the loss which the child has sustained by the death of her father, and not the compensating gain she has received in the shape of an affectionate stepfather. Counsel arrives at that result in this way: He says that injuries on the one hand and benefits on the other are only to be regarded if they are the result of, or the consequence of, the death in question. Here, he says, the marriage, from the point of view of the child, has no causal connection at all with the accident; that, from the child's point of view, the marriage is irrelevant; it does not give her any rights of maintenance against the stepfather. Therefore, he says, to take into account what the child has gained in the form of the prospect of being maintained by the stepfather would be doing what was held to be wrong in *Peacock v. Amusement Equipment Co., Ltd.* (2), that is to say, lightening the burden of the wrongdoers (namely, the defendants), on the strength of the generosity of the stepfather, as it is in this case, or the stepchildren, as it was in *Peacock v. Amusement Equipment Co., Ltd.* (2). In my view, that is not the right way of regarding the child's acquisition of a stepfather. Clearly, if the father had not died, the mother could not have re-married and the child could never have acquired a stepfather. She could not have the advantage of being protected by two fathers at one and the same time; so that the financial advantage to her of the protection of the stepfather was something that she could not have enjoyed but for the death of her father. In my view, there is a sufficient causal connection here to make it proper to take into account the financial consequences to the child of the re-marriage of her mother. D E F

Counsel for the defendants contended that, once the re-marriage was taken into account, it put an end not only to the claim of the widow in respect of any period after the re-marriage, but also to the claim of the child Christine in respect of any period after the re-marriage. He said that, on the facts of the case, the child was, for all practical purposes, in just as good a financial position as she was before her father's death, owing to the closely comparable circumstances of the father and the stepfather, and the stepfather's very kind and generous treatment of the child. In my view, that is wrong. However good a stepfather this man may be, I do not think it is possible to regard the moral obligation he has chosen to undertake as equivalent to the legal obligation of a father. In these cases one has to consider the financial aspect of the matter; and, so viewing it, I cannot see that the stepfather's moral obligation is the financial equivalent of the father's legal obligation. In my view, therefore, the defendants have not shown that the child's injury is fully compensated in the circumstances by an award calculated only in respect of the period from her father's death down to G H I

A the date of her mother's re-marriage, or that the child has ceased to be a dependant in consequence of her mother's re-marriage. It follows, in my view, that since the contrary has not been proved, the child must be entitled to some further payment in addition to what was awarded to her by the learned judge, because she was admittedly and indisputably a person falling within s. 2 of the Fatal Accidents Act and it has not been shown that her mother's re-marriage
 B has provided a countervailing pecuniary advantage sufficient wholly to offset her loss in respect of any subsequent period.

In these cases it is always difficult to fix on a figure, but I agree with the figure of £200 which my Lord proposes as the whole amount of the damages for the child, and I would allow the appeal accordingly.

C **PARKER, L.J.:** I agree with what my Lords have said and would only add this. The learned judge came to the conclusion that, on the facts of this case, no reasonable probability of future pecuniary loss had been shown. He said:

"In the present case I have no evidence of such a prospective pecuniary loss as should sound in damages for Christine."

D If, as the learned judge appears to have assumed, the onus was on the plaintiff, then I agree with his conclusion; but it seems to me that, once a person is shown to be a person for whose benefit an action can be brought under the Act, and is shown to be a person who has suffered a loss of dependency, then the onus shifts. It is then for the defendants to show, if they can, that on the facts of the case the dependency originally lost has been reduced or has ceased entirely. It seems to me that it is a heavy onus for the defendants to discharge, when they
 E seek to say that the dependency has entirely ceased. The evidence consisted entirely, on this point, of three or four answers in cross-examination of the plaintiff, passages to which my Lord has referred. Although that is evidence which goes, I think, in reduction of the loss, I cannot think that it is sufficient to enable the defendants to discharge the onus on them of showing that the loss has entirely ceased. In those circumstances, I agree with the proposed order.

Appeal allowed.

Solicitors: *Ellis, Bickersteth & Co.* (for the plaintiff); *Carpenters* (for the defendants).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]



NORTH RIVER FREIGHTERS, LTD. v. H. E. THE PRESIDENT OF INDIA.

[COURT OF APPEAL (Singleton, Jenkins and Parker, L.JJ.), November 22, 24, December 8, 1955.]

Shipping—Charterparty—Lay days—Loading—Time lost in waiting for berth to count as loading time—Ship waiting for berth but ready to load—No notice of readiness sent by master—When loading time began to run.

By a charterparty dated May 18, 1951, the owners chartered the s.s. Radnor to the charterer to proceed to one safe berth at Dairen and there to load cargo. Clause 17 of the charterparty provided "Lay days to commence twenty-four hours after vessel is dunnaged, matted and all hatches ready for cargo, and captain having given written notice . . . to that effect to charterers or their agents." Clause 5 provided: "Time lost in waiting for berth to count as loading time". It was also provided that demurrage was to be at the rate of £600 a day.

The Radnor reached the commercial area of the port of Dairen on June 3, at 7.30 a.m. and she was ready to load cargo by 9.30 a.m. She stopped in the quarantine anchorage where she was kept waiting for a berth until June 10, at 4.30 p.m. During that period of waiting it was not in fact possible for her master to send to the charterer's agents a notice of readiness under cl. 17. On a claim by the owners that they were entitled to be paid the agreed rate of demurrage for the time while the ship was waiting for a berth, the charterers contended that though time might have been spent in waiting for a berth it was not lost within cl. 5 until notice had been given by the master under cl. 17.

Held: on the true construction of the charterparty the provision in cl. 5, viz., that time lost in waiting for a berth should count as loading time, was independent of cl. 17 and time accordingly began to run (under cl. 5) for the purposes of demurrage from 9.30 a.m. on June 3 (when the ship reached Dairen and was ready to load) although notice of readiness to load had not been given; the owners were entitled, therefore, to demurrage for the period while the ship was waiting for a berth.

Appeal allowed.

[As to the time for loading of cargo, see 30 HALSBURY'S LAWS (2nd Edn.) 337, para. 519.]

Appeal.

The plaintiffs, the owners of the s.s. Radnor, appealed from an order of McNAIR, J., dated June 29, 1955, on a Special Case Stated by an umpire under the Arbitration Act, 1950. The arbitrator gave his award, subject to the opinion of the court, in favour of the plaintiffs. McNAIR, J., on the appeal to him held that the claim failed.

The facts appear in the judgment of SINGLETON, L.J.

Eustace Roskill, Q.C., and *R. A. MacCrindle* for the owners.

John Megaw, Q.C., and *J. F. Donaldson* for the charterer.

Cur. adv. vult.

Dec. 8. The following judgments were read.

SINGLETON, L.J.: This dispute arises out of a charterparty dated May 18, 1951, under which North River Freighters, Ltd., owners of the steamer Radnor, chartered the vessel to the government of India. Clause 1 of the

A charterparty provides that the vessel (which was then trading and was expected to be ready to load at Dairen under the charter about May 29)

“shall proceed to one safe berth Dairen always afloat, and there load a full and complete cargo of soya beans . . . which the charterers bind themselves to ship, and being so loaded the vessel shall proceed to Madras or Madras and Calcutta in charterers’ option as per cl. 32”,

B at the rate or rates of freight therein stated. Dairen is a port in Manchuria. Clause 29 (A) reads:

“Master is to give Dairen at least seven days’ notice of his readiness to load, and in addition is to telegraph them his sailing from last port of discharge before proceeding to Dairen.”

C I take this statement of the facts from the award in the form of a Special Case Stated by the umpire:

“5. The s.s. Radnor arrived off Dairen on Sunday, June 3, 1951, at 7.30 a.m. and stopped awaiting a pilot. At 7.44 a.m., no pilot having arrived, the Radnor anchored in the quarantine anchorage and at 8 a.m. the customs officials and a doctor boarded the vessel. Pratique was granted at 9.30 a.m. About twelve officials went on board the vessel, of whom one spoke English and acted as interpreter. All shore leave was forbidden, as was the use of the ship’s radio and the placing of any of the ship’s boats in the water. The ship’s radio was sealed up by the customs officials who also removed from the vessel all customs papers, crew lists, manifests, bill of health and other papers, including the ship’s register. Before the officials left the vessel, the master requested the interpreter and the doctor to take a notice of readiness ashore and hand it to the charterers’ agents. They both refused to do this. The master alleged, and I accept his evidence, that the officials (through the interpreter) informed him that the agent would himself come out to the ship the next day (June 4) and would give the master the necessary information regarding loading arrangements, and where the vessel should berth. 6. The charterers’ agents did not send a representative on board the Radnor the following day (June 4) nor at any time while the vessel was waiting at the quarantine anchorage. She was kept there until 4.30 p.m. on Sunday, June 10, when a pilot went on board and the vessel was taken to a berth at pier No. 3 where she arrived at 6.30 p.m. on June 10, 1951. 7. It was not possible for the master during this period between 7.30 a.m. on June 3 and 6.30 p.m. on June 10 to go, or send a boat, ashore or to communicate in any way with the shore or with the charterers’ agents. 8. The Radnor as from 9.30 a.m. on June 3, 1951, was completely ready in all respects (i.e., dunnaged, matted and all hatches ready for cargo) to load her cargo under the said charterparty. 9. A representative of the charterers’ agents went on board on Monday, June 11, 1951, when the master gave him a notice of readiness bearing that date which the said representative accepted as from 10 a.m. on that day. The agents declined to accept responsibility for the delay in the anchorage on the ground that the harbour master allocated berths and ordered vessels into port. 10. No evidence was given whether or not the notice provided for in cl. 29 (A) of the charterparty was given by the master to the charterers’ agents at Dairen. No allegation was made by the charterers that it had not been sent. I assume, therefore, that it was sent either by the master or the ship’s agent when the vessel sailed from Moji in Japan towards Dairen as this would be a matter of routine. In any event, I am satisfied and so find that the charterers’ agents at Dairen had knowledge of the arrival of the Radnor at Dairen on June 3, 1951.”

I The questions which have to be decided are whether the period during which the vessel was kept waiting is time lost in waiting for a berth and whether, under

words in the charterparty to which I shall refer presently, the charterers have to pay for it. A

I must complete the statement of facts. The vessel moved to another berth at pier No. 3 on June 11 and there she remained until June 16, when she proceeded to a loading berth at pier No. 2 at which she arrived at 7.40 p.m. Loading commenced at 2.20 p.m. on June 17 and was completed at 11.50 a.m. on June 25. The delay from June 11 was due to the fact that the cargo had not arrived in the port area. 9,707 tons of cargo were loaded, the total lay time allowed for loading which was nine days, sixteen hours and fifty-eight minutes. Clause 5 of the charterparty—the clause which contains provisions as to loading—has been considerably altered from the original. As altered, it reads: “Cargo to be loaded as per cl. 17 and 18”. Clause 17, which is the material clause, is: B

“Loading. Cargo to be loaded at the average rate of one thousand tons per weather working day (Sundays and holidays excepted) provided vessel can load at this rate. Lay days to commence twenty-four hours after vessel is dunnaged, matted and all hatches ready for cargo, and captain having given written notice (within business hours 10 a.m. to 5 p.m., Saturdays 10 a.m. to 1 p.m.) to that effect to charterers or their agents.” C

Clause 5 continues: D

“The notice to be given to the charterers’ agent at Dairen. . . . Time lost in waiting for berth to count as loading time.”

It is on these last eleven words that the case falls to be determined. Clause 7 reads:

“Demurrage at the rate of £600 a day or pro rata any part of a day.” E

The owners claim that they are entitled to be paid at the agreed rate of demurrage time lost while the ship was waiting for berth. The charterers dispute the claim. The umpire who was appointed under cl. 27 gave his award in the form of a Special Case and held, subject to the opinion of the court, that the claim succeeded. McNair, J., took a different view and held that the claim failed. The owners appeal to this court. F

It is desirable that I should read para. 16 of the award in which the umpire states further facts, and his conclusions. It reads:

“In addition to the facts already stated I find so far as they are questions of fact and I hold, subject to the opinion of the court, so far as they are questions of law, as follows: (1) When the Radnor arrived at the quarantine anchorage at Dairen, she was within the commercial area of the port of Dairen. (2) The vessel was delayed at the quarantine anchorage from 9.30 a.m. on June 3 until 4.30 p.m. on June 10, 1951. (3) I am satisfied that if a berth had been ready for the Radnor a pilot would have been available to take the vessel to her berth when she arrived and the vessel was, therefore, kept waiting for a berth from 9.30 a.m. on June 3 until 4.30 p.m. on June 10, 1951. (4) The wording in cl. 5 of the charterparty ‘Time lost in waiting for berth to count as loading time’ was independent of the provision that lay days were to count from twenty-four hours after notice of readiness had been given. While the lay days did not commence until 10 a.m. on June 12, 1951, the burden of the time lost beforehand while the vessel was waiting for a berth is placed by the charterparty on the charterer.” G

There is some uncertainty as to conditions at the port of Dairen at the beginning of June, 1951, and there is nothing to show whether they were unusual at the port. It is, however, interesting to notice from para. 9 of the award that the charterers’ agents declined to accept responsibility for the delay in the anchorage on the ground that the harbour master allocated berths and ordered vessels into port. If this was the regular practice, it should have been within the knowledge of the charterers’ agents. Furthermore, it does not appear that the cargo was within the port area until about June 16 (para. 11 of the award). H I

A What were the duties of the parties? On the owners was the duty of seeing that the vessel proceeded to Dairen and that the notices called for in cl. 29 (A) were given. There was no dispute as to this, and the umpire drew the inference that the notices were given: and he was satisfied that the charterers' agents at Dairen had knowledge of the arrival of the Radnor at Dairen on June 3, 1951. The duty on the charterers was to make arrangements for a berth and for the cargo, and to communicate to the master of the vessel the berth they had arranged.

B It is not disputed that the communication had to be made within a reasonable time. *Prima facie*, that would be when they knew of the arrival of the vessel at the port of Dairen. The object of the notices required under cl. 29 (A) is to enable them to know the approximate time of her arrival and to make arrangements accordingly. Until the master was told the berth to which the vessel had to go, he could do nothing. As the award shows, the vessel was kept waiting for over seven days after she arrived at the port without any communication being made to her by the charterers. It was not contended that this was a reasonable time. The owners do not rely on any breach of contract on the part of the charterers. They claim that that which happened is provided for in the charterparty by the words in cl. 5, line 67: "Time lost in waiting for berth to count as loading time". "Time lost" in that sentence means time lost to the ship, time wasted, or time which has gone to no purpose. The finding of the umpire in para. 16 (3) is that if a berth had been ready for the Radnor a pilot would have been available to take her to her berth when she arrived and the vessel was, therefore, kept waiting for a berth from 9.30 a.m. on June 3 until 4.30 p.m. on June 10. I would add that I find it difficult to see, on the facts stated, how the charterers can say that time was not lost in waiting for a berth if, as I have said, there was a duty on them to nominate a berth and they failed to do so when they knew that the vessel had arrived at the port.

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The submission made on behalf of the charterers is that time was not lost within the meaning of the words in cl. 5, line 67, as time lost was to count as loading time, and loading time had not begun nor had lay days commenced as no notice had been given under cl. 17 of the charterparty. Time may be spent but it is not time lost unless notice has been given, it is said. McNAIR, J., accepted this submission. He said:

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"As it seems to me, the critical question in this case is: From what point of time does time begin to be lost? Can time be lost before it begins to run? I think not. It seems to me that it is a contradiction in terms if one answers that question in the affirmative. Accordingly, I look to the charterparty to see whether the parties have by their express bargain dealt with the problem of when time begins to run. I find in cl. 17 that they say in terms that lay days are to commence 'twenty-four hours after the vessel is dunnaged, matted and all hatches ready for cargo, and the captain having given written notice within business hours'—as set out—'to that effect to the charterers or their agents'. There they say in terms when the lay days are to commence. I can see no reason why the phrase 'lay days to commence' is any different from 'loading time to start'. Accordingly, under this charterparty it seems to me that the loading times start when those two conditions are satisfied, namely, the vessel is dunnaged and matted and all hatches ready for cargo, and the captain has given the particular form of notice required. For present purposes I need not decide where the ship must be when these conditions have to be satisfied. If that is accurate, as I believe it to be, then time does not appear to be lost until notice has been given, and it seems to me that it is irrelevant on this view that line 67 adds nothing to the common law position. The particular phrase or sentence in line 67 is 'Time lost in waiting for berth to count as loading time'. It is to be observed that it does not say that time lost in waiting for berth is to be 'deemed to be' part of the loading time. It merely is 'to count' as part of

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the loading time, which means that it falls within the numerical calculation of lay time. That is the construction which, after listening to the arguments which have been addressed to me, I place upon this particular charterparty."

I do not take this view. The clause as to time lost is independent of cl. 17. It is inserted to avoid questions which have arisen in many cases which have been before the courts. The risk of time lost in waiting for a berth is put on the charterers whose agents are, or ought to be, familiar with local conditions. The clause might have provided simply that time lost in waiting for a berth should be paid for at the rate of £600 a day. As drawn, it gives the charterers an advantage, for they may save on loading time some, or all, of the time lost in waiting for a berth. The time lost is to count as, or to be added to, loading time in order to ascertain the position between the parties. I am unable to accept the view that under the words in line 67 time is not lost until notice has been given under cl. 17.

There is no magic in a charterparty: it is the contract in which the rights and obligations of the parties to it are found. On the terms of this contract it is clear, I think, that the risk of time lost through waiting for a berth is undertaken by the charterers, and there is nothing which deprives the owners of the right which, on the face of the document, is given to them. Again, it appears to me that the master could not give the notice envisaged in cl. 17 of the charterparty until the vessel arrived at the nominated berth. On the charterparty, she had to proceed to "one safe berth Dairen". She would not reach her destination until she reached her berth: and it was for the charterers to arrange the berth and inform the master accordingly. There would be no point in a notice under cl. 17 if the vessel had not reached the place at which she was bound to be ready for cargo. It could be no more than a notice: "I will be ready to receive cargo when I get to a berth". A notice to this, or the like, effect would be of no help to the charterers, nor would it be a notice within cl. 17, having regard to the terms of the contract. In my opinion, the provision as to notice in cl. 17 does not affect the question arising under line 67 of the charterparty, and the lack of a notice under that clause does not avoid the owners' rights in regard to time lost through waiting for a berth. The notice is something which has to be given for the purpose of calculating lay days. That calculation is independent of the provision in line 67, although the one has to be added to the other to reach the true position under the contract. There was certainly no obligation on the master to give a notice under cl. 17 when the vessel reached the port of Dairen. The charterers knew of her arrival and the next step was for them to nominate the berth to which they wished her to go. If they failed to do so within a reasonable time, and without any adequate explanation, time was lost by the ship in waiting for a berth. It was to meet such a case that the words in line 67 were inserted in the charterparty. The dispute cannot be solved merely by deciding whether this is a port or a berth charter, although, as I have indicated, I would regard it as a berth charter.

I have sought to deal with the appeal in as simple a way as possible and without reference to the authorities which were cited to us. I feel that the case ought to be looked on as an ordinary claim under a contract and that, when it is so regarded, the owners are entitled to succeed. I would allow the appeal, and direct that the award of the umpire be restored.

JENKINS, L.J.: This is an appeal from a judgment of McNair, J., dated June 29, 1955, on an award stated in the form of a Special Case by an umpire appointed under the provisions for arbitration contained in a charterparty dated May 18, 1951, between North River Freighters, Ltd., as owners, and His Excellency The President of India as charterer, of the steamship Radnor.

The arbitration concerned the amount of demurrage payable by the charterer, and the sole point now at issue between the parties is whether, by virtue of a

- A provision in the charterparty to the effect that time lost waiting for berth should count as loading time, a period of seven days and seven hours during which the Radnor was kept waiting for a berth at the port at which she was to load should be included in the calculation, at the rate of £600 per day prescribed by the charterparty, of the total amount of demurrage for which the charterer is liable. I understand it to be now agreed that if this period of waiting ought to be included
- B in the calculation as time lost waiting for berth within the meaning of the charterparty, the balance due from the charterer to the owners in respect of demurrage over and above sums already paid or admittedly owing would be £4,975 as found by the umpire, and that we need not concern ourselves with an alternative method of calculation which he left it open to the court to adopt and which would have the effect of reducing the balance due from the charterer on
- C this footing to £4,912 9s. 4d.

Subject to the opinion of the court, the umpire decided that the owners were entitled to demurrage in respect of the period of waiting I have mentioned, which he held to be "time lost waiting for berth" within the meaning of the charterparty, and accordingly awarded the owners, in addition to a sum of £158 6s. 8d. admittedly due to them from the charterer, the further sum of £4,975. The

- D question stated by the umpire for the opinion of the court, so far as now material, was in effect whether, on the facts found by him and on the true construction of the charterparty, the owners were entitled to this additional sum of £4,975. To point the issue of law implicit in the amount awarded, the question may be restated as being whether, on the true construction of the charterparty and on the facts found by the umpire, the period of waiting undergone by the Radnor
- E before she was berthed was, within the meaning of the charterparty, "time lost in waiting for berth" and therefore to be counted as loading time. The learned judge differed from the conclusion reached by the umpire on this question of law. He held that the period during which the Radnor was kept waiting for a berth was not "time lost in waiting for berth" within the meaning of the charterparty, and accordingly that the owners were not entitled to any further
- F payment other than the £158 6s. 8d. admittedly due, and from his judgment to that effect the owners now appeal to this court.

[HIS LORDSHIP read the material provisions of cl. 1, 5, 17 and 29 (A) of the charterparty which are stated at p. 51, letter A (cl. 1), p. 52, letter C (cl. 5, 17), and p. 51, letter B (cl. 29 (A)), ante, and continued:]

- I should next refer to some of the paragraphs in the Case, in which the facts
- G as found by the umpire are set out. I begin with para. 5, to which my Lord has already referred. I will not take up time by reading it again, but I make this comment: Counsel for the charterer objected to the last sentence of this paragraph on the ground that the master's evidence of what the officials told him as to the intentions of the charterer's agents was inadmissible. I accept this objection, as did the learned judge, and accordingly ignore the passage in question.
- H I return to the Case, paras. 6 to 11 inclusive and para. 16, to all of which my Lord has sufficiently referred. The last of these findings states succinctly the view taken by the umpire, and in the submission of the owners rightly taken by him, on the question of law referred to the court. The opposing view, which commended itself to the learned judge and which the charterer is concerned to support, is to the effect that, even though the vessel was in fact ready to load
- I and ready to proceed to whatever berth the charterer might designate for the purpose of loading, time could not begin to be lost waiting for berth until the notice of readiness to load prescribed by cl. 5 and 17 of the charterparty had been given, and the stipulated period of twenty-four hours from the giving of such notice had expired, so as to make the lay days or loading time start running against the charterer.

I do not think the intervention of the local authorities described in para. 5 of the Case has any real bearing on the question we have to decide. It is true

that this intervention made it impossible for the captain of the Radnor to give notice of readiness to load, which he would otherwise have done at or about 9.30 a.m. on June 3, 1951, until after the vessel had berthed on June 10, the notice in fact being given on the following day. But it was not contended before us on the part of the owners that this impossibility absolved them from the necessity of giving such notice in order to make the lay days or loading time begin to run, or entitled them to treat the notice as having been given any sooner than it was in fact given. On the other hand, it was not contended before us on the part of the charterer that the intervention of the local authorities made it impossible for the vessel to proceed to a berth any earlier than 4.30 p.m. on June 10, 1951, or absolved the charterer from his obligation to designate the berth to which she was to proceed. Indeed, it was hardly open to the charterer so to contend in the face of the umpire's findings in paras. 16 (2) and (3) of the Case. The matter must, therefore, as it seems to me, be dealt with on the footing that the Radnor, having arrived in the commercial area of the port of Dairen, was in fact ready to load and ready and able to proceed to any berth the charterer might designate by 9.30 a.m. on June 3, but was kept waiting for a berth until 4.30 p.m. on June 10, owing to the charterer's failure to nominate the berth to which she was to proceed. In these circumstances, it seems to me to be clear that the period from 9.30 a.m. on June 3 to 4.30 p.m. on June 10 was "time lost in waiting for berth" according to the natural and ordinary meaning of those few simple words, with the result that, unless some qualification of their natural and ordinary meaning is to be read into them, the period in question must count as loading time by the express terms of cl. 5 of the charterparty.

It is, however, contended on the part of the charterer, in effect, that the words "time lost in waiting for berth to count as loading time" must, as a matter of necessary implication, be qualified by inserting after the words "time lost in waiting for berth" some such words as "after notice of readiness to load has been given", or (to reflect the argument with strict accuracy) "after the expiration of twenty-four hours from the giving by the captain of notice of readiness to load, the vessel having reached the destination prescribed by the charterparty and being in fact ready to load." It is said that the necessity for this implication resides in the use of the word "lost" and the words "to count as loading time". "Time", it is said, cannot be "lost" in waiting for berth until time has begun to run. It is said that the owners cannot claim that if there had been no delay in berthing, loading would have begun any sooner, because the charterer would not have been under any obligation to begin loading until twenty-four hours after receipt of notice of readiness to load, and such notice was not in fact given until June 11, 1951, after the period of waiting for a berth was over. Furthermore, it is pointed out that the time lost is to "count as", not "to be deemed to be", loading time, and it is said that this shows that the intention is not to make that which is not loading time notionally constitute loading time, but to ensure that loading time of a particular sort (that is to say, any period elapsing between the time from which loading time begins to run and the time at which the charterer designates the berth to which the vessel is to proceed) is to be included in the numerical calculation of loading time. In adopting this view of the matter, the learned judge said:

"As it seems to me, the critical question in this case is: From what point of time does time begin to be lost? Can time be lost before it begins to run? I think not. It seems to me that it is a contradiction in terms if one answers that question in the affirmative. Accordingly, I look to the charterparty to see whether the parties have by their express bargain dealt with the problem of when time begins to run. I find in cl. 17 that they say in terms that lay days are to commence 'twenty-four hours after the vessel is dunnaged, matted and all hatches ready for cargo, and the captain having given written notice within business hours'—as set out,—'to that effect

A to the charterers or their agents'. There they say in terms when the lay days are to commence. I can see no reason why the phrase 'lay days to commence' is any different from 'loading time to start'. Accordingly, under this charterparty it seems to me that the loading times start when those two conditions are satisfied, namely, the vessel is dunnaged and matted and all hatches ready for cargo, and the captain has given the particular form of

B notice required. For present purposes I need not decide where the ship must be when these conditions have to be satisfied. If that is accurate, as I believe it to be, then time does not appear to be lost until notice has been given, and it seems to me that it is irrelevant on this view that line 67 adds nothing to the common law position. The particular phrase or sentence in line 67 is 'Time lost in waiting for berth to count as loading time'. It is to

C be observed that it does not say that time lost in waiting for berth is to be 'deemed to be' part of the loading time. It merely is 'to count' as part of the loading time, which means that it falls within the numerical calculation of lay time. That is the construction which, after listening to the arguments which have been addressed to me, I place upon this particular charterparty."

D The main argument on the owners' side was simply to the effect that it was not necessary to give notice of readiness to load before time could begin to be lost waiting for berth within the meaning of cl. 5 of the charterparty, and that for this purpose any period of waiting for berth undergone by the vessel after she had, to the knowledge of the charterer, reached the commercial area of the

E port was time lost waiting for berth if the vessel, so far as she was concerned, could have been in her berth and ready to load by the commencement of such period, but for the failure of the charterer to designate the berth to which she was to proceed. If this is the right test, there can be no doubt that the disputed

F period of seven days and seven hours was, on the facts found by the umpire, "time lost waiting for berth" within the meaning of cl. 5. For the owners, it is further pointed out, and I think there is great force in this, that the words "time lost in waiting for berth to count as loading time" are appropriate to bring into the calculation of loading time a period which otherwise would not be loading time, and that the view taken by the learned judge and supported in argument by counsel for the charterer would reduce the words in question to no more than a statement that a period which without them would be loading time in

G any case is to count as loading time, thus making them to all intents and purposes a mere idle and otiose expression of a consequence which would equally have ensued if they had been omitted. I would add that, from a practical point of view, the fact that notice of readiness to load was not given until the period of waiting for berth was over could not affect the loss of time brought about by such period of waiting, for loading could not in any case begin until the vessel was berthed.

H For the purposes of their main argument, counsel for the owners were content to assume that the charterparty here in question was a "port" as distinct from a "berth" charterparty. But the critical importance attached by the charterer's argument and the learned judge's decision to the giving of notice of readiness to load led to considerable argument on the question whether this charterparty belonged to the "port" or the "berth" type. For the owners, it was submitted that, while they were entitled to succeed on either view, the true view was that this was a "berth charter" and that, if it was a berth charter, they had an unanswerable case even if their main argument was rejected. For the charterer, it was submitted that this was a "port charter" but that, while his argument was easier to sustain on that footing, he was entitled to succeed whether it was a "port charter" or a "berth charter". The learned judge's reasoning shows, I think, that he treated it as a port charter, although he did not expressly say so. So far as it is necessary to go into the distinction between

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"port" and "berth" charters, I understand it to be that in the case of a port charter (that is to say, a charter which requires the vessel to proceed for loading to a named port but not to some particular berth either specified in the charter or by the express terms of the charter to be specified by the charterer) the charterer has an implied right to nominate the particular berth to which the vessel is to go, but that lay days begin to run so soon as the vessel has arrived in the commercial area of the port, is ready to load, and has given notice to the charterer in manner prescribed by the charter of her readiness to load; whereas in the case of a berth charter (that is to say, a charter which requires the vessel to proceed for loading to a particular berth either specified in the charter or by the express terms of the charter to be specified by the charterer) lay days do not begin to run until the vessel has arrived at the particular berth, is ready to load, and has given notice to the charterer in manner prescribed by the charter of her readiness to load. On the owners' side it is said that the requirement in cl. 1 of the present charterparty that the vessel should proceed to one safe berth Dairen, sufficed to make this a berth charter, and that if it was a berth charter no effective notice of readiness to load could be given until the vessel had reached the berth designated by the charterer. Therefore (so it is argued) time was clearly lost by the vessel in waiting for berth, since the delay in berthing brought about a corresponding delay in the giving of the notice of readiness to load, and consequently in the commencement of the lay days. But, even if this is a port charter, the result, say counsel for the owners, is the same, given acceptance of their main argument, the effect of which I have summarised above. For the charterer, on the other hand, it is urged that if this is a port charter, as it is submitted to be, he must clearly succeed, for the reasons which I hope I have sufficiently stated earlier in this judgment, inasmuch as on that footing (apart from the intervention of the local authorities described in para. 5 of the Case, which, for reasons already given*, I ignore) notice of readiness to load could have been given so soon as the vessel arrived in the commercial area of the port and was in fact ready to load. I hope I will not be thought disrespectful of the argument on the charterer's side on the footing that, contrary to the foregoing submission, this was a berth charter, if I content myself by saying that it seems to me to be fraught with insuperable difficulties. In particular, on the footing that this was a berth charter, I cannot accept the submission that the words "time lost in waiting for berth to count as loading time" should be given the effect of accelerating what is normally the appropriate time for giving notice of readiness to load under a charter of that description.

Having given the best consideration I can to the submissions made on either side, I have come to the conclusion that the owners should succeed on their main argument, and accordingly find it unnecessary to decide the difficult and technical question whether this was a "berth" or a "port" charter. But I think the owners are to some small extent assisted by the circumstance that the words "time lost in waiting for berth to count as loading time" occur in a printed form equally adaptable as a berth or a port charterparty. Accordingly, I would allow this appeal.

PARKER, L.J.: I agree. There is no doubt, having regard to the finding in para. 16 (3) of the Special Case, that the vessel was kept waiting for a berth from 9.30 a.m. on June 3 until 4.30 p.m. on June 10, 1951. The sole question is whether that time is "time lost" within the meaning of the words "Time lost waiting for berth to count as loading time" in cl. 5 of the charterparty. *Prima facie*, those words cover this case. The vessel had been made ready for cargo by 9.30 a.m. on June 3, 1951, and would have gone to a berth if one was available (see paras. 8 and 16 (3) of the Case). How, then, can it be said that the time spent in waiting for a berth was not time lost to the ship? But for that period of waiting, the vessel would, so far as she was concerned, have been in a position

* See pp. 55, 56, *ante*.

A to take on cargo over seven days earlier. A ship is a money-earning machine, and time during which she could have earned money was wasted or lost. The charterer, however, contends that time cannot be said to have been "lost" until it has begun to run. The words in question follow (in the amended form of cl. 5) the provision in cl. 17 for the giving of a written notice of readiness to load, twenty-four hours after which loading time commences. Accordingly, so runs

B the argument, as a matter of construction or by necessary implication, "time" is not "lost" until that notice has been given and loading time has commenced. Reliance is also placed on the words "to count as loading time", it being contended that those words show that the parties did not intend to treat time as loading time which was not loading time. These contentions were accepted by the learned judge in the passage which my Lords have read. I find myself unable

C to accept this view. No doubt "time" cannot be said to be "lost" until it has begun to run, but it surely begins to run when the vessel has reached the point where she has to stop until a berth is available. It seems to me that that is the natural meaning of the words, and that the expression is wholly independent of the time when loading time commences. If in any case a charterer could show that, even if a berth had been available, the vessel could not have been

D ready for cargo, he would be able to say that all the time occupied in waiting for a berth had not been "lost", but the finding here is that at 9.30 a.m. on June 3, 1951, the vessel was "dunnaged, matted and all hatches ready for cargo". Nor do I think that the words "to count as loading time" assist the charterer. They are, as it seems to me, more appropriate to deal with a period which, although not loading time, is to be added to the loading time when the final

E calculation is made.

So far I have been content to assume that the charter in question is a port charter, and not a berth charter, but I have considerable doubts whether that is the true position. No doubt where the charter is in the form "That the vessel shall proceed to . . .", a named port, "and there load at one safe berth", the charter is a port charter. The contractual voyage is to the port, albeit that

F the owners must obey the charterer's instructions as to the berth nominated by the latter. Here, however, the contractual voyage is not to the port of Dairen, and if necessary I would have held that this is a berth charter. If this is the true view, then it seems to me that the charterer's contention is almost unarguable. Apart, at any rate, from a case where the charterer is in breach in failing to nominate a berth, the notice of readiness cannot be given until the vessel is at the

G berth. Accordingly, on the charterer's contention, the words in question would add nothing. I cannot accept the suggestion that the words are apt to make the ship an arrived ship so as to enable a notice of readiness to be given before she reaches her contractual destination. Be that as it may, I think that, however this charter is treated, the words in question, as the umpire held, are independent of the provision in cl. 17 as to when loading time is to commence.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Stokes & Mitcalfe* (for the owners); *William A. Crump & Son* (for the charterer).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

A

Re POWELL-COTTON'S RE-SETTLEMENT.
HENNIKER-MAJOR AND OTHERS *v.* POWELL-COTTON
AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., and Birkett, L.J.), December 5, 1955.]

B

Trust and Trustee—Variation of trusts by the court—Infants' interests—Ambiguity in investment clause—Substitution of a new clause—Jurisdiction—Compromise—Trustee Act, 1925 (15 & 16 Geo. 5 c. 19), s. 57 (1).

Settlement—Variation of trusts—Compromise of dispute—Infants' interests—Ambiguity in investment clause—Proposed substitution of new investment clause—Jurisdiction.

C

By cl. 12 of a settlement of realty and personalty made in 1940 the settlor empowered his trustees to invest capital moneys arising under the Settled Land Act, 1925, "in or upon", among other investments, "the debentures debenture stock or rentcharge guaranteed or preferred stock or shares of any company incorporated by special Act or by or under any public general Act or Acts of the Imperial Parliament or the legislature of any colony or Royal Charter or in or upon the ordinary stock or shares of any such company a fixed or minimum rate of interest or dividend on which is guaranteed by the government of the United Kingdom . . . or in or upon ordinary preferred stock or shares . . . of any such company". An originating summons, to which adult and infant beneficiaries were parties, was issued by the trustees of the settlement for the determination of questions of the meaning of certain terms in this clause, and in particular of the term "ordinary preferred stock or shares". Application was made to the court to sanction on behalf of the infant defendants, with the assent of the adult defendants, a proposed compromise of the questions by substituting a wider and more modern form of investment clause for the investment clause in the settlement. Sanction having been refused, the plaintiffs appealed.

D

E

F

Held: (i) assuming that there was a question of substance to be decided on the summons and that this question was proposed to be compromised, the Court of Appeal would not interfere with the decision of the judge in his discretion that the substitution of an entirely new investment clause was not the right solution.

G

(ii) although where powers in trust instruments were expressed with uncertainty they might give rise to disputed questions of the rights of beneficiaries, yet in the present case it had been sought by fastening on an ambiguity in an investment clause to procure the substitution of a new investment clause to the common advantage of all beneficiaries; such a course was not a compromise of disputed rights and the court had not power to sanction it.

H

Chapman v. Chapman ([1954] 1 All E.R. 798) applied.

Appeal dismissed.

I

[As to the departure from the terms of a trust under authority of the court, see 29 HALSBURY'S LAWS (2nd Edn.) 745, para. 1037 and 33 HALSBURY'S LAWS (2nd Edn.) 297-299, paras. 520, 521; and for cases on the subject, see 43 DIGEST 839-841, 2857-2867.]

Case referred to:

(1) *Chapman v. Chapman*, [1954] 1 All E.R. 798; [1954] A.C. 429; 3rd Digest Supp.

A Appeal.

This was an appeal by adult beneficiaries under a re-settlement from a decision of DANCKWERTS, J., in chambers on Oct. 24, 1955, refusing to approve and sanction on behalf of infant beneficiaries what was in effect the substitution of a new investment clause for the investment clause contained in the re-settlement. The relevant facts appear in the judgment of SIR RAYMOND EVERSHERD, M.R., and are summarised in the headnote.

G. A. Rink for the first and fifth defendants, the adult beneficiaries.

P. W. E. Taylor for the plaintiffs, the trustees of the re-settlement.

M. Browne for the second, third and fourth defendants, the infant beneficiaries.

C SIR RAYMOND EVERSHERD, M.R.: DANCKWERTS, J., gave leave for this case to be considered by the Court of Appeal. The question is whether the court could or should, by way of what was called a compromise, sanction the substitution for an old-fashioned investment clause in a strict settlement of realty and personalty of a modern investment clause which would give to the trustees a power to invest capital moneys in what are commonly called equities. **D** I cannot do better than cite the language of the learned counsel who advised the infants. He said:

“The existing narrower investment clause may, therefore, actually have a detrimental effect on security of investment by making the trustees select the best of a rather restricted category instead of the best available, and a well-drawn modern investment clause would, therefore, be for the benefit of the infants.”

The proposal is that the court should sanction the substitution for the narrower old-fashioned clause of “a well-drawn modern investment clause”. It is, of course, plain enough that the court has not the power, and has never assumed that it had the power, to improve on the performance of the settlor by substituting for some provision which he inserted restricting the power of trustees to make investments, a much better more modern clause, on the ground that so to do would be for the benefit of all beneficiaries existing and to come into existence under the settlement. The case for the appellants (the adult beneficiaries, who are supported by the infant beneficiaries) is that a doubt or difficulty of construction—I avoid the word “dispute” for there never was really any dispute—has arisen as to the meaning of the clause which the settlor selected from the forms he or his draftsman had in mind. The clause is very long, and in some measure undoubtedly repetitive. Having dealt with matters like government securities, freehold mortgages and the like, the settlor proceeded to empower his trustees to invest

“in or upon the debentures debenture stock or rentcharge guaranteed or preferred stock or shares of any company incorporated by special Act or by or under any public general Act or Acts of the Imperial Parliament or the legislature of any colony or Royal Charter or in or upon the ordinary stock or shares of any such company a fixed or minimum rate of interest or dividend on which is guaranteed by the government of the United Kingdom or India or any colony or any foreign government or state or in or upon ordinary preferred stock or shares but not on deferred stock or shares of any such company.”

Then the mind of the settlor passed to municipal authorities. The question, said to be one of doubt, which has arisen is this. The phrase “ordinary preferred stock” (though I assume that it came from the precedent book) is unusual, and has next to no actual application today. In an affidavit which counsel for the

adult beneficiaries read, an experienced stockbroker said that the phrase was a term of art, which in a sense surprised me. He said:

"I have come across the term 'ordinary preferred shares' in an investment clause . . . My recollection is that such clauses are used in old trusts established many years ago. I am not aware of any company having shares so described in its articles."

Transposing the language, the term "preferred ordinary" is, of course, much more common; but the suggestion is that there has been a slip—that perhaps the word "or" or the word "and" was missed from between the words "ordinary" and "preferred", so that the clause would run "or in or upon ordinary or preferred stock but not on deferred stock". That view of construction (on which I do not pronounce) would, if accepted, lead to the result that it rendered quite nugatory and futile the very special provisions which immediately precede it to the effect that investment in ordinary stock or shares can be made only where a minimum rate of dividend is guaranteed by government authority. Still, I will proceed on the view that here there is a doubt about the meaning and intention of this somewhat old-fashioned clause. That being so, it is contended that it is permissible (and within the jurisdiction of the court) to accede to the request that the compromise of that question by way of the substitution of an entirely new investment clause should be sanctioned by the court on behalf of the beneficiaries now infants or not yet in being; and the case is put on the broad proposition that the word "compromise" covers any resolution, not merely of a dispute or actual controversy, but also of any question of doubt or difficulty.

DANCKWERTS, J., rejected that application, and (though we have no note of his judgment), I gather that he did so on two grounds. He said that the "dressing up" of this case as one of a compromise of a dispute is quite false—I am not using these words in any offensive sense—and that it does not in the least degree represent the true situation. "I do not think" I understand him to have said, "that in such a case as this the jurisdiction of the Chancery Court extends to granting the request put to it, and I also do not think in the exercise of my discretion that this is the sort of thing which in any case the court in its discretion (if it has any) ought to do".

It has been said very many times how useful is the jurisdiction in chambers of the Chancery judges in dealing with all manner of problems that arise in regard to the execution of trusts, particularly in looking after the interests of infants. I always feel most unwilling in the Court of Appeal to lay down principles and rules which may fetter undesirably that very useful jurisdiction. Bearing that in mind, I for my part prefer to base my own conclusion in rejecting this appeal on the second ground which I have stated. If it could be said that a question was being compromised, nevertheless I would feel quite unjustified in interfering with the view which the learned judge in his discretion took, that it was not the right way to go about it to substitute an entirely new modern investment clause for that which was found in the settlement. In a sense, that is really all that need be said.

The broader question of jurisdiction was argued, and perhaps I should say just a word about it though I want to avoid laying down any hard and fast rule, or, indeed, expressing any final definite conclusion on it. We were referred to the language used particularly by LORD SIMONDS, L.C., and LORD MORTON OF HENRYTON in the recent case of *Chapman v. Chapman* (1) ([1954] 1 All E.R. 798). It had there been argued that jurisdiction of the Chancery Court was of the widest and most unrestricted character possible; that the court could sanction

A anything to which the label of "arrangement" could be attached, by way of variation of the terms of existing settlements, so long only as the adult beneficiaries agreed, and that it was for the benefit of beneficiaries who were infants or not yet in being. The door to that spacious jurisdiction was, I think, firmly closed by the House of Lords, and I am by no means sure that if counsel's argument in its full effect were accepted, the result would not be to reopen that door.

B I would like to cite one or two passages from the speeches in *Chapman v. Chapman* (1). LORD SIMONDS, L.C., said (*ibid.*, at p. 802):

"So, too, the court had power in the administration of trust property to direct that by way of salvage some transaction unauthorised by the trust instrument should be carried out. Nothing is more significant than the repeated assertions by the court that mere expediency was not enough to found the jurisdiction. Lastly, and I can find no other than these four categories, the court had power to sanction a compromise by an infant in a suit to which that infant was a party by next friend or guardian ad litem. This jurisdiction, it may be noted, is exercisable alike in the Queen's Bench Division and the Chancery Division and whether or not the court is in course of executing a trust. This brings me to the question which alone presents any difficulty in this case. It is whether this fourth category, which I may call the compromise category, should be extended to cover cases in which there is no real dispute as to rights and, therefore, no compromise, but it is sought by way of bargain between the beneficiaries to re-arrange the beneficial interests under the trust instrument . . ."

E LORD MORTON OF HENRYTON on the same point said (*ibid.*, at p. 811):

"There are, of course, many cases to be found in the reports in which the Court of Chancery, and its successor the Chancery Division, have approved compromises of disputed rights on behalf of infants interested under a will or settlement and on behalf also of possible after-born beneficiaries . . . Where rights are in dispute and the court approves a compromise it is not altering the trusts, for the trusts are, *ex hypothesi*, still in doubt and unascertained."

F That proposition and those views were expanded (*ibid.*, at p. 814). I need not read the whole of the passage to which our attention has been directed. I refer to the paragraph beginning:

G "This argument brings one face to face with the vitally important question:—Is it possible to draw a line at some point between the court's undoubted jurisdiction to sanction a compromise of disputed rights and the alleged unlimited jurisdiction to alter beneficial interests to any extent . . ."

H It will be noticed that in all those passages, the subject-matter of the alleged compromise must be (and I cite again the last passage I have quoted) "a compromise of disputed rights". We are here concerned with a discretionary power given to trustees as regards investment. It is said, and I will again assume, that the precise scope of that power is not clear, and is open to real and substantial argument. Still, it seems to me very doubtful, to say the least, whether it could be said that there is any dispute between the beneficiaries in this case as to their rights. That has been made manifest by the circumstance that, as counsel for

I the infants freely confessed, the advantage which he sought for his infants lay not in any give and take with somebody who had other rights, but in the mere circumstance that if a much more modern investment clause were substituted, the trustees (if they exercised their powers sensibly) would benefit everybody all round.

Without, therefore, saying more for reasons which I have already indicated, I am bound to say that as at present advised I am not satisfied that this court can now, in loyalty to the principles laid down in *Chapman v. Chapman* (1),

accept the wide significance which, for purposes of jurisdiction, counsel would assign to the word "compromise". It may well be that powers which are expressed with uncertainty may give rise to questions of dispute as to rights, but in this case the learned judge rightly thought that the simple question, and the compromise of that question sought to be achieved, was really "dressed up" in the sense that here the advisers of the persons concerned, no doubt acting in the very best interests of those they represent, have in truth sought and hoped, by fastening on an ambiguity in a power of investment, to take the opportunity of substituting an entirely new investment clause. If the matter were complex enough, and the interests sufficiently elaborate, they might go further and say that, without other countervailing alterations, even that substitution would not suffice; so that under the pretext of the difficulty of construction in a power, there might in the end almost be achieved what, no doubt would be an admirable result for many purposes, viz., re-drafting the settlement from beginning to end. I base my decision in this case, however, primarily on the view that in all the circumstances, I do not think that it would be right (or could be suggested to be right) that this court should interfere with the view expressed by DANCKWERTS, J., when he said:

"I do not think I ought to make the order which I have been asked to make."

I think, therefore, that the appeal should be dismissed.

BIRKETT, L.J.: I am entirely of the same opinion, and I do not desire to add anything to the judgment which SIR RAYMOND EVERSHED, M.R., has just delivered.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *A. F. & R. W. Tweedie* (for all parties).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

ATTORNEY-GENERAL v. PARSONS AND OTHERS.

[HOUSE OF LORDS (Earl Jowitt, Lord Porter, Lord Morton of Henryton, Lord MacDermott and Lord Cohen), November 14, 16, 17, 21, December 19, 1955.]

Company—Foreign company—Mortmain—Acquisition of lease—Residue of lease for ninety-nine years—Forfeiture to Crown.

Crown—Forfeiture of lease—Mortmain—Crown not accepting or entering on land—Liability of Crown under lessee's covenants—Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 1 (1)—Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 3.

In 1862, land in Hammersmith was demised for a term of ninety-nine years from Sept. 29, 1858. Title to the leasehold interest was registered at the Land Registry with good leasehold title on Oct. 12, 1917. On Feb. 21, 1953, the leasehold interest was assigned by registered disposition to Arffe, Ltd., for valuable consideration. Arffe, Ltd., was a company incorporated in the Republic of Ireland on July 26, 1950, and had its registered office in Dublin. Arffe, Ltd., had not delivered to the Registrar of Companies any documents for registration under Part 10 of the Companies Act, 1948, and consequently it had not the power to hold land which an oversea company can acquire under that Part of that Act, nor had it been granted a licence to hold land in mortmain. The Crown had taken no step towards enforcing any forfeiture of the land leased and had not entered on it under the Mortmain and Charitable Uses Act, 1888, s. 1.

Held (LORD MORTON OF HENRYTON dissenting): the assignment to Arffe, Ltd. did not cause an automatic forfeiture of the unexpired residue of the term of years to the Crown because the word "forfeited" in the Mortmain and Charitable Uses Act, 1888, s. 1 (1), was to be construed as meaning "liable to be forfeited" and accordingly the land comprised in the lease would not vest in the Crown unless and until Her Majesty took steps to enforce the forfeiture.

Morelle, Ltd. v. Waterworth, Rodnal, Ltd. v. Ludbrook ([1954] 2 All E.R. 673) overruled.

Per LORD MORTON, LORD MACDERMOTT and LORD COHEN: (i) "land" in the Mortmain and Charitable Uses Act, 1888, s. 1 (1), includes leaseholds, (ii) a transfer of leaseholds is an assurance of land within that Act, and (iii) (LORD MACDERMOTT contra, however, on this point) the land assured by the transfer of the unexpired residue ($4\frac{1}{2}$ years) of the term to Arffe, Ltd. was assured "in mortmain" within the meaning of that phrase in s. 1 (1) of the Act of 1888. (See p. 74, letters B to I, p. 77, letter H, p. 79, letter C, and p. 81, letters E and H, post).

Decision of the COURT OF APPEAL ([1955] 2 All E.R. 466) reversed.

[Editorial Note. The Court of Appeal had held (see particularly [1955] 2 All E.R. at pp. 470, 471) that there was an automatic forfeiture of the residue of the term assigned to Arffe, Ltd. notwithstanding that the assignment was by registered disposition and the terms of s. 80 and s. 23 of the Land Registration Act, 1925. In the House of Lords it was not necessary, in view of the majority decision, that a decision should be reached on this question. Two opinions were expressed on it. EARL JOWITT doubted the conclusion of the Court of Appeal (see p. 71, letter G, post), but LORD MORTON OF HENRYTON considered that the Land Registration Act, 1925, did not negative forfeiture (see p. 76, letters A to C, post). A consequence of the present decision is, therefore, that *Morelle, Ltd. v. Wakeling* ([1955] 1 All E.R. 708) is overruled in so far as it followed the ratio decidendi of automatic forfeiture (i.e., as regards para. (i) of the holding at [1955] 1 All E.R. 708, letter H), but stands as regards the effect of s. 23 and s. 80 of the Land Registration Act, 1925.

As to the law relating to mortmain, see 9 HALSBURY'S LAWS (3rd Edn.) 73, paras. 144 et seq.; and for cases on the subject, see 13 DIGEST 371, 1025-1028.

For the Mortmain and Charitable Uses Act, 1888, s. 1, and the Mortmain and Charitable Uses Act, 1891, s. 3, see 2 HALSBURY'S STATUTES (2nd Edn.) 910, 921.]

Cases referred to:

- (1) *Morelle, Ltd. v. Waterworth, Rodnal, Ltd. v. Ludbrook*, [1954] 2 All E.R. 673; [1955] 1 Q.B. 1; 3rd Digest Supp.
- (2) *Morelle, Ltd. v. Wakeling*, [1955] 1 All E.R. 708; [1955] 2 Q.B. 379.
- (3) *Re Kershaw*, (1888), 37 Ch.D. 674; 57 L.J.Ch. 599; 58 L.T. 512; 23 Digest 488, 5553.
- (4) *Truro Corpn. v. Rowe*, [1901] 2 K.B. 870; *on appeal* C.A., [1902] 2 K.B. 709; 71 L.J.K.B. 974; 87 L.T. 386; 66 J.P. 821; 13 Digest 371, 1027.
- (5) *Re Levy's Trusts*, (1885), 30 Ch.D. 119; 54 L.J.Ch. 968; 53 L.T. 200; 5 Digest 665, 5906.
- (6) *Quesnel Forks Gold Mining Co. v. Ward*, [1920] A.C. 222; 89 L.J.P.C. 13; 122 L.T. 206; 31 Digest (Repl.) 525, 6483.

Appeal.

Appeal by the Attorney-General from an order of the Court of Appeal, dated May 10, 1955, and reported [1955] 2 All E.R. 466, affirming an order of HARMAN, J., dated Apr. 6, 1955, on an originating summons issued by the Attorney-General for the determination of the following questions:—

(i) Whether on the true construction of the Mortmain and Charitable Uses Act, 1888, the Mortmain and Charitable Uses Act, 1891, and the Land Registration Act, 1925, certain land at Hammersmith (a) was vested in Arffe, Ltd., for the unexpired residue of a term of ninety-nine years from [Sept.]* 29, 1858, created by a lease dated Aug. 11, 1862, or (b) ought to be deemed to be so vested, or (c) was vested in Her Majesty the Queen for such unexpired residue.

(ii) If the answer to para. (i) (c) should be in the affirmative, whether on the true construction of the Mortmain and Charitable Uses Acts, 1888 and 1891, and of the Queen's Remembrancer Act, 1859, Her Majesty the Queen was in the events which had happened liable under the lessee's covenants contained in the said lease notwithstanding that Her Majesty had not, nor had anyone on her behalf, entered into possession of any part of the said land nor had there been any inquisition made or office found in relation to Her Majesty's title to the said land or any part thereof.

HARMAN, J., held that the premises in question were vested in the Crown, and that the Crown was liable under the lessee's covenants contained in the lease.

The following facts are taken from the opinions of EARL JOWITT and LORD MORTON OF HENRYTON. By a lease dated Aug. 11, 1862, John Cave and others demised a number of houses in Hammersmith to one John Murray for a term of ninety-nine years from Sept. 29, 1858, subject to the rent thereby reserved and to the covenants on the part of the lessee therein contained. The freehold reversion expectant on the determination of the term was now vested in the seventeenth respondent, the Official Trustee of Charity Lands, by virtue of a scheme of the Charity Commissioners sealed on June 4, 1886, for the Odiham Consolidated Charities. The first fifteen respondents were the present managing trustees of these charities. On Oct. 12, 1917, the leasehold title to the demised premises was registered at H.M. Land Registry, under Title No. 188069, and had, since that date, remained so registered as a good leasehold title. On Feb. 21, 1953, the sixteenth respondent, Arffe, Ltd., was registered as proprietor of the demised premises at H.M. Land Registry as a transferee for valuable consideration, the price paid being stated as £75. Arffe, Ltd., was a company incorporated

* See p. 82, letter G, post.

A in the Republic of Ireland on July 26, 1950, and had its registered office in Dublin. The company had not delivered to the Registrar of Companies any documents for registration under Part 10 of the Companies Act, 1948, and, consequently, it had not got the statutory power to hold land which was conferred on companies incorporated under that Act, nor had it been granted a licence to hold land in mortmain. The fifteen respondent trustees alleged that in or before March, 1955, there had been breaches of the covenants on the part of the lessee contained in the lease of 1862, and that the leasehold term created by that lease had become vested in the Crown by virtue of the Mortmain and Charitable Uses Act, 1888, s. 1. The latter allegation was disputed by the Crown, and, on Mar. 10, 1955, the Attorney-General issued the originating summons raising the questions set out above. It was common ground that Her Majesty had taken no steps to enter into possession of the land in question, and it was conceded that, so far as was possible, Her Majesty had disclaimed any interest in the land.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), Geoffrey Cross, Q.C., and Denys B. Buckley for the Crown.

D *S. Pascoe Hayward, Q.C., and F. E. Skone James for the first fifteen respondents, the managing trustees of the Odiham Consolidated Charities, and for the seventeenth respondent, the Official Trustee of Charity Lands.*

The sixteenth respondent, Arffe, Ltd., did not appear.

The House took time for consideration.

Dec. 19. The following opinions were read.

E **EARL JOWITT** stated the facts and continued: My Lords, it was claimed by the respondents (the managing trustees of the charities) that, on the true construction of the Mortmain and Charitable Uses Acts, 1888 and 1891, the transfer of the unexpired residue of the term to Arffe, Ltd., for valuable consideration was an assurance of lands in mortmain, and that such an assurance brought about an automatic transfer of the unexpired residue of the term whereby the same became vested in Her Majesty. The Attorney-General, on the other hand, contended that, even if there had been an assurance of lands in mortmain (which he disputed), Her Majesty would have acquired merely a right to enter on, and take possession of the lands if she desired to do so, but was under no obligation if she did not so desire.

G The Court of Appeal (SINGLETON, DENNING and MORRIS, L.JJ.) had decided in a previous case in which a leasehold interest had been transferred to an Irish company without licence to hold lands in mortmain that an automatic forfeiture to Her Majesty had resulted (*Morelle, Ltd. v. Waterworth, Rodnal, Ltd. v. Ludbrook* (1), [1954] 2 All E.R. 673). **HARMAN, J.**, and the Court of Appeal decided in the present case, and I think rightly decided, that they ought to follow this previous decision. We have, therefore, to consider whether *Morelle, Ltd. v. Waterworth* (1) was rightly decided.

I The consequences of the decision in that case are, indeed, far-reaching. It would follow that any person holding a short unexpired residue of a leasehold interest would merely have to transfer that interest to a company without licence to hold lands in mortmain to bring about the result that the unexpired residue would be vested in Her Majesty, so as to make Her Majesty liable under the covenants contained in the lease. Such covenants commonly involve an obligation to repair and, at the end of a long lease, such covenants may, and generally will, involve onerous burdens. It is not improbable, if this be good law, that many leasehold interests involving onerous burdens will be transferred indirectly to Her Majesty by the simple expedient of transferring such interests directly to a company without licence to hold lands in mortmain.

Before considering the construction to be placed on the Mortmain and Charitable Uses Acts, 1888 and 1891, the law as it existed before the passing of these

Acts should be stated. Under the Statute de Viris Religiosis (7 Edw. 1), it was A provided that

“no person, religious or other, whatsoever he be that will, buy or sell any lands or tenements, or under the colour of gift or lease, or that will receive by reason of any other title, whatsoever it be, lands or tenements, or by any other craft or engine will presume to appropriate to himself, under pain of forfeiture of the same, whereby such lands or tenements may any wise come into mortmain. We have provided also, that if any person, religious or other, do presume either by craft or engine to offend against this statute, it shall be lawful to us and other chief lords of the fee immediate, to enter into the land so aliened, within a year from the time of the alienation, and to hold it in fee as an inheritance.” B

C That statute contained provisions preserving the rights of the chief lords, or the next chief lord or the lords immediate, as the case might be, to enter on the land; and, in the event of all the lords neglecting to exercise their right, the statute provided that, after the expiration of one year from the act creating the forfeiture,

“we . . . shall take such lands and tenements into our hand, and shall D infeoff therein by certain services to be done to us for the defence of our realm . . .”

No doubt the explanation of the passing of this statute was to protect the rights of the lords, for, as LORD COKE said (COKE ON LITTLETON: 2b):

“the lands were said to come to dead hands as to the lords, for that by E alienation in mortmain they lost wholly their escheats, and in effect their knights-services for the defence of the realm, wards, marriages, reliefs, and the like; and therefore was called a dead hand, for that a dead hand yieldeth no service.”

F It should be noticed that the Statute de Viris Religiosis did not extend to leaseholds unless the lease, either by the length of term granted or by reason of its other incidents, could be regarded as an alienation of the fee. The words of the Statute de Viris Religiosis are “under the colour of gift or lease”. It appears that it was considered that a term for twenty or forty or even ninety-nine years was not within the statute but that a lease for one hundred or two hundred years was within the statute. It is to be noticed further that there was no automatic forfeiture—indeed, unless the lord entered within one year after the alienation G giving rise to the forfeiture he lost his right to enter. The King could not enter on lands alienated in mortmain save after office found or inquisition—and it was, of course, open to the King to decide whether or not this machinery should be put in motion.

H Other statutes were subsequently passed to prevent ingenious attempts to evade the prohibition of alienation which had been enacted by the Statute de Viris Religiosis, and to make it plain that the prohibition of alienation applied to corporations lay as well as to corporations ecclesiastical. So the law remained in all essentials for many centuries, and the problem which arises in the present case depends on whether the Acts of 1888 and 1891 must be construed as having made such a fundamental and far-reaching alteration in the structure of the pre-existing law as to involve the consequence that an alienation in mortmain, which I had previously given the mesne lords or the King a right to enter on the lands if they so desired, was henceforth to involve an automatic transfer of the lands to Her Majesty, whether she entered into possession or not. By the year 1888 feudal tenure had, for all practical purposes, come to an end, and I find it difficult to imagine any reason which could have induced the legislature in that year to make any such sweeping alteration in the pre-existing law.

It is necessary to examine carefully the language of the Act which is entitled

A “An Act to consolidate and amend the law relating to mortmain and to the disposition of land for charitable uses”,

to see whether such an alteration was made. The definition of land, which was originally contained in the Act of 1888, was replaced by an amended definition contained in the Act of 1891. Section 1 of the Act of 1888 is in the following terms:

B

“ (1) Land shall not be assured to or for the benefit of, or acquired by or on behalf of, any corporation in mortmain, otherwise than under the authority of a licence from Her Majesty the Queen, or of a statute for the time being in force, and if any land is so assured otherwise than as aforesaid the land shall be forfeited to Her Majesty from the date of the assurance, and Her Majesty may enter on and hold the land accordingly:

C

“ (2) Provided as follows: (i) if the land is held directly of a mesne lord under Her Majesty, that mesne lord may enter on and hold the land at any time within twelve months from the date of the assurance; (ii) if the land is held of more than one mesne lord in gradation under Her Majesty, the superior of those mesne lords may enter on and hold the land at any time within six months after the time at which the right of the inferior lord to enter on the land expires; (iii) if a mesne lord is at the time when his right of entry accrues under this Act a lunatic or otherwise under incapacity, his right of entry may be exercised by his guardian or the committee of his estate, or by such person as Her Majesty's High Court of Justice may appoint in that behalf: (iv) if the right of entry under this Act is exercised by or on behalf of a mesne lord, the land shall be forfeited to that lord from the date of the assurance instead of to Her Majesty.”

E

By definition, “assurance” includes a lease or transfer, and “land” includes tenements or hereditaments of any tenure.*

I will assume, without expressing any final opinion on the point, that the transfer to Arffe, Ltd., in 1953 of the residue of the term, then consisting of some
F four and a half years, constituted an “assurance of lands in mortmain”. Such a transfer on this assumption was, therefore, within the prohibition of the statute. It then becomes necessary to consider whether such prohibited transfer had the effect of automatically vesting the residue of the term in Her Majesty, or whether it merely gave Her Majesty a right, if she should be so minded, to enter on and hold the land.

G

The critical words of the statute are

“the land shall be forfeited to Her Majesty from the date of the assurance, and Her Majesty may enter on and hold the land accordingly.”

It is, I think, clear that the extent and consequences of the word “forfeited” may be controlled by the context in which the word is used.

H

In the days before the passing of the Act of 1888, at a time when there was no suggestion of an automatic forfeiture, it would surely have been appropriate to use the word “forfeited” in relation to lands which had become liable to forfeiture by reason of an alienation in mortmain. The lands, it might have been said, were “forfeit” or “forfeited”. In such a case, it might happen that the mesne lord or the King would exact the penalty, and would enter on, and take possession of the land which had been so alienated and, if such an event happened, it would have been appropriate to refer to the land as having been
I “forfeited”. It might happen, on the other hand, that the mesne lord or the King would not exact the penalty—and, in such a case, it would have been a correct use of language to say “the land was forfeited but advantage was not taken of the forfeiture”. In either case, the land could have been described

* These definitions are contained in s. 10 (iii) of the Mortmain and Charitable Uses Act, 1888, and s. 3 of the Mortmain and Charitable Uses Act, 1891, which are set out at p. 73, letters E to G, post.

accurately as having been "forfeited", but the consequence of the forfeiture would depend on whether the mesne lord or the King decided to enter on the land. To this extent, and to this extent only, is there an ambiguity about the word "forfeited". A

It follows, in my view, that no inference can be drawn from the use of the word "forfeited" in this section; for the consequences of a prohibited alienation depend not only on the forfeiture but also on the question whether there had been a subsequent entry on the land. Nor can I think that the words "from the date of the assurance" help to resolve any ambiguity that may exist—for these words may mean merely that, if Her Majesty takes advantage of the forfeiture by entry on the lands, her title is to date back to the date of the assurance. The words are plainly used in this sense in the fourth proviso when the Act is dealing with the rights of the mesne lords. B C

On the other hand, the words "Her Majesty may enter on and hold the land accordingly" point, in my view, to the conclusion that Her Majesty was being given an option to enter or not as she might think fit, and are hardly consistent with the idea of an automatic forfeiture. I find it difficult to give any effective meaning to the words "may enter" if the forfeiture is to be automatic. I am strengthened in this view by the consideration of the law existing before the Act of 1888; for under that law the King had a right to enter on and hold land which had incurred a forfeiture, but was under no obligation to enter—and this notwithstanding the words of the statute, "we *shall* take such lands and tenements into our hands". It would, indeed, be a strange result if we were to hold that, under the Act of 1888, Her Majesty was bound to take over the land when the corresponding words are "Her Majesty *may* enter on and hold the land accordingly". It must be remembered that the Act of 1888 was entitled "An Act to consolidate and amend . . ." D E

Bearing in mind, therefore, that the Act must, at least in part, be construed as a "consolidating" Act, it is material to see the extent of the alterations in the pre-existing law for which the respondents contend. First, they contend that the Act of 1888 applied to leaseholds, however short the term might be. I have assumed this contention to be correct; it was far otherwise with the pre-existing law. Secondly, they contend that the forfeiture resulting from a prohibited alienation might be merely a forfeiture of the leasehold interest. It cannot, I think, be doubted that, under the pre-existing law, the forfeiture—if forfeiture there was—extended to nothing less than the fee itself. I think an acceptance of this second contention logically follows from an acceptance of the first contention. Thirdly, they contend that the forfeiture to Her Majesty is an "automatic forfeiture", in no way depending on her volition. F G

The first two contentions are, indeed, far-reaching and constitute important "amendments" to the pre-existing law; but if, in addition to these two contentions, the third contention also is to be accepted, it would seem that the pre-existing law has been virtually swept away. At the most, a few fragments—and relatively unimportant fragments—of the pre-existing law would remain. If this had been intended, I cannot think that the Act of 1888 would have been entitled "An Act to consolidate and amend . . .". H

Reliance was placed by the respondents on the words of the fourth proviso contained in s. 1 (2) of the Act of 1888, which is in the following terms:

"if the right of entry under this Act is exercised by or on behalf of a mesne lord, the land shall be forfeited to that lord from the date of the assurance instead of to Her Majesty." I

It was argued that, in that proviso, the word "forfeited" is used in the sense of an absolute forfeiture, and not as meaning a mere right to forfeit. I think this is so. But that proviso is dealing with the case where a mesne lord has entered, and the legal penalties resulting from the forfeiture have been exacted. It does not make it impossible to give a more limited meaning to the word in those

A cases in which there has been no entry. The provisos make it plain that the mesne lord was being given a right to enter or not to enter as he thought fit if a prohibited assurance were made. I cannot think that it was intended to differentiate between the position of the mesne lords and the position of Her Majesty in this respect.

B Finally, my Lords, in construing the Act of 1888 we should bear in mind the provisions of the Land Registration Act, 1925. It would be unfortunate if we were driven to adopt a construction of the Act of 1888 which would lead to one result if the leasehold title to the land in question had been registered under the scheme laid down by the Act of 1925, and would lead to another and to a different result if it had not been so registered. By s. 80 of the Act of 1925, it was provided as follows:—

C “Subject to the express provisions of this Act relating to . . . the effect of registration of a disposition for valuable consideration, nothing in this Act affects any right of His Majesty to any . . . forfeiture.”

Incidentally, I would point out that the phrase the “right of His Majesty to any forfeiture” seems quite inapt if the fact be that Her Majesty has no right to decide on her course of action but has a duty to take whatever may be cast into her lap.

D The express provisions relevant to this point are to be found in s. 23 (1), (2) of the Act of 1925, and are in the following terms:

E “In the case of a leasehold estate registered with an absolute title, a disposition . . . for valuable consideration shall, when registered, be deemed to vest in the transferee . . . the estate transferred . . . to the extent of the registered estate”

subject as therein mentioned

F “but free from all other estates and interests whatsoever, including estates and interests of His Majesty; and the transfer . . . shall operate in like manner as if the registered transferor . . . were (subject to any entry to the contrary on the register) absolutely entitled to the registered lease for his own benefit.”

Similar provisions, with differences not now material, apply to the registration of a good leasehold title as they apply to registration with an absolute title.

G The Court of Appeal considered the effect of these provisions in *Morelle, Ltd. v. Wakeling* (2) ([1955] 1 All E.R. 708), and came to the conclusion that the express provisions contained in s. 23 did not affect Her Majesty's right of forfeiture. My Lords, with the very greatest respect to the opinion of the Court of Appeal, I confess that I should have felt great difficulty in reaching this conclusion.

H There can be no doubt that the provisions contained in s. 23 are express provisions relating to a disposition for valuable consideration, and I should have been inclined to construe them as affecting the right of Her Majesty to forfeiture in such a case as the present. It may well be that Her Majesty has the right to apply to have the register rectified, but the fact that such a step might be a necessary preliminary to enforcing a forfeiture would in itself affect her rights.

I Fortunately it is not necessary in the view which I take to express any final opinion on this point, and I prefer not to do so.

In the result, holding as I do that there was no automatic forfeiture, I would allow this appeal. I would answer the question 1 (a) posed in the originating summons in the affirmative. The other questions do not arise.

LORD PORTER: My Lords, a number of difficult and abstruse questions have been presented to your Lordships' House for the solution of this case, but, as I have formed a view with regard to one only, and that view is decisive of the

case, I do not intend to express any opinion on the other matters. The decision which I have reached depends, and depends only, on the construction to be placed on s. 1 of the Mortmain and Charitable Uses Act, 1888. That section has been set out in the opinion expressed by my noble and learned friend on the Woolsack, and I need not repeat it; it must, I think, be read as a whole, and it is, in my opinion, important to observe that, in each of the enactments the same phrase is used, viz., "may enter on and hold", i.e., "Her Majesty may enter on and hold": "that mesne lord may enter on and hold": "the superior of those lords may enter on and hold". Admittedly, in the two latter cases, the land passed to the mesne lord, not automatically but of his choice, and I find it difficult to think that identical language should be used of the Crown and of the mesne lords unless it was intended to produce the same result. A

My opinion is strengthened by two considerations—(i) I should think it unlikely that a burden should be placed on the Crown against its will by language so ambiguous, and (ii) under sub-s. (2) (iv) the land is to be forfeited to the mesne lord "instead of to Her Majesty". If the land automatically passed to Her Majesty by an assurance in mortmain, it would pass not to the mesne lord instead of to Her Majesty, but from Her Majesty to the mesne lord, however infinitesimal the time during which Her Majesty's tenure might last. If, on the other hand, the person assuring the land in mortmain continues to remain in possession until Her Majesty or some mesne lord exercises an option to enter and hold, no difficulty arises. If, however, the land passes automatically to the Crown, then, until the mesne lord exercises his option, it is the Crown's property and not that of the assurer in mortmain. I heard no solution of this difficulty on the part of the respondents and, accordingly, sub-s. (2) (iv), in my opinion, supports the view that the forfeiting is not automatic. B

That the forfeiture relates back to the date of the assurance does not, as I think, affect this construction. In the case of the Crown, as in that of the mesne lord, once an option to forfeit is exercised, the land is, in my opinion, held by the Crown or the mesne lord as the case may be from the date of the assurance. I am unable to accept the suggestion that the land, having been forfeited to Her Majesty, ceases to be so forfeited because, at a later stage, the mesne lord elects to enter and hold the property. D

The strength of the opposite opinion rests on the fact that "forfeited" in s. 1 (1) must, on the construction which I have adopted, mean "liable to forfeiture", whereas, as my noble and learned friend, LORD MORTON OF HENRYTON points out in his opinion which I have had an opportunity of reading, it bears the meaning of "forfeited" and not "liable to forfeiture" in sub-s. (2) (iv). This is true, but the collocation is different. Admittedly, the word "forfeited" may bear the meaning "liable to forfeiture" at the will of the person to whom the right of forfeiture is given, and does not in every case imply automatic forfeiture. In my opinion, the former is the more usual meaning, unless there is something in the surrounding expressions which necessitates a contrary implication. In sub-s. (2) (i) and (ii), the word necessarily bears the meaning that the land passes to the mesne lord on his exercising his election to take it, and then becomes his from the date of the assurance in mortmain. But in sub-s. (1), where no right of choice is expressly given, there is no necessity for construing it as passing the property contrary to the will of the recipient. Indeed, the provision that the land should pass to the mesne lord as from the date of the assurance, is, as I have said, in my view, contrary to such a construction. E

I would allow the appeal. F

LORD MORTON OF HENRYTON stated the facts and continued: My Lords, it is convenient at this point to set out the relevant provisions of the Mortmain and Charitable Uses Acts, 1888 and 1891. The Act of 1888 is entitled: G

H
I

A "An Act to consolidate and amend the law relating to mortmain and to the disposition of land for charitable uses",
 so that it is not merely a consolidating Act. Section 1 of the Act is as follows:

B "(1) Land shall not be assured to or for the benefit of, or acquired by or on behalf of, any corporation in mortmain, otherwise than under the authority of a licence from Her Majesty the Queen, or of a statute for the time being in force, and if any land is so assured otherwise than as aforesaid the land shall be forfeited to Her Majesty from the date of the assurance, and Her Majesty may enter on and hold the land accordingly:

C "(2) Provided as follows: (i) if the land is held directly of a mesne lord under Her Majesty, that mesne lord may enter on and hold the land at any time within twelve months from the date of the assurance: (ii) if the land is held of more than one mesne lord in gradation under Her Majesty, the superior of those mesne lords may enter on and hold the land at any time within six months after the time at which the right of the inferior lord to enter on the land expires: (iii) if a mesne lord is at the time when his right of entry accrues under this Act a lunatic or otherwise under incapacity, his right of entry may be exercised by his guardian or the committee of his estate, or by such person as Her Majesty's High Court of Justice may appoint in that behalf: (iv) if the right of entry under this Act is exercised by or on behalf of a mesne lord, the land shall be forfeited to that lord from the date of the assurance instead of to Her Majesty."

Section 10 provides—

E "In this Act, unless the context otherwise requires,—(i) 'Assurance' includes a gift, conveyance, appointment, lease, transfer, settlement, mortgage, charge, incumbrance, devise, bequest, and every other assurance by deed, will, or other instrument; and 'assure' and 'assuror' have meanings corresponding with assurance . . . (iii) 'Land' includes tenements and hereditaments corporeal and incorporeal of whatsoever tenure, and any estate and interest in land."

F Section 3 of the amending Act of 1891 altered the last-mentioned definition by providing that—

G "'Land' in the Mortmain and Charitable Uses Act, 1888, and in this Act, shall include tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land; and the definition of land contained in the Mortmain and Charitable Uses Act, 1888, is hereby repealed."

H My Lords, the first question arising for decision is whether the transfer to Arffe, Ltd., in 1953 was an assurance of land in mortmain, within the meaning of s. 1 of the Act of 1888. If that question is answered in the affirmative, the further question arises whether the words "shall be forfeited to Her Majesty from the date of the assurance" denote immediate forfeiture or merely a liability to forfeiture. If these words are held to have the former meaning, a third question will arise, viz., whether the effect of the Acts of 1888 and 1891 in the case of registered land is different from their effect in the case of unregistered land. The fifteen trustees contended that the first question just stated should be answered in the affirmative; that the land became vested in the Crown from the date of the assurance to Arffe, Ltd., and that registered land is, in this respect, on the same footing as unregistered land. The Crown contended to the contrary. The Official Trustee and Arffe, Ltd., did not desire to take part in the arguments in your Lordships' House and were willing to submit to any order, but Arffe, Ltd., desired to identify itself with the arguments presented on behalf of the Crown. The three questions just stated have been decided in favour of the trustees by

the Court of Appeal. In so deciding, that court followed decisions of its own in *Morelle, Ltd. v. Waterworth, Rodnal, Ltd. v. Ludbrook* (1) ([1954] 2 All E.R. 673), and *Morelle, Ltd. v. Wakeling* (2) ([1955] 1 All E.R. 708). A

My Lords, I now turn to the question whether the transfer to Arffe, Ltd., in 1953 was, or was not, an assurance of land in mortmain within the meaning of s. 1 of the Act of 1888. I think this question can be conveniently divided into three parts: first, was the transfer an assurance; secondly, if so, was it an assurance in mortmain; thirdly, if so, was it an assurance of "land" in mortmain. B

My Lords, to my mind the first of these questions is answered clearly by the definition of "assurance" in s. 10 of the Act of 1888. That section defines "assurance" in terms which could hardly be wider, and the definition expressly includes

"a lease, transfer . . . and every other assurance by deed, will, or other instrument . . ."

The word "transfer" is an exact description of the document whereby the residue of the lease was transferred to Arffe, Ltd. The definition is qualified by the words "unless the context otherwise requires", but I can find no such context in s. 1 of the Act. It is true that the provisos in sub-s. (2) are only applicable to a case in which the land assured is of freehold tenure, but that is not a context which requires a narrower meaning to be given to sub-s. (1). D

Next, is the transfer an assurance in mortmain? Again, it seems to me that it exactly answers that description. It is an assurance, and it cannot, I think, be doubted that, as a result of the assurance, the land comprised therein was in mortmain. I do not read the words "in mortmain" as importing any quality into the assurance itself. They look to the result which is achieved by the transfer. It was suggested in argument, on behalf of the Crown, that the only assurances which were "assurances in mortmain" within the Act of 1888 were assurances which gave rise to forfeiture under the Statute de Viris Religiosis (7 Edw. 1), that is, assurances of freeholds or of leases which were merely colourable and amounted, in effect, to an assurance of the freehold. My Lords, I do not find it necessary to consider what assurances were within the scope of the statute of Edward 1. There is much learning on the subject, and the view appears to have been held that a lease for ninety-nine years was not within the mischief of the statute, but a lease for one hundred years might be. To my mind, the suggestion put forward by the Attorney-General cannot stand in face of the all-embracing definition, already quoted, in s. 10 of the Act of 1888. That definition draws no distinction between one lease and another, and clearly contemplates that leases, transfers and "every other assurance by deed, will, or other instrument" may be assurances in mortmain, leading to a forfeiture. E F G

Next, is the transfer an assurance of "land"? Here, the matter is made clear, to my mind, by the definition, already quoted, in s. 3 of the Act of 1891. Under that section, "land", in the Acts of 1888 and 1891,

"shall include tenements and hereditaments, corporeal or incorporeal, of any tenure . . ."

Leasehold is a tenure (see, for instance, Co.Litt.93b and *Re Kershaw* (3) (1888) (37 Ch.D. at p. 677), and that which was transferred to Arffe, Ltd., was a corporeal tenement of leasehold tenure. It was, therefore, to my mind, exactly within the definition. I would add that, as a lease and a transfer are assurances within s. 1 of the Act of 1888, it is difficult to believe that the section did not apply to land held under a lease. I

I must next deal with the question whether the words "shall be forfeited to Her Majesty from the date of the assurance" do, or do not, bring about an immediate forfeiture. My Lords, in my opinion, these words are unambiguous; indeed, if the legislature desired to enact that an assurance which came within the section was to bring about an immediate forfeiture, I find it difficult to imagine

- A words more apt for the purpose. Do not the words "from the date of the assurance" indicate an immediate forfeiture just as clearly as would the word "immediately"? The contention on behalf of the Crown really involves reading the words in question as meaning "shall be liable to forfeiture by Her Majesty, and if Her Majesty puts the forfeiture into effect it shall date back to the date of the assurance". My Lords, I cannot bring myself to put that meaning on these simple words. I think, also, that the passive tense "shall be forfeited" signifies that something *happens* to the land from the date of the assurance, without any action on the part of any person. Further, the meaning which I put on the words in question is supported by the words which immediately follow: "and Her Majesty may enter on and hold the land accordingly".
- C To my mind, these words are referring to a time after the forfeiture has taken place, and Her Majesty may "accordingly", i.e. by reason of that fact, enter on and hold the land. It was suggested in argument that these words were mere surplusage. I do not agree. I think it likely that the words were intended to emphasise the fact that Her Majesty may enter on the land, notwithstanding that the mesne lords are also given rights of entry which may be exercised.
- D Finally—a point to which I attach great importance—we find in sub-s. (2) (iv) the words:

"if the right of entry under this Act is exercised by or on behalf of a mesne lord, the land shall be forfeited to that lord from the date of the assurance instead of to Her Majesty."

- E It is to be observed that, in this sub-section, as well as in sub-s. (1), we find that, in a certain event, "the land shall be forfeited". The construction which I favour gives exactly the same meaning to these words in each place where they occur; whereas the Attorney-General conceded that the construction for which he contended gave to the words "shall be forfeited", in sub-s. (1), a meaning different from the meaning which they must bear in sub-s. (2) (iv). He
- F contended, however, that the words "instead of to Her Majesty", in sub-s. (2) (iv), were inappropriate if the land had already been forfeited automatically to the Crown under sub-s. (1). My Lords, to my mind, this argument loses any force which it might otherwise have possessed, when it is realised that the same situation could arise even if the word "forfeited", in sub-s. (1), meant "liable to be forfeited"; for Her Majesty might well have elected to exercise her right of
- G forfeiture shortly after the date of the offending assurance, and the mesne lord might later enter on the land before the relevant period under sub-s. (2) had expired. Moreover, the words are not, in my view, wholly inappropriate to a case where there has already been a forfeiture to Her Majesty. They simply effect a substitution of the lord for Her Majesty, as from the date of the assurance,
- H if and when he chooses to enter on the land. I should, perhaps, add, in view of an argument advanced by the Attorney-General, that, in my view, the "land" which is forfeited in the present case is the leasehold land comprised in the transfer to Arffe, Ltd., and not the freehold. It is unnecessary to pursue this point, as the Attorney-General's argument that the forfeiture, if any, would be a forfeiture of the freehold did not, I think, commend itself to any of your Lordships.
- I I now come to a question which is, I think, one of great doubt and difficulty. Even if s. 1 of the Act of 1888 provides for an immediate forfeiture, as I think it does, can this provision take effect in the case of registered land, having regard to the terms of the Land Registration Act, 1925, and, in particular, s. 80 and s. 20 to s. 24 inclusive of that Act? This question was considered by the Court of Appeal in *Morelle, Ltd. v. Wakeling* (2) ([1955] 1 All E.R. at p. 719 et seq.). The portion of s. 80 which is relevant for the present purpose is as follows:

"Subject to the express provisions of this Act relating to . . . the effect of registration of a disposition for valuable consideration, nothing in this Act affects any right of His Majesty to any . . . forfeiture." A

My Lords, in the course of the argument I have felt considerable doubt whether the express provisions of s. 23 (1) and (2) of the Act of 1925 did, or did not, negative any forfeiture to the Crown of land registered with good leasehold title, in a case where a disposition for value of that land had been registered. In the end, however, I am not prepared to differ from the Court of Appeal's view that a more limited effect must be given to these sub-sections. I am assisted to this conclusion by the reflection that it is most unlikely that the legislature can have intended the provisions of s. 1 of the Mortmain and Charitable Uses Act, 1888, to be defeated in the case of an assurance of registered land, while allowing these provisions still to have effect in the case of an assurance of land the title to which had not been registered. B C

For these reasons, my Lords, I would answer the questions asked in para. 1 of the originating summons by declaring that the land in question is now vested in Her Majesty the Queen for the unexpired residue of the term granted by the lease of 1862.

Question 2 of the originating summons is as follows: D

"If the answer to para. 1 (c) hereof be affirmative whether upon the true construction of the Mortmain and Charitable Uses Acts, 1888 and 1891, and of the Queen's Remembrancer Act, 1859, Her Majesty the Queen is in the events which have happened now liable under the lessee's covenants contained in the said lease notwithstanding that Her Majesty has not nor has anyone on her behalf entered into possession of any part of the said land nor has there been any inquisition made or office found in relation to Her Majesty's title to the said land or any part thereof." E

HARMAN, J., and the Court of Appeal answered this question in the affirmative. I would give the same answer. In my view, the terms of s. 1 of the Act of 1888 make it clear that the forfeiture takes place without any inquisition made or office found, and notwithstanding that neither Her Majesty, nor anyone on her behalf, has entered into possession of any part of the land. It is true that, as a result, the Crown is saddled with obligations which it has never consented to assume, but the words "shall be forfeited" are, to my mind, imperative, and they apply equally to beneficial and onerous property. F

I would dismiss the appeal. G

LORD MACDERMOTT: My Lords, on the view I take of it this appeal depends entirely on the true construction of s. 1 (1) of the Mortmain and Charitable Uses Act, 1888. In ascertaining what that construction is, an answer must be found to several questions, and of these it will be convenient to begin with that which seeks the meaning of the word "land" as it is used in the following parts of the sub-section, namely, H

"Land shall not be assured . . . in mortmain . . . and if any land is so assured . . . the land shall be forfeited to Her Majesty . . ."

The submission of the Crown was that, throughout this sub-section, "land" does not include a term of years and that, in consequence, the interest now in question, the unexpired residue of a lease for ninety-nine years, is unaffected by s. 1 and, therefore, remains vested in the defendant company, Arffe, Ltd. Historically, this is a plausible contention, for Part I of the Act of 1888 was intended to replace the earlier mortmain Acts commencing with the Statute de Viris Religiosis of 1279, and these, although they might be contravened by a transaction "under the colour" of a lease, were concerned with the alienation and forfeiture of the fee rather than of any leasehold interest. And it is also to be noted in this connection that s. 1 (2) of the Act of 1888 provides for what may I

A happen, if "the land" is held of one or more mesne lords, in a manner which shows the legislature still minded to preserve for a class, by then reduced almost to extinction, the rights of entry which it had been given in the hey-day of feudalism by the Act of 1279. Indeed, sub-s. (2) seems, on any view of the remainder of the section, to relate to feudal tenure alone, and to use the word "land" as signifying nothing less than the fee.

B Notwithstanding these considerations the submission under examination must, in my opinion, be rejected having regard to the width of the statutory definition of "land" for the purposes of the Act of 1888. Section 10 of that Act had originally provided that, unless the context otherwise required, "land" should include

C "tenements and hereditaments corporeal and incorporeal of whatsoever tenure, and any estate and interest in land."

There can, I think, be no doubt that this definition included leaseholds. But it was repealed by s. 3 of the Mortmain and Charitable Uses Act, 1891, which provided instead that "land" in the Act of 1888

D "shall include tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land . . ."

E It was said that the excluding words which end this definition sufficed to exclude leaseholds, and that these could not, therefore, come within the expression "tenements and hereditaments . . . of any tenure". In my opinion, the excluding words of this definition do not refer to leaseholds. I think it is clear that their object was to exclude certain kinds of personal property, such as mortgages and charges on land and the proceeds of sale on a trust for conversion, which had come to be spoken of as "impure personalty", but which did not include chattels real. This being so, the expression "tenements and hereditaments . . . of any tenure" in the definition may be interpreted for present purposes without regard to what follows it. Now, it would, I think, have been F generally accepted at one time that these words referred to feudal tenures and were not apt to describe a term of years. But that was long before 1891, and I have no doubt that, by the middle of the nineteenth century, if not earlier, this expression was commonly used to include leaseholds. In *Re Kershaw* (3) (1888) (37 Ch.D. at p. 677), NORTH, J., held that the words "any land or other hereditaments of whatever tenure" in the Real Estate Charges Act, 1877, extended to leaseholds, and I think it was in this sense that the words "of any tenure" G were used in the definitions of "land" contained in s. 4 of Lord Brougham's Act, 1850 (13 & 14 Vict. c. 21), in s. 2 of the Conveyancing Act, 1881, and in s. 3 of the Interpretation Act, 1889.

H I am, therefore, of opinion that the definition of "land" in the Act of 1891 includes land held on lease, and I find confirmation for this view in s. 4 of the Act of 1888, which contemplates a valid disposition of land for charitable uses taking the form of a lease, and also in the definition of "assurance" in s. 10, which is wide enough to include a lease and the assignment of a lease. But does the context "otherwise require" so as to make this definition of land inapplicable as respects the parts of sub-s. (1) to which I have referred? For the reason already mentioned, I think it may well be that the word "land", as used I in sub-s. (2), does not embrace leaseholds. Sub-section (1), however, furnishes no reason of that sort and the question here is really whether the departure from the Statute de Viris Religiosis, which adherence to the statutory definition would entail, can justify the exclusion of leaseholds. Had the Act of 1888 purported merely to consolidate the law of mortmain much might be said in favour of such exclusion; but in its short title it is described as an Act to consolidate and amend the law relating to mortmain, and that being one of its avowed purposes I can see no sound ground for holding that the leasehold implications of the definition

should stop short of sub-s. (1). It would, indeed, be strange if the legislature had not sought to amend the law in this very direction; for the six centuries between the Statute de Viris Religiosis and the Act of 1888 that saw the disappearance of the feudal system also saw the term of years gaining greatly in importance as a common form of property and to an extent which Parliament could not afford to ignore in any enactment meant to control the holding of land by bodies with a perpetual succession. A

I, therefore, conclude that in sub-s. (1), the expression "Land shall not be assured" is capable of applying to the making or assignment of a lease; and, this being so, I think the word "land" must have a corresponding meaning in the other parts of the sub-section so that, in the event of a forfeiture, "the land . . . forfeited" will be the estate or interest assured in breach of the sub-section. B
It is this last application of the definition which may work the most striking departure from the Statute de Viris Religiosis, as forfeiture thereunder was of the fee alone. But to avoid this by applying the definition to the beginning, though not to the end, of the sub-section does not seem possible; the language of the text does not require or suggest such a distinction, and to adopt it would be to create a confiscatory situation capable of producing, in the changed conditions of 1888 and since, the most inequitable results. C
If, then, a term of years is created or assigned in breach of sub-s. (1), it is the lessee's interest, and not a superior interest, that becomes subject to the forfeiture provisions. D

The next question to be considered concerns the significance of the words "in mortmain", which come immediately after the word "corporation" in sub-s. (1). If the views I have already expressed are correct, it follows, on the facts of this appeal, that the land has been assured, within the meaning of the sub-section, to a corporation—Arffe, Ltd.—without authority. E
But was this an assurance to that corporation in mortmain? If so, the case will be within the sub-section, but if not, the sub-section will not apply, and no question of forfeiture can arise. F
The point here, as I understand it, calls for a choice between two views—(i) that the expression "in mortmain" connotes the situation which arises whenever land is assured to a corporation and, therefore, adds nothing to what precedes it in the text, and (ii) that the expression has a longstanding technical import which qualifies the transaction described, and so excludes from the sub-section those assurances which, before the Act of 1888, would not have been regarded as bringing the land into mortmain.

My Lords, it must be conceded that the mischief to which the law of mortmain has been directed has changed with the times; but the term itself occurs in the Statute de Viris Religiosis, and seems to have signified throughout its long user an alienation which, by its nature, made it likely, or at least possible, that the land would thereafter remain in one hand for a very long period. G
The purposes of the grant, and the capacity of the grantee to continue in existence were, therefore, highly relevant matters. H
And I venture to think that, for the same reasons, the character of the interest granted must have been regarded as no less so. Such interest, for example, might be so brief or transient that it could be of little moment, and make little difference whether it vested in a mortal person or an undying corporation. I
That line of reasoning makes it difficult to think of a short term of years as being the subject of an alienation in mortmain, and I am of opinion that the law had long been settled in favour of that view when the Act of 1888 came to be passed. This seems to be the conclusion to which one is necessarily brought by the cases and text writers that are listed in *TUDOR ON CHARITIES* (5th Edn.), at p. 145 and 8 *HALSBURY'S LAWS OF ENGLAND* (2nd Edn.), p. 83, note (g). These citations span a long period—from the *Year Book 3 Edw. 4 to Truro Corpn. v. Rowe* (4) ([1901] 2 K.B. 870 and [1902] 2 K.B. 709)—and, despite differences as to the effect of the Act of 1888, both of the standard works to which I have just referred seem at one in accepting the proposition that

A before that Act, the assurance of a short term to a corporation was not an assurance in mortmain; or, as WILLS, J., put it with regard to the holding in question in *Truro Corpn. v. Rowe* (4) ([1901] 2 K.B. at p. 875),

“The Statutes of Mortmain appear to me to have nothing to do with a short lease of fourteen years.”

B This conclusion as to what was excluded from the conception of mortmain before 1888 leads me to adopt the second of the views enumerated above. The words “in mortmain” have not been defined, and I see nothing in the definition of “land”, or elsewhere in the Act, to justify the assumption that they are now mere surplusage, and apt to include a type of disposition which the law on the subject had ignored for so long on account of its impermanence. I would, therefore,

C in, hold that, though sub-s. (1) applies to leaseholds, the effect of the words “in mortmain” is to exonerate the short term.

What, then, distinguishes the short term from the longer term that these words will allow to remain within the sub-section? Some writers would draw the line at ninety-nine years, and hold terms not exceeding that to be outside mortmain. In my opinion, the authorities do not go the length of fixing this or any other hard and fast line of division. That, however, raises no real difficulty on the facts of this case as I see them. Here, all that could pass to Arffe, Ltd. was the fag-end of a lease which had less than five years to run. If the views I have expressed are right, such an interest would have been incapable of alienation in mortmain before 1888, and should still be so regarded.

That is enough to determine the appeal in favour of the Crown. But if I am

E wrong in the opinion I have formed concerning the words “in mortmain”, I would still allow the appeal on the grounds (a) that in sub-s. (1), the expression “shall be forfeited” means “shall be liable to be forfeited”, and does not connote an automatic forfeiture, and (b) that the Crown has not taken, and declines to take, any step to enforce such forfeiture as may have been incurred.

There is no question as to ground (b). As to ground (a), the considerations

F which bear on this conclusion, and which, in their conjoint effect, seem to me to make it the proper interpretation, may be enumerated as follows. (i) The word “forfeited” may, in its natural usage, signify either an actual forfeiture or a liability to forfeiture. See per KAY, J., in *Re Levy's Trusts* (5) (1885) (30 Ch.D. at p. 125; and *Quesnel Forks Gold Mining Co. v. Ward* (6) ([1920] A.C. 222). (ii) The concluding words of sub-s. (1)—“and Her Majesty may enter on and hold the land accordingly”, follow the permissive form which is used in sub-s. (2) in

G connection with the clearly optional right of entry which it confers on mesne lords. “Shall” instead of “may” would have been the appropriate word here, if the view taken by the Court of Appeal is well founded; and the far-reaching consequences for the Crown of that view, which I advert to later, give added significance to the wording of the text at this point. (iii) Under the earlier

H statutes, the offending assurance was voidable and not void. The language of s. 1, and the procedure for which it provides, indicate that this is still the position and that, while the forfeiture, if enforced, relates back to the date of the assurance, there is no automatic forfeiture as soon as the assurance is perfected. The right of entry given to mesne lords by sub-s. (2) may be exercisable for as long as eighteen months after the date of the assurance and para. (iv) of that sub-section enacts that if such right of entry is exercised by a mesne lord

I “the land shall be forfeited to that lord from the date of the assurance instead of to Her Majesty.”

This wording, and the absence of any provision for a transfer from Her Majesty to the mesne lord electing to enter, indicate, fairly clearly as I think, that the interest assured was intended to remain in the corporation taking in breach of the section until the forfeiture was enforced. If so, the final words of sub-s. (1) cannot be meant to provide for an automatic forfeiture to the Crown on the

assurance being made, and the significance of the permissive "may enter and hold" is again emphasised. (iv) While the expression "the land shall be forfeited" in sub-s. (2) (iv) undoubtedly uses the word "forfeited" to connote an actual forfeiture, the nature of that paragraph puts any other meaning out of the question, for it is only concerned with what is to happen when a mesne lord has decided to exercise his right of entry and so enforce the forfeiture. This context is so different from that of sub-s. (1), and the word itself is so apt to take the colour of its surroundings, that it seems to me impossible to argue upwards, as it were, from para. (iv) in this connection. (v) There is nothing to suggest that the policy of the Act of 1888 required a sharper sanction, in the shape of automatic forfeiture, than the liability to forfeiture which had sufficed during the currency of the earlier statutes. (vi) To construe sub-s. (1) as providing for automatic forfeiture, denies the Crown any right to refuse acceptance of the forfeited interest, although sub-s. (2) admittedly respects the feudal dispensation to the extent of according such a right to those holding under the Crown. (vii) If, however, that construction is sound, and the effect of the operation of sub-s. (1), in the case of a lease or assignment, is to vest the same immediately in the Crown, it is, I think, hard to stop there and resist the ultimate conclusion reached by the Court of Appeal to the effect that the Crown steps into the shoes of the lessee and becomes liable under the lessee's covenants. But, if this is the position, it would lead, in circumstances which cannot be considered either fanciful or unlikely, to extraordinary results. Take, as an instance, the case of a lease to a corporation. Sub-section (1) forbids the intending lessor, no less than the intending lessee, to complete the transaction without a licence. The lease is made without a licence in breach of the sub-section. On the present hypothesis, the Crown thereupon becomes bound to hold as tenant of the transgressing lessor under an instrument which it has not authorised, and may even have refused to authorise. In addition, it may find itself bound by onerous stipulations designed by, and calculated to benefit, the transgressing lessor. The position of the Crown as an involuntary assignee might well be equally embarrassing and anomalous, and I think the facts of the present case and of *Morelle, Ltd. v. Waterworth, Rodnal, Ltd. v. Ludbrook* (1) ([1954] 2 All E.R. 673), and *Morelle, Ltd. v. Wakeling* (2) ([1955] 1 All E.R. 708), go to show this. Consequences such as these cannot be disregarded as incidental or remote. I find it impossible to ascribe to the legislature an intention to bring such consequences about, and so make the Crown an open receptacle for all such onerous interests as might be transferred or created in breach of the statute. I, therefore, think that the construction which avoids consequences of this abnormal nature should be preferred, and this all the more as to hold otherwise would be to bind the Crown to its prejudice by an implication which, to say the least, is open to argument. No doubt, it can be said that such consequences would, in part, be due to deciding that a leasehold may be the subject of forfeiture under the Act of 1888. But if, as I think, that decision is inescapable having regard to the definition of "land", the case for avoiding such strange and irrational results by reading "forfeited" as "liable to be forfeited" remains unimpaired.

My Lords, as this conclusion also suffices to dispose of the appeal, I do not propose to examine or express an opinion on the effect of the registration of the leasehold in the name of Arffe, Ltd., under the provisions of the Land Registration Act, 1925.

For the reasons stated, I would allow the appeal, discharge the declarations made by *HARMAN, J.*, and affirmed by the Court of Appeal, and answer question 1 (a) as set out in the summons in the affirmative.

LORD COHEN: My Lords, the question for your decision may be stated as follows: 1. Did the transfer to Arffe, Ltd., for valuable consideration, of the unexpired residue of the term of ninety-nine years from Sept. 29, 1858, created by a lease dated Aug. 11, 1862 (which transfer was registered at the Land Registry

A on Feb. 21, 1953), offend against s. 1 of the Mortmain and Charitable Uses Act, 1888 ? 2. If so, did that unexpired residue vest in Her Majesty automatically by reason of the transfer or would it only so vest on performance of some act (e.g., entry) on behalf of Her Majesty evidencing her determination to enforce forfeiture ?

B The case for the respondents on the first question has the merit of simplicity. They say that (i) under s. 3 of the Mortmain and Charitable Uses Act, 1891, "land" includes tenements and hereditaments of any tenure and, therefore, includes leaseholds, and it follows that leaseholds must not be assured to any corporation in mortmain otherwise than under the authority of a licence from Her Majesty; (ii) the transfer to Arffe, Ltd. was a transfer of land and, under s. 10 of the Act of 1888, "assurance" includes transfer; (iii) it was an assurance in mortmain since, to quote STROUD'S JUDICIAL DICTIONARY (3rd Edn.), Vol. 3, p. 1838:

" 'Mortmaine' signifies an alienation of lands and tenements to any guild, corporation, or fraternity and their successors ";

D Arffe, Ltd. was a corporation; it was incorporated in Eire; it did not deliver to the Registrar of Companies any documents for registration under Part 10 of the Companies Act, 1948, nor was it granted a licence to hold land in mortmain and, consequently, had no authority to hold land in mortmain.

My Lords, I am not prepared to dissent from the answer in favour of the respondents given by the Court of Appeal in *Morelle, Ltd. v. Waterworth, Rodnal, Ltd. v. Ludbrook* (1) ([1954] 2 All E.R. 673), to the first question I have posed.

E It is, I think, clear that, by 1888, the expression "tenements and hereditaments of any tenure" would have been held by the courts, in the absence of any context restricting the meaning of the words, to be wide enough to include leaseholds. Any transfer of "land" within the meaning of the Mortmain and Charitable Uses Acts, 1888 and 1891, is clearly an assurance within the meaning of the Acts. The question which has given me some difficulty is whether the transfer of a leasehold interest can be said to be a transfer *in mortmain*.

F The Acts contain no definition of "mortmain". It is, therefore, in my opinion, proper to assume that the legislature, in the Act of 1888, used the word in the same sense as it was used in the statutes as to mortmain in force immediately before the passing of the Act of 1888. Under those statutes and, in particular, under the Statute de Viris Religiosis (7 Edw. 1) made Nov. 15, 1279, it was held that the grant of a short lease did not offend against the statute. Therefore, it was argued on behalf of the Crown, the transfer of a term of which only about four years remained unexpired, could not be a transfer in mortmain. The answer to this argument is, I think, that the reason why the grant of a short lease was held not to offend against the statutes was solely because, on the wording of the statute of 1279, short leases were not lands or tenements within the meaning of the statute. If this be the right view, it necessarily follows that this ratio decidendi no longer applies, since the wide definition of "land" in the Acts of 1888 and 1891 brings leaseholds of any length within the mischief of the Act. It is said that such a decision would lead to strange consequences imposing heavy liabilities on the Crown, but this consideration ought not to affect your Lordships' construction of the statute. Moreover, the consequences will only follow if your Lordships answer the second question I have posed by holding that the forfeiture to Her Majesty is automatic.

I The case made by counsel for the respondents on this point also is simple. He admits that the word "forfeited" is capable of meaning "liable to be forfeited", but he says that its primary meaning connotes immediate forfeiture. He points out that that is the meaning which the word must bear in s. 1 (2) (iv) of the Act of 1888. He submits that a different meaning should not be attributed to it in sub-s. (1) to that which it must bear in sub-s. (2). Despite its attractive simplicity, I am unable to accept this argument. If it were

accepted, little effect could be given to the words at the end of sub-s. (1), "and Her Majesty may enter on and hold the land accordingly". It was suggested that these words were inserted to make it clear that Her Majesty was entitled to enter before the period of the option given to mesne lords by sub-s. (2) had expired. I doubt if that was the purpose of these words, and it seems to me that the words are far more appropriate if, in sub-s. (1), "forfeited" is read as meaning "liable to be forfeited". Moreover, the respondents' construction connotes that, if a mesne lord exercises his right of entry, the title will pass to him not from the person who has executed the offending assurance but from Her Majesty, whereas sub-s. (2) (iv) provides that the land shall be forfeited to the mesne lord from the date of that assurance instead of to Her Majesty.

If the respondents' contentions on this point were well founded, a radical change would, indeed, have been effected by the Act of 1888, for it is admitted that, under the law in force before that Act was passed, the forfeiture did not become effective until Her Majesty took steps to enforce it. I am unable to accept the view that, if Parliament had intended such a radical alteration, it would have effected it by such ambiguous language. I would add that, if the respondents' argument were well founded, the effect of the alteration would be to enable a tenant who wished to escape his obligations to do so by transferring them to Her Majesty against her will.

Having reached this conclusion it is unnecessary for me to consider whether, if I had been of opinion that the consequence of an assurance of land not registered under the Land Registration Act, 1925, offending against the Mortmain and Charitable Uses Act, 1888, was immediate forfeiture, the position would be altered by the fact that the land in the present case was registered under the Act of 1925 in the name of Arffe, Ltd. In *Morelle, Ltd. v. Wakeling* (2) ([1955] 1 All E.R. 708), the Court of Appeal held that registration did not affect the matter. I must not be taken either as agreeing with or dissenting from that decision.

There is only one other point I need mention. The Attorney-General and Mr. Cross argued that, if there was an automatic forfeiture, it was of the fee simple and not of the leasehold interest. In my opinion, the foundation for this argument disappears if I am right in the opinion I have expressed that the definition of "land" in s. 3 of the Act of 1891 includes leaseholds.

For the reasons I have stated, I would allow the appeal, and answer the question stated in para. 1 of the originating summons in this matter in the sense indicated in sub-para. (a) of that paragraph, subject to the correction of the date which appears therein, by substituting "September" for "October". The second question does not arise.

Appeal allowed.

Solicitors: *Treasury Solicitor; Meredith Hardy & Hutchison*, agents for *Lamb, Brooks & Bullock*, Odiham (for the respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

LONGSDON v. MINISTER OF PENSIONS AND NATIONAL INSURANCE.

[QUEEN'S BENCH DIVISION (Havers, J.), December 12, 1955.]

National Insurance—Contributions—Exception from liability to pay contributions—Meaning of “income” in s. 5 (1) (a) (iii) of National Insurance Act, 1946 (9 & 10 Geo. 6 c. 67).

The appellant was self-employed as a farmer and was engaged in building up a pedigree herd of cattle. In order to improve his farm and build up his herd he ploughed back all profits made and fed capital into the farm. As a result his annual accounts showed persistent net losses and these losses were accepted by the Inland Revenue for income tax purposes. The appellant also owned a business which was not running at a profit. He also possessed certain shares and securities, which yielded a gross annual income exceeding £200, and he owned certain property which for the year 1952-53 had a net annual value of about £661, maintenance for the same period amounting to about £659. He maintained a standard of living representing expenditure at the rate of approximately £1,500 a year, but this was financed partly by selling capital and partly by borrowing from the bank. On the question whether the appellant was entitled to a certificate of exception from paying contributions under the National Insurance Act, 1946, as a self-employed person on the ground that in the relevant period (June 2, 1952 to Dec. 3, 1953) he was not in receipt of an income exceeding £104 a year within s. 5 (1) (a) (iii)* of the Act of 1946,

Held: the word “income” in s. 5 (1) (a) (iii) of the Act of 1946 was used in the sense “that which comes in” and without regard to outgoings; therefore, as the appellant had an income from investments exceeding £104 per annum, he was not entitled to be excepted from paying contributions under the National Insurance Act, 1946.

Appeal dismissed.

[For a summary of the National Insurance (Contributions) Regulations, 1948 (S.I. 1948 No. 1417), see 15 HALSBURY'S STATUTORY INSTRUMENTS 226, and SERVICE.]

For the National Insurance (Determination of Claims and Questions) Regulations, 1948 (S.I. 1948 No. 1144), see 15 HALSBURY'S STATUTORY INSTRUMENTS 189, and SERVICE.

For the National Insurance Act, 1946, s. 5 (1), see 16 HALSBURY'S STATUTES (2nd Edn.) 678.]

Cases referred to:

- (1) *The People v. Board of Supervisors of the County of Niagara*, (1842), 4 Hill's Reports of the Supreme Court of the State of New York, 20.
- (2) *Jones v. Ogle*, (1872), 8 Ch. App. 192; 42 L.J.Ch. 334; 28 L.T. 245; 20 Digest 282, 412.
- (3) *Re Huggins, Ex p. Huggins*, (1882), 21 Ch.D. 85; 51 L.J.Ch. 935; 47 L.T. 559; 5 Digest 725, 6296.
- (4) *Taxation Comrs. v. Téece*, [1899] A.C. 254; 79 L.T. 601; 28 Digest 44, g.

Appeal.

This was an appeal by Anthony Ernest Cross Longsdon (the appellant) by way of Case Stated by the Minister of Pensions and National Insurance at the request of the appellant under reg. 4 of the National Insurance (Determination of Claims and Questions) Regulations, 1948 (S.I. 1948 No. 1144) (made under

*The terms of the enactment are printed at p. 84, letter H, post.

s. 43 of the National Insurance Act, 1946) and under the provisions of R.S.C., A
Ord. 55 (B) as amended by R.S.C. (No. 2) 1948 (S.I. 1948 No. 1439).

On Dec. 3, 1953, the appellant applied to the Minister for the determination of the question whether he was and had been entitled to the issue of certificates of exception from liability to pay contributions under the National Insurance Act, 1946, since the Act came into force. The Minister in accordance with reg. 3 (3) of the National Insurance (Determination of Claims and Questions) Regulations, 1948, appointed Mr. W. H. COBHAM HODGES, Barrister-at-Law, to hold an inquiry into the question and to report to him thereon. An inquiry was held on June 10, 1954. The appellant, who had been excepted from liability to pay contributions under the Act as a self-employed or non-employed person for the period July 5, 1948, to June 1, 1952, agreed that his application be amended to read "for the period from June 2, 1952" instead of "since the Act came into force". On consideration of the report the Minister decided that the appellant during the period June 2, 1952 to Dec. 3, 1953, was in receipt of an income exceeding £104 a year, and was not therefore entitled to the issue of a certificate of exception from liability to pay contributions under the provisions of reg. 10 and reg. 13 of the National Insurance (Contributions) Regulations, 1948. The Minister was of opinion that the appellant's business losses were not to be set against his income from stocks and shares in determining whether he was in receipt of an income exceeding £104 a year for the purposes of s. 5 (1) (a) (iii) of the National Insurance Act, 1946, and reg. 13 of the National Insurance (Contributions) Regulations, 1948.

The appellant appeared in person.

Rodger Winn for the Minister of Pensions and National Insurance.

HAVERS, J.: This is an appeal against a decision of the Minister of Pensions and National Insurance whereby he decided that the appellant did not come within the provisions of s. 5 (1) (a) (iii) of the National Insurance Act, 1946; in other words, the Minister decided that the appellant was not excepted from liability to pay contributions.

The National Insurance Act, 1946, as is well known, provided that every person after the appointed day* who was over school leaving age and under pensionable age in Great Britain and who fulfilled the prescribed conditions was compulsorily insured under the Act and continued to be insured. The classes of insured persons are: (a) employed persons; (b) self-employed persons; and (c) non-employed persons. The Act provided [by s. 2] that in order to establish a source of funds the insured person, together with his employer, should make contributions. Section 5 of the Act provides certain exceptions from liability for making contributions. It begins in these terms:

"(1) Subject to the provisions of sub-s. (2) of this section, regulations may provide for—(a) excepting insured persons from liability to pay contributions for periods—(i) of unemployment or of incapacity for work; (ii) of full time education or of full time unpaid apprenticeship; (iii) when they are not in receipt (or are deemed in accordance with the regulations not to be in receipt) of an income exceeding £104 a year; and for such other periods as may be prescribed . . ."

That last sub-paragraph is the material one for the purpose of this case. The appellant contends that on the true construction of that sub-paragraph he is entitled to be excepted from liability to pay contributions because, as he says, he is not in receipt of an income exceeding £104 a year.

* July 5, 1948, was declared to be the "appointed day" for all purposes of the Act by the National Insurance Act, 1946 (Appointed Day) Order, 1948 (S.I. 1948 No. 54).

- A In accordance with the power conferred by the Act certain regulations* were made under this section. The material ones for the purpose of this appeal are reg. 13 and reg. 14. I need not refer to reg. 13, which contains certain special provisions relating to the granting of certificates of exception. Regulation 14 is, I think, of importance for the purpose of this appeal because, in effect, it provides that certain sums which may be received by the applicant are not to be taken into account for the purpose of calculating his income within the meaning of the section. Regulation 14 reads as follows:

- B “Where an applicant for a certificate of exception is in receipt of an income exceeding £104 a year by reason only of the inclusion therein of any one or more of the following items, he shall be deemed for the purposes of s. 5 (1) (a) (iii) of the Act not to be in receipt of an income exceeding £104 a year . . .”

- C Then there are specified a number of sums from certain sources to which this regulation applies. For instance, there is a sum received by way of assistance under the National Assistance Act, 1948, a sum received by way of old age pension as a blind person under the Old Age Pensions Act, 1936, and some other sums which may be described as ejusdem generis to the two which I have already mentioned.

- D The Minister having given his decision, the appellant, in accordance with the provisions of the Act, objected to the Minister's decision and the Minister appointed,† in accordance with the provisions of the Act, a Mr. COBHAM HODGES to make an inquiry, at which the appellant gave evidence. The facts which were then found by the Minister after consideration of the report made by Mr. COBHAM HODGES were as follows:

- E “(a) At all material times the applicant has been self-employed as a farmer, farming at Smithwood Farm, Cranleigh, Surrey, until September, 1952, and thereafter at the Manor, Little Longstone, near Bakewell, Derbyshire. His principal occupation is the building up of a herd of pedigree Guernsey cattle and it is generally recognised that his herd is now one of the best in the county. (b) The applicant bought Smithwood Farm at the end of the last war for about £8,000 and sold it after the expenditure of considerable sums on improvements in September, 1952, for £18,978—this figure did not include development value under the Town and Country Planning Act, 1947. (c) The Manor, Little Longstone, has been in the applicant's family for many generations and is entailed. He has at present 130 acres in hand. (d) In order to improve his farms and build up his herd the applicant has ploughed back all profits made and has fed capital into the farms. As a result he has shown consistent net losses; his losses for the years for which accounts are available being: 1951-52, £2,779 17s. 10d.; 1952-53, £1,850 14s. 3d.; and it is understood that his loss for the year 1953-54 is approximately the same as that for 1952-53. These figures have been accepted by the Inland Revenue for income tax purposes.”

- H Then the Case goes on to find that the applicant is also the owner of a mineral water factory at Malvern, Worcestershire. He took over this from an elderly relative when it had been losing money for some years, in consideration of an annuity of £300. The Case goes on to find:

* National Insurance (Contributions) Regulations, 1948 (S.I. 1948 No. 1417), as amended by S.I. 1949 No. 1171, 1950 Nos. 330 and 1947, 1952 No. 1393, 1953 No. 1544, 1954 No. 189, and 1955 No. 781.

† See p. 84, letter B, ante.

"There were debts of some £900 owed by the firm. The losses for the first seven months, that is from June to December, 1952, were £325 5s. 8d. (f) Debts have largely been paid off since but the firm is not as yet making a profit."

In addition the applicant is also the owner of certain property. The net annual value of this in the year 1951-52 was £746 10s. and maintenance cost approximately £363, and improvements and alterations approximately £102. In the year 1952-53 the net annual value was £661, maintenance £659, and improvements and alterations to the Manor and property at Little Longstone £8,721.

All that sounds to some extent rather bleak but the position is not quite as bad as it appears at first sight because, as was found by the Minister, and as the applicant quite frankly recognises and admits, the applicant managed to maintain a standard of living representing expenditure at the rate of approximately £1,500 a year, partly by selling capital and borrowing from the bank. In addition to this, one of the vital findings of fact in the Case, I think, is this. The Minister has found that:

"The applicant possesses certain securities and shares of public companies with Stock Exchange quotations. The par values and gross income therefrom in the years 1951-52 and 1952-53 were as follows: 1951-52, £8,526 11s. 6d. gross income £292 1s. 10d.; 1952-53, £8,226 11s. 6d. gross income £297 8s. 10d. In these figures his wife's shares worth £356 15s. at par and income therefrom (£10-14) are disregarded. His investment income for the year 1953-54 was at least £200 . . ."

In the light of those findings of fact the Minister came to the conclusion that, on the true construction of s. 5 (1) (a) (iii) the applicant was not entitled to be excepted from liability to pay contributions. Against that the applicant has appealed, and the grounds on which he asks me in his notice of appeal to say that the decision is wrong in law are that the Minister:

"1. In making his decision took into account the fact that the appellant had from investments an income in excess of £104 a year without also taking into account the losses from the appellant's business transactions which reduced his net income to a figure lower than the said sum of £104. 2. That the Minister in assessing the appellant's income in this way elected to exercise severance in respect of such income thereby exercising a discretion not granted to him by the provisions of the said Act. 3. In making his decision took into account the standard of living maintained by the appellant which he held to be on a figure in excess of £104 a year and which is admitted by the appellant although the Minister in para. 4 (i) of the said Case admits that such standard of living had been maintained by the appellant by the selling of capital and borrowing from the bank."

The appellant has appeared in person to argue his case before me, and, if he will allow me to say so, he has put his case very clearly and forcefully before me. He contends that in considering what is meant by "income" the Minister ought to take into consideration the whole of the sources of income and the net results of the trading as regards his farm and the properties which he owns and this business which he says he really took over. He contends that if it appears, as the result of the assessment for income tax, that he is under no liability to pay tax, then he is not in receipt of income within the meaning of this section.

His argument really comes to this: that the word "income" in s. 5 (1) (a) (iii) of the Act should be read as either "net income" or "income assessable to tax". Counsel for the Minister has called my attention to a number of authorities in which the courts overseas have from time to time considered the true interpretation of the word "income". One decision was that of *The People v. Board of Supervisors of the County of Niagara* (1) (1842) (4 Hills Rep. 20). It is an American

A decision and the passage to which counsel directed my attention is in the judgment of BRONSON, J. In the course of his judgment he says this (*ibid.*, at p. 23):

B “A tax is to be levied upon all monied or stock corporations ‘deriving an income or profit from their capital, or otherwise’. And the name of the corporation is only to be stricken from the assessment roll when the president or other proper officer shall make affidavit, ‘that such company is not in the receipt of any profits or income.’ It is undoubtedly true that ‘profits’ and ‘income’ are sometimes used as synonymous terms; but, strictly speaking, ‘income’ means that which comes in, or is received from any business or investment of capital, without reference to the outgoing expenditure: while ‘profits’ generally mean the gain which is made upon any business or investment when both receipts and payments are taken into the account. ‘Income’, when applied to the affairs of individuals, expresses the same idea that revenue does when applied to the affairs of a state or nation; and no one would think of denying that our government has any revenue because the expenditures for a given period may exceed the amount of receipts.”

D Of course I have to bear in mind, in referring to these cases, that they are cases on the word “income” in a wholly different statute in a different country and made for entirely different purposes from those for which the National Insurance Act, 1946, was made in this country. However, this judgment does give some assistance and throws some light on what is the general meaning of the word “income”.

E I shall also refer to another case, *Jones v. Ogle* (2) (1872) (42 L.J.Ch. 334). The headnote to that case is:

F “Profits in a private trading partnership, carried on under a deed by which it was provided that such dividends should be made from time to time amongst the partners as the managing partners should direct, are not dividends or other periodical payments in the nature of income within the meaning of the Apportionment Act, 1870 (33 & 34 Vict. c. 35), and are not apportionable as between tenants for life and residuary legatees under that Act.”

My attention was directed to a passage in the judgment of LORD SELBORNE, L.C., which is the only relevant passage (*ibid.*, at p. 336):

G “Then as to the word income, it is a general expression signifying what comes in, and that expression is used, as it happens in the Act of Parliament itself, with reference to a periodical payment in the nature of income.”

H My attention has also been called to *Re Huggins, Ex p. Huggins* (3) (1882) (51 L.J.Ch. 935). There is one passage which counsel for the Minister referred to in support of his argument, in which SIR GEORGE JESSEL, M.R., said (*ibid.*, at p. 938):

“The present appellant’s income is not a ‘salary,’ but it is ‘income.’ The word ‘income’ is as large a word as can be used.”

Counsel for the Minister, with his usual candour, has called my attention to another case in which the court took a different view on the facts of the statute.

I That is *Taxation Comrs. v. Teece* (4) ([1899] A.C. 254). The headnote is this:

“Under the New South Wales Land and Income Tax Assessment Act, 1895, s. 27, the taxable amount of the respondent’s income was limited to the amount of its income derived from mortgages; under s. 28 (1), certain expenses incurred by the taxpayer ‘in the production of his income’ were to be deducted:—Held, that by the true construction of the subsection the respondent was entitled to deduct all expenses incurred in the production, not merely of its mortgage income, but of its income as a whole.”

LORD MACNAGHTEN, who delivered the judgment of the Board in that case, said (ibid., at p. 257):

“Although perhaps the illustration to which the learned Chief Justice resorts in support of his view may be open to criticism, their Lordships are of opinion that the principle of the decision is perfectly sound. It is obvious that the conclusion at which the Commissioners of Taxation arrived cannot be reached without introducing some limitation or some qualification which is not to be found in the words of the Act. The words ‘in the production of his income’—that is, in the production of the income of the taxpayer entitled to the deductions mentioned in the Act—in their natural and ordinary meaning, apply to the income of the taxpayer as a whole. Though it would certainly have led to a variety of nice and difficult questions, it might have been more logical, it might have been more in accordance with the fitness of things, it might have made the scheme of the Act look more symmetrical, if the taxpayer claiming deduction had been confined to deductions immediately connected with or properly attributable to his taxable income. But that is not what the Act says. And it is the duty of the court to construe the Act as they find it.”

There, of course, it was provided in the very statute in which the word “income” appeared to be considered a provision that there should be a deduction. Counsel quite rightly points out that there is no such provision in the National Insurance Act, 1946.

I have to construe this section according to its natural and ordinary meaning, unless that would lead to some repugnance or absurdity. I am asked to infer where the word “income” is mentioned, the words “net income” or “income assessable to income tax” or “income after deduction of expenditure” or some words of that kind. It would have been a perfectly simple thing if that had been the intention of Parliament to have put in the word “net” or some such word as that, which would have made it perfectly plain that what Parliament was contemplating here was the net income, or one which was assessable to tax, or some similar phrase. On the contrary, Parliament has simply used the word “income” without adding any words of limitation or qualification of any kind. I think I am bound to give that its natural and ordinary meaning, which is, as BRONSON, J., says in the case which was then before him: “‘income’ means that which comes in”. I hold, therefore, that the Minister correctly construed the provisions of this section and that this appeal must therefore be dismissed.

Appeal dismissed.

Solicitor: *Solicitor, Ministry of Pensions and National Insurance.*

[Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.]

A

Re BISS (deceased).

HEASMAN v. BISS AND OTHERS.

[CHANCERY DIVISION (Harman, J.), December 6, 7, 1955.]

B

Administration of Estates—Gift cum onere—Real property mortgaged—Specific devise of part—Rest forming part of residuary estate—Order of application of real property towards discharge of mortgage debt—Administration of Estates Act, 1925 (15 Geo. 5 c. 23), s. 34 (3), s. 35 (1), Sch. 1, Part 2.

C

In 1950 a testator borrowed £10,000 from a bank. Repayment of this was secured by (a) a mortgage of property called Denver Lodge, (b) a mortgage of other real property, (c) a charge on shares in a building society, and (d) a guarantee by his wife. By his will dated Nov. 2, 1951, the testator devised Denver Lodge specifically to the plaintiff absolutely, and gave the residue of his property (which included real property mortgaged to his bank to secure repayment of the £10,000 and the building society shares so mortgaged) to his trustees on trust after payment thereof of all his just debts, funeral and testamentary expenses to divide the same equally between two other persons. The testator further provided by his will that if the plaintiff or her successors in title desired to sell Denver Lodge, a purchaser should have an option to buy it for £2,000. The secured debt due to the bank at the testator's death was about £7,328 and the proportion attributable rateably by value to Denver Lodge amounted to about £3,700. The testator did not express in his will any direction that s. 35 of the Administration of Estates Act, 1925,* should not apply. On the question what part, if any, of the debt to the bank outstanding at the testator's death should be borne by Denver Lodge,

D

E

Held: (i) so much of the property charged to the bank as was comprised in the residuary gift should be applied towards the discharge of the bank's secured debt before property specifically devised, viz., before Denver Lodge (*Brownson v. Lawrance* (1868), L.R. 6 Eq. 1 and *Re Turner*, [1938] 2 All E.R. 560, considered), and

F

(ii) the fact that the testator had given an option for the purchase of Denver Lodge, if the plaintiff wished to sell it, at a price well below the proportion of the debt to the bank which would be attributable to Denver Lodge under s. 35 of the Act of 1925 if it applied, did not signify such a contrary or other intention as would exclude that section.

G

[As to discharge of debt where several properties mortgaged, see 14 HALSBURY'S LAWS (2nd Edn.) 383, para. 712; and for cases on the subject, see 23 DIGEST 493-495, 5604-5615.]

For the Administration of Estates Act, 1925, s. 34, s. 35 and Sch. 1, Part 2, see 9 HALSBURY'S STATUTES (2nd Edn.) 737, 739, and 767.]

H

* Section 35 (1) (2) of the Administration of Estates Act, 1925, are as follows—

I

“35. Charges on property of deceased to be paid primarily out of the property charged.—(1) Where a person dies possessed of, or entitled to, or, under a general power of appointment (including the statutory power to dispose of entailed interests) by his will disposes of, an interest in property, which at the time of his death is charged with the payment of money, whether by way of legal mortgage, equitable charge or otherwise (including a lien for unpaid purchase money), and the deceased has not by will deed or other document signified a contrary or other intention, the interest so charged, shall as between the different persons claiming through the deceased, be primarily liable for the payment of the charge; and every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof.

(2) Such contrary or other intention shall not be deemed to be signified—

(a) by a general direction for the payment of debts or of all the debts of the testator out of his personal estate, or his residuary real and personal estate, or his residuary real estate; or

(b) by a charge of debts upon any such estate;

unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge.”

Cases referred to:

- (1) *Brownson v. Lawrance*, (1868), L.R. 6 Eq. 1; 37 L.J.Ch. 351; 18 L.T. 143; 23 Digest 492, 5598.
- (2) *Re Turner*, [1938] 2 All E.R. 560; [1938] Ch. 593; 107 L.J.Ch. 326; 159 L.T. 246; Digest Supp.

Adjourned Summons.

The plaintiff, Ruth Pamela Joyce Heasman, applied to the court by originating summons for the determination of the question (among others) whether the property known as Denver Lodge and adjoining land which was specifically devised to the plaintiff by the will of John Stanley Biss, was liable to bear a proportionate part of the testator's debts charged thereon by a mortgage dated Mar. 2, 1950, or whether such debts ought to be discharged out of the residuary estate.

In March, 1950, the testator borrowed £10,000 from the Midland Bank, Ltd., which was credited to his private account and secured as follows: (a) by a mortgage dated Mar. 2, 1950, of property known as Denver Lodge and adjoining land; (b) by a mortgage of property known as St. Boniface; (c) by a charge on forty-four shares of £50 each in a building society, and (d) by a guarantee given by his wife. On Apr. 26, 1950, the testator formed a private company to carry on the business of greyhound trainers and on Aug. 19, 1950, he sold to the company all his plant and stock in trade of the business of greyhound trainer which he carried on at Denver Lodge.

By cl. 6 of his will dated Nov. 2, 1951, the testator devised Denver Lodge and adjoining land to the plaintiff absolutely provided that

"if at any time she or her successors in title require or desire to sell the same or any part thereof the whole shall first be offered in writing to J. S. Biss & Co., Ltd., hereinafter called 'the company' who shall have an option of one month from the date of such notice in writing to exercise such option to purchase the same for the sum of £2,000 (which said sum of £2,000 shall be paid to and become the property of the said [plaintiff] or her successors in title as the case may be)."

By cl. 8 the testator provided:

"I devise and bequeath all the rest and residue of my property whatsoever and wheresoever which I may die possessed of or entitled to (including all shares and other interests held by me in the company at the date of my death) unto my trustees upon trust after payment thereof of all my just debts funeral and testamentary expenses to divide the same equally between such of my two children the said Stanley George Biss and Roger David Biss as shall survive me and attain the age of twenty-one years . . ."

There followed a substitutional gift in favour of issue of either of the residuary beneficiaries who should predecease the testator.

On Mar. 9, 1952, the testator died and there remained owing to the bank on the security of the mortgage £7,328 0s. 1d. together with £70 12s. 4d. in respect of accrued bank charges.

Michael Albery, Q.C., and *C. F. Fletcher-Cooke* for the plaintiff, devisee under the will.

J. P. Hunter-Brown for the first defendant, an executor.

R. W. Goff, Q.C., and *W. T. Elverston* for the second and third defendants, sons of the testator, residuary legatees.

HARMAN, J.: The point which I have to decide is whether the real property specifically devised to the plaintiff has to bear a proportionate part of a debt owed to a bank which is secured on that and other properties. *Prima facie*,

A that must be so: see s. 35 of the Administration of Estates Act, 1925, which replaces and somewhat extends the Real Estate Charges Act, 1854.*

[HIS LORDSHIP stated the facts and continued:] The net debt at the date of the death of the testator was £7,328, plus some interest. It was argued on behalf of the executors that the property devised to the plaintiff was made liable to bear its share by the words "every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole" in the Administration of Estates Act, 1925, s. 35 (1). The word "interest" was a curious word to use in that sub-section, but it must mean the aggregate of the properties charged. The plaintiff is liable, on the contention put forward by the executors, to pay off more than half the overdraft, and the question that I have to determine is whether a contrary intention is signified by the testator. He had not by deed, will or other document expressly done so, and though it seems highly unlikely that he intended the plaintiff to pay off half the overdraft, the fact that he directed payment of his debts out of residue is not of itself enough to signify a contrary intention, having regard to the express terms of s. 35 (2) (a).

Two indications were suggested. The first was the option to purchase given to the company: it is said that it would be ridiculous to saddle the devisee with £3,700 (or so) in respect of the charge, and then to provide that she shall not sell for more than £2,000. The right of purchase contained in the option purports to extend to the successors of the plaintiff. Counsel for the plaintiff has argued that so curious an intention could not be imputed to the testator. He argued moreover that the option was to purchase free from incumbrances and that the devise must therefore comprise the like subject-matter. But the figure of £2,000 is arbitrary, and it is a mere deterrent. I find no contrary intention here.

The second point relied on was that part of the property charged falls into residue and residue should rank below specifically devised property. There is no doubt about the order of the application of assets in payment of the unsecured debts having regard to s. 34 (3) of the Administration of Estates Act, 1925, and Part 2 of Sch. 1 to that Act. Residuary realty comes first, and, therefore, it was said, a specific devise of part of the property put it in a higher class and is an indication that it should not suffer before the lower class is exhausted. That construction appeals to me apart from authority. If one were dealing with unsecured debts, the specifically devised property would be above residue, and why should not that apply to secured debts as well? There is some authority for this in *Brownson v. Lawrance* (1) (1868) (L.R. 6 Eq. at p. 6) where LORD ROMILLY, M.R., so held, but did not give any reasons for his decision. The circumstances were not unlike those existing here and LORD ROMILLY, M.R., decided that the specific devise of part of the mortgaged property indicated a contrary intention. The case was overruled, the reason being that before 1926 residuary realty was not put behind specifically devised realty: both were regarded as specifically given. That is not so since 1925, because the Administration of Estates Act, 1925, distinguishes between a specific and residuary devise, so that the conclusion of LORD ROMILLY, M.R., would now rest on a true premise. In *Re Turner* (2) ([1938] 2 All E.R. 560), SIMONDS, J., did not take the point, but it was not suggested that he should; that, therefore, is no authority. In my judgment the point is a good one. I hold, therefore, that to the extent of the value of the rest of the mortgaged property the plaintiff's property is exonerated.

Order accordingly.

Solicitors: *Guillaume & Sons* (for the plaintiff); *Breeze & Wyles* (for the first defendant); *Amphlett & Co.* (for the remaining defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

* The Real Estate Charges Act, 1854, and the Real Estate Charges Act of 1867 and 1877, were repealed by the Administration of Estates Act, 1925, s. 56, except as regards deaths occurring before 1926.

PERPETUAL TRUSTEE CO. (LTD.) v. PACIFIC COAL
CO. PTY., LTD.

[PRIVY COUNCIL (Viscount Kilmuir, L.C., Lord Oaksey, Lord Morton of Henryton, Lord Reid and Lord Tucker), October 10, 11, 12, 13, 14, 24, 31, December 14, 1955.]

Privy Council—Australia—New South Wales—Coal mining—Lease—Rent and fluctuating royalties for coal mined—Statutory deductions—Whether statutory deductions to be taken into account in computing amount due—Landlord and Tenant (Amendment) Act, 1932-1947 (New South Wales)—Commonwealth National Security Act, 1939-1949—Commonwealth National Security (Prices) Regulations, reg. 3 (b), reg. 23 (2)—Commonwealth Prices Regulation Order No. 985, para. 2 (c)—Prices Regulation Act, 1948 (No. 26) (New South Wales), s. 2 (1).

By a mining lease dated Sept. 1, 1919, the lessor demised to the lessee for a term of forty-three years from Sept. 1, 1919, certain mines of coal with full liberty to the lessee to work the mines. The lease reserved a yearly rental of £819, payable quarterly and, in addition, payment of a royalty at specified rates on all coal worked over and above the quantity which would produce in any one year the sum of £819 at the rate specified in regard to the payment of royalty. By the New South Wales Reduction of Rents Act, 1931, and the Landlord and Tenant (Amendment) Act, 1932-1947, rent reserved by or under any lease to which the Acts applied was reduced by 22½ per cent. Under the National Security (Prices) Regulations, which were made in 1940, the Minister was empowered (by reg. 22 (2)) to declare any service to be a "declared service" for the purposes of the regulations and (by reg. 23 (2) (a)) the Commonwealth Prices Commissioner was empowered to fix the maximum rate at which any declared service might be supplied. By reg. 3 of these regulations a "service" was defined as follows: "'Service' means . . . (b) any rights or privileges for which remuneration is payable in the form of royalty . . . or other levy based on volume or value of goods produced". On Nov. 30, 1942, the Minister declared that, with certain immaterial exceptions, all services supplied or carried on in Australia were "declared services" for the purposes of these regulations. In March, 1943, the commissioner made the Prices Regulation Order No. 985, by para. 2 of which he fixed and declared "the maximum rates per ton of coal mined at which mining rights may be supplied in respect of coal mined from the classes of mining properties mentioned hereunder to be . . . (c) Properties not subject to Crown lease which were privately leased on Aug. 31, 1939—the amount per ton of coal mined payable on Aug. 31, 1939". The New South Wales Landlord and Tenant (Amendment) Act, 1932-1947, expired on Dec. 31, 1947. In 1951 the lessor brought an action against the lessee claiming arrears of rent and royalty at the full rates payable under the lease of 1919 in respect of two periods, among others, viz., July 1 to Sept. 20, 1948, and Sept. 20, 1948 to Dec. 31, 1950. The lessee contended that throughout those periods the lessor was entitled only to rent and royalty at the reduced rate, i.e., full rent and royalty reduced by 22½ per cent., and that that had been paid. The lessor contended, among other contentions, that the rent payable under the lease was not capable of being controlled and was not, in fact, controlled by Order No. 985; and, further, that para. 2 (c) of Order No. 985 did not apply unless it was proved that coal in respect of which royalty was payable was mined on Aug. 31, 1939.

Held: (i) the rent payable under the lease of 1919 was controlled by Order No. 985 because (a) reg. 3 (b) of the National Security (Prices) Regulations, on its true construction, covered every case in which any

A remuneration in the form of royalty was payable, even though part of the total remuneration was a fixed rent, and (b) the regulations contemplated that, under a mining lease, the lessor was supplying a service throughout the term of the lease, for which service a maximum rate of remuneration might be fixed.

B (ii) para. 2 (c) of Order No. 985 fixed the rate of remuneration as the rate which would have been in operation on Aug. 31, 1939, on the hypothesis that coal was being mined on that date; the rate so fixed was the reduced rate, viz., the rate of rent and royalty under the lease less the 22½ per cent. statutory deduction in operation on Aug. 31, 1939.

Appeal dismissed.

C [As to payment of rent and royalties under mining leases, see 22 HALSBURY'S LAWS (2nd Edn.) 598, 604, paras. 1300, 1313.]

Appeal.

Appeal by special leave by Perpetual Trustee Co. (Ltd.), the lessor of a coal mine, from an order of the High Court of Australia, dated Aug. 20, 1954, reversing in part an order of the Full Court of the Supreme Court of New South Wales, dated Nov. 30, 1953. The facts appear in the judgment of the Board.

D *Sir Garfield Barwick, Q.C.* (of the Australian Bar), and *I. C. Baillieu* for the appellant.

R. Else Mitchell, Q.C., and *K. J. Holland* (both of the Australian Bar) for the respondent.

E **VISCOUNT KILMUIR, L.C.:** This is an appeal from a judgment of the High Court of Australia allowing the appeal of the respondent from part of a judgment of the Full Court of the Supreme Court of New South Wales.

F The questions to be decided arise out of an action in which the appellant was plaintiff and the respondent was defendant. The respondent is a company incorporated under the laws of the State of New South Wales, and at all material times was carrying on the business of coal mining in New South Wales. By declaration dated Sept. 13, 1951, the appellant claimed arrears of rent and royalty due and payable under a mining lease (hereafter referred to as "the mining lease") dated Sept. 1, 1919. The arrears so claimed were the sum of £880 12s. 7d. in respect of the period from Dec. 31, 1931, to Mar. 31, 1934, and the sum of £27,488 14s. 7d. in respect of the period from Mar. 31, 1939, to Dec. 31, 1950. G The declaration stated that, by the mining lease, the appellant demised to the respondent all and singular the mines, beds, veins and seams of coal, shale and minerals of a similar character in or under certain lands therein described

H "with full liberty to the [respondent] to search for win get convert carry away sell and dispose of the said mines of coal shale or minerals of a similar character thereby demised together with free way leave and right and liberty of passage and other rights enabling the [respondent] to load and carry away the said coal shale and other minerals for a term of forty-three years computed from Sept. 1, 1919, at a yearly rental of £819 payable quarterly each year provided that the [respondent] be permitted to win work carry away forth and out of the said mines and seams of coal shale and other minerals of a similar character such a quantity of coal shale and such other minerals as should at the rate per ton hereinafter mentioned produce in any one year of the term thereby created the said sum of £819 and at a royalty per ton of all coal wrought and brought to bank from the said mines thereby demised over and above such quantity as may be worked in respect of such rent as aforesaid as follows: when the selling price per ton of round or best coal obtained from the said mines free on board at Newcastle should be less than 6s. 3d. the royalty to be 5d. per ton; when the said selling price should be not less than 6s. 3d. but less than 7s. 3d. the royalty to be 6d. per ton; when the said selling price should be not less than 7s. 3d. but less

than 8s. 3d. the royalty to be 7d. per ton and so on the royalty to be increased by one penny for every increase of one shilling in the said selling price provided that such royalty as aforesaid should be reduced to a fixed and constant royalty of 3d. per ton in respect of all small coal so wrought and brought to bank as aforesaid and above such quantity as may be worked in respect of the fixed rent thereinbefore provided and provided further that fractions of a shilling on such selling price as aforesaid should not be taken into account in calculating the said royalty and a royalty in respect of all shale and other minerals of similar character wrought and brought to bank as in the said memorandum of lease provided . . .”

The respondent pleaded three pleas in answer to the appellant's declaration, and the appellant demurred to those pleas. When the demurrer came on for argument the Supreme Court gave leave to the respondent to amend its pleas. Pursuant thereto, the respondent filed six pleas in substitution for the original three pleas, and the demurrer was argued as demurrers to each of these six pleas. The present appeal relates only to the fourth and fifth pleas, but it is convenient to summarise the first five pleas, having regard to the arguments presented to the Board.

The first plea was limited to the sum of £333 17s. 7d., being the amount claimed in respect of the period Dec. 31, 1931, to Dec. 31, 1932, and alleged that that sum represented a deduction of 22½ per cent. of the rent and royalty payable in terms of the mining lease, which deduction the respondent was entitled to make by virtue of the New South Wales Reduction of Rents Act, 1931.

The second plea was limited to the sum of £9,513 10s. 2d., being the amount claimed in respect of the periods Jan. 1, 1933, to Mar. 31, 1934, and the period Mar. 31, 1939, to Dec. 31, 1947, and alleged that that sum represented a deduction of 22½ per cent. of the rent and royalty payable in terms of the mining lease, which deduction the respondent was entitled to make by virtue of the Landlord and Tenant (Amendment) Act, 1932-1947. The Reduction of Rents Act, 1931, had expired on Dec. 31, 1932, and was replaced by the Act last mentioned, which itself expired on Dec. 31, 1947.

The third plea was limited to the sum of £649 14s. 11d., being the amount claimed in respect of the period Jan. 1, 1948, to June 30, 1948, and alleged that Commonwealth Prices Regulation Order No. 985 applied to the lease so as, in effect, to continue during the said period the right of the respondent to make a 22½ per cent. deduction from the amount of the rent and royalty otherwise due under the mining lease. The plea alleged that the sum pleaded to was the amount of the deduction which it was so entitled to make.

The fourth plea was limited to the sum of £1,093 10s. 5d., being the sum claimed for the period July 1, 1948, to Sept. 20, 1948, and again relied on Commonwealth Prices Regulation Order No. 985, but alleged that the order had an effect on the lease different from that alleged under the third plea. It alleged that the effect of the order was to fix the amount payable by the respondent for the period to which the plea related at the amount which would have been payable under the mining lease on the basis of the selling price of coal f.o.b. Newcastle at Aug. 31, 1939, less a reduction of 22½ per cent. It alleged that the sum pleaded to was a sum in excess of the amount so fixed by the order.

The fifth plea was limited to the sum of £16,778 14s. 1d., being the sum claimed in respect of the period Sept. 20, 1948, to Dec. 31, 1950, and relied on the same Prices Regulation Order No. 985 as having the same effect on the mining lease as alleged in the fourth plea, but relied on it as having force under a statute of New South Wales* taking the place of the Commonwealth statute and regulations, which had ceased to operate on Sept. 20, 1948. It will be observed that the total sum mentioned in the first five pleas is the same as the sum sued for, namely, £28,369 7s. 2d.

* Prices Regulation Act, 1948 (No. 26) (New South Wales), s. 2 (1).

- A On Nov. 30, 1953, the Supreme Court (STREET, C.J., OWEN and HERRON, JJ.), gave judgment for the respondent on the demurrers to the first and second pleas; judgment was given for the appellant on the demurrers to the third, fourth and fifth pleas, HERRON, J., dissenting as to the fourth and fifth pleas. The respondent appealed to the High Court of Australia against so much of the judgment of the Supreme Court as related to its third, fourth and fifth pleas.
- B The High Court (SIR OWEN DIXON, C.J., WEBB and FULLAGAR, JJ.) allowed the appeal and gave judgment for the respondent on the demurrers to the fourth and fifth pleas. The appellant now appeals from that decision. The High Court did not disturb the judgment of the Supreme Court on the demurrer to the third plea.

- C The statutes on which the first two pleas were based contain provisions for a reduction by $22\frac{1}{2}$ per cent. of "rent reserved by or under any lease" to which the statutory provisions applied (see s. 6 (1) of the Reduction of Rents Act, 1931 (N.S.W.), and s. 15 (1) of the Landlord and Tenant (Amendment) Act, 1932-1947 (N.S.W.)). The Supreme Court held that all the payments to be made under the mining lease were rent, notwithstanding that only the fixed yearly sum of £819 was therein described as a "rental", and, therefore, that the two statutes just mentioned reduced the total amount of rent and royalty for the periods covered
- D by the first and second pleas. The appellant did not lodge a cross-appeal to the High Court in respect of the decision on these two pleas.

- E Their Lordships now turn to the legislation which is relevant in respect of the fourth and fifth pleas. The National Security Act, 1939-1949, of the Federal Parliament empowered the Governor-General of the Commonwealth, for the purposes of the defence of the Commonwealth, to make regulations controlling (inter alia) rents payable under all leases, including mining leases, and to control prices of goods and moneys payable under contract or otherwise. Many regulations were made under this Act, and were from time to time amended by the Governor-General. The regulations which are material to this appeal are the National Security (Prices) Regulations. The Prices Regulations were first made on Aug. 22, 1940. They were amended from time to time, and on Mar. 17, 1943,
- F being the date of the making of the Prices Regulation Order No. 985 by the Commonwealth Prices Commissioner (which was relied on in the fourth and fifth pleas), the material parts of the regulations were as follows:—

- G "3. In these regulations, unless the contrary intention appears . . . 'declared service' means any service declared by the Minister, by notice in the Gazette, to be a declared service for the purpose of these regulations . . . 'rate' includes every valuable consideration whatsoever, whether direct or indirect . . . 'service' means—(a) any service supplied or carried on by any person or body of persons, whether incorporated or unincorporated, engaged in a public utility undertaking or an industrial, commercial . . . enterprise . . . ; and (b) any rights or privileges for which remuneration is payable in the form of royalty, stumpage, tribute or other levy based on volume or value of goods produced, and includes any other undertaking or service which is declared by the Minister, by notice in the Gazette, to be in his opinion essential to the life of the community . . .
- H

- I "22. (2) The Minister may, by notice in the Gazette, declare any service to be a declared service for the purpose of these regulations; Provided that the Minister shall not make any declaration under this sub-regulation with respect to any service supplied or carried on by the government of any state except with the concurrence of the executive government of that state; (3) Any declaration by the Minister in pursuance of this regulation may be made generally or in respect of any part of Australia or any proclaimed area or in respect of any person or body or association of persons; (4) Any such notice may, by notice in the Gazette, be amended, varied or revoked by the Minister.

" 23. (2) The commissioner may, with respect to any declared service, from time to time, in his absolute discretion, by order published in the Gazette—(a) fix and declare the maximum rate at which any declared service may be supplied or carried on generally or in any part of Australia or in any proclaimed area; or (b) declare that the maximum rate at which any such service may be supplied or carried on by any person or body or association of persons shall be such rate as is fixed by notice by the commissioner in writing to that person or body or association of persons. (2A) In particular, but without limiting the generality of the last preceding sub-regulation, the commissioner, in the exercise of his powers under that sub-regulation, may fix and declare—(a) different maximum rates according to differences in the quality, description or volume of the service supplied or carried on or in respect of different forms, modes, conditions, terms or localities of trade, commerce or supply; (b) different maximum rates for different parts of Australia or in different proclaimed areas; (c) maximum rates on a sliding scale; (d) maximum rates on a condition or conditions; (e) maximum rates for cash or on terms; (f) maximum rates according to or upon any principle or condition specified by the commissioner; and (g) maximum rates relative to such standards as he thinks proper, or relative to the rates charged by individual suppliers on any date specified by the commissioner, with such variations (if any) as in the special circumstances of the case the commissioner thinks fit, or so that such rates will vary in accordance with a standard, or time, or other circumstance, or shall vary with profits or wages, or with such costs as are determined by the commissioner. (3) The commissioner may at any time by order published in the Gazette amend, vary or revoke any order made in pursuance of this regulation . . . "

On Nov. 30, 1942, the Minister, acting under the power conferred on him by the Prices Regulations, had declared that, with certain immaterial exceptions, all services supplied or carried on in Australia were "declared services" for the purposes of the Prices Regulations. On Mar. 17, 1943, the Prices Commissioner made the Prices Regulation Order No. 985, the material parts of which are as follows:—

" Order 985 Issued by the Commonwealth Prices Commissioner

1. . . . 2. I fix and declare the maximum rates per ton of coal mined at which mining rights may be supplied in respect of coal mined from the classes of mining properties mentioned hereunder to be—(a) Properties subject to Crown lease which are sub-leased by the Crown lessee on Aug. 31, 1939—the amount per ton of coal mined now payable under the Crown lease plus the amount per ton of coal mined paid by the sub-lessee on Aug. 31, 1939 (after deducting the amount then payable under the Crown lease). (b) Properties subject to Crown lease which were not sub-leased on Aug. 31, 1939, but have since been sub-leased—the amount at present payable under the Crown lease per ton of coal mined plus one penny. (c) Properties not subject to Crown lease which were privately leased on Aug. 31, 1939—the amount per ton of coal mined payable on Aug. 31, 1939. (d) Properties not subject to Crown lease which were not previously leased on Aug. 31, 1939—three pence per ton. 3. . . . 4. For the purpose of this order, 'lease' includes any contract or agreement, express or implied, whereby rights to mine coal are granted or leased for some fixed or ascertainable period on a consideration of the payment of a royalty, tribute or other levy based on coal mined—and 'leased' has a corresponding meaning."

After the making of Order No. 985, the Prices Regulations were amended from time to time in certain respects, but, having regard to the view which they have formed as to the construction and effect of reg. 23 (2), their Lordships find it unnecessary to refer to any of these amendments.

- A The appellant contended that the rent payable under the mining lease now in question was not capable of being controlled, and was not, in fact, controlled by Order No. 985; consequently its demurrers to the fourth and fifth pleas should have been upheld. Before considering in detail the questions which arise on this contention, their Lordships must mention a further argument which counsel sought to advance for the appellant. He pointed out (i) that the respondent had
- B succeeded on its first and second pleas on the basis that the State Act of 1932-1947* operated to reduce the rent under the mining lease, including the so-called royalty, up to Dec. 31, 1947, (ii) that the respondent now sought to argue that Order No. 985 operated to reduce the royalty as from Jan. 1, 1948. He desired to argue that the respondent was estopped from putting forward this argument, for, if Order No. 985 so operated as from Jan. 1, 1948, it must also
- C have so operated from Mar. 17, 1943. The State Act and the order could not both have operated to reduce the royalty during the period from Mar. 17, 1943, to Dec. 31, 1947; therefore, said counsel, the arguments now sought to be put forward by the respondent are inconsistent with the judgment already given in its favour by the Supreme Court on its first and second pleas, and it is estopped from advancing this argument. Counsel for the respondent submitted that the
- D appellant should not be allowed to advance this plea of estoppel at the present stage of the proceedings. With this submission their Lordships agree. The alleged inconsistency in the respondent's pleas was present when the original pleas were delivered on Nov. 2, 1951; yet the appellant did not base any argument on this point in the Supreme Court. Next, this same plea of estoppel could have been advanced in the High Court, since, at that stage, the Supreme Court had
- E given its decision on pleas 1 and 2, and there was no appeal from that decision. Moreover, their Lordships think that the plea raises questions of some complexity, the answer to which would depend, to some extent at least, on the rules of pleading in force in Australia and on decisions of the courts in Australia. Their Lordships have not the advantage of a judgment on this point by the High Court, since the appellant did not think fit to take it in that court. In these circumstances, their
- F Lordships decline to allow the appellant to advance the plea of estoppel at this stage, and they now turn to a consideration of the questions arising for decision on this footing.

The first question is whether the rights which the respondent possessed under the mining lease were

- G "rights or privileges for which remuneration is payable in the form of royalty"
- within the meaning of reg. 3 (b) of the National Security (Prices) Regulations. Counsel for the appellant argued that they were not. He submitted that the words "rights or privileges" were apt to cover rights exercised over the land of another, but not to describe the incidents of ownership of the soil, whether in fee or for a term of years; that the phrase "remuneration in the form of royalty" is not apt to describe rent payable by a lessee to a lessor; and that reg. 3 (b) only applied where the whole of the "remuneration" was payable in the form of royalty, whereas, under the mining lease, part at least of the remuneration (i.e., the dead rent of £819) was admittedly payable in the form of rent. Their Lordships appreciate that there is much force in these arguments, but they have
- H come to the conclusion that they must fail, having regard to the wording of the regulations as a whole, and to their object as revealed by that wording. They think that, when a lessee takes and carries away coal, he may fairly be described as exercising a right, even although it is a right which is incident to his interest in the soil as lessee. They recognise that the sum described as a "royalty" in the mining lease has been held by the Supreme Court to be part of the rent reserved by the lease, but they think that a rent which is payable at a rate per
- I

* The Landlord and Tenant (Amendment) Act, 1932-1947; see p. 94, letter E, ante.

ton of coal wrought and brought to bank is ordinarily referred to as a royalty, A
and it is noteworthy that this is the word which is used in the mining lease itself.
Finally, they think that counsel's last argument on this point must be rejected.
To accept it would be, in effect, to alter "remuneration" to "*the* remuneration"
or to insert the word "only" after the words "for which remuneration is
payable" in reg. 3 (b). In their Lordships' opinion, reg. 3 (b) covers every case B
in which any remuneration in the form of royalty is payable, even although
part of the total remuneration may be payable in the form of a fixed rent.

Regulation 3 (b), which has just been construed, forms part of the definition
of "service" which is contained in reg. 3. Reading this regulation in conjunction
with reg. 23 (2), their Lordships reach the conclusion that, in the regulations,
the lessor under the mining lease is regarded as the "supplier" of a service,
namely mining rights, and the lessee is regarded as a person who is paying the C
lessor remuneration for the "supply" of these rights. This is a curious use of
words, but, as the High Court observed in its judgment (91 C.L.R. at p. 499),

"by definitions and the introduction of conclusive presumptions into the
regulations . . . many unnatural meanings have been given to words . . ."

The next question arises on the wording of reg. 23 (2). It is admitted that the D
supply of mining rights under the mining lease, if it is a service, is also a "declared
service" by reason of reg. 22 (2) and the declaration, already mentioned, which
was made by the Minister on Nov. 30, 1942. Regulation 23 (2) empowers the
commissioner to "fix and declare the maximum rate at which any declared
service may be supplied." Counsel for the appellant contends that this regulation
gives the commissioner no power to fix the rate of royalty to be paid under E
the mining lease, since the words "may be supplied" can only refer to a "supply"
of a service after the date of an order fixing the rate, whereas the mining rights
exercised by the appellant under the mining lease were "supplied" once and
for all when the mining lease was executed in 1919, and thereafter there could
be no "supplying" of rights. This contention was rejected by HERRON, J.,
in the Supreme Court. The High Court did not find it necessary to express a F
final view on the point, but indicated an inclination to the view that the conten-
tion on behalf of the appellant was ill-founded. Their Honours observed
(91 C.L.R. at p. 500):

"Now it seems to be clear enough that para. (b) of the definition of the
word 'service', operating as it does upon and therefore through the
expression 'declared service', extends the application of reg. 23 (2) beyond G
its natural meaning and must, so to speak, be read into it. Regulation
23 (2) (a) thus should be understood as if expressed to authorise a fixing
and declaring of the maximum rate at which any declared service including
any rights or privileges for which remuneration is payable in the form
of royalty etc. may be supplied or carried on. The incongruity of the word
'supply' with rights or privileges for which a royalty is payable is obvious. H
But another word inappropriately chosen is 'remuneration' to describe
a royalty. These words evidently were intended to receive a flexible meaning
in accordance with the context and the subject-matter. It seems almost
undeniable that they cover royalties payable in connection with the exercise
of rights or privileges granted after the making of an order fixing or declaring
the maximum royalty payable therefor. Do they cover royalties payable in I
connection with the exercise of rights or privileges granted before the
making of an order fixing or declaring the maximum royalty, and before the
making of the regulations? There is much to support the view that they do.
The regulations were dealing with 'goods and services', a collocation familiar
in economics, and they were assigning to the latter category the providing
of rights and privileges to be exercised for the production of goods at a
royalty etc. The word 'supply' in relation to the category if it were not
artificially extended would be equivalent to 'perform' and, if it is to be

A moulded to fit the extension of the category, the analogous meaning is to maintain the enjoyment of the right rather than to grant it once for all. The subject is 'price fixing' as a war measure and it is obvious that what must be controlled are the rates that affect the cost of production and go into the price of the goods. It is the royalty charged *de die in diem* that matters, not the grant of the right and the initial fixing of a royalty. It is to be noticed that royalties on the value of goods produced were included. That doubtless was because a rise in value would mean a rise in the royalty. And that would be so irrespective of the term for which the right or privilege was granted."

Their Lordships have found this a difficult and doubtful point, but they have come to the conclusion that the appellant's argument fails. Their Lordships are impressed by the considerations mentioned in the judgment of the High Court, and by the reasoning of HERRON, J., and they think that the Prices Regulations contemplated the lessor under a mining lease as providing a supply of mining rights throughout the term of the lease, as and when the lessee exercises these rights. It follows that, on Mar. 17, 1943, when the commissioner made Order D No. 985, he had power to fix the maximum rates per ton of coal payable by the lessee under the mining lease. The last question which arises is as to the true construction of para. 2 (c) of that order which has already been set out.*

What has to be determined is the meaning, in this context, of the words in the paragraph "the amount per ton of coal mined payable on Aug. 31, 1939". In their Lordships' judgment, this means the amount of royalty payable per ton of coal mined on Aug. 31, 1939; the date refers to the mining of the coal and not to the payment of the royalty. It was argued that this provision cannot be applied unless it is proved that coal in respect of which royalty was payable was, in fact, mined on Aug. 31, 1939, but, in their Lordships' view, that is much too narrow a meaning to attach to this provision. The order is not concerned with what actually happened on that date; what it is concerned with is the rate of royalty which was then in operation. In effect, it poses this question: if coal in respect of which royalty was payable had been mined on that date what would have been the rate of royalty payable in respect of that coal?

If coal in respect of which royalty was payable had been mined on Aug. 31, 1939, it is not now disputed that the amount of royalty which the tenant was bound to pay in respect of it depended on two factors—the provisions of the lease and the provisions of the Landlord and Tenant (Amendment) Act, 1932-1947. The lease required payment at a rate per ton depending on the selling price of coal free on board at Newcastle, and the Act reduced the rent payable by a tenant. As this royalty is a form of rent, it therefore reduced the amount of royalty so calculated by $22\frac{1}{2}$ per cent. For example, if the result of applying the provision of the lease had been that, in respect of the amount of coal mined on that date, the tenant was liable to pay royalty amounting to £100, the Act would have reduced the tenant's liability, so that the tenant would only have been bound to pay £77 10s. In effect, the Act reduced the rate of royalty to $77\frac{1}{2}$ per cent. of the rate required by the lease, for it can make no practical difference whether the full rate of royalty is first multiplied by the total tonnage and the total is then reduced by $22\frac{1}{2}$ per cent., or the full rate of royalty is first reduced by $22\frac{1}{2}$ per cent. and then multiplied by the total tonnage.

It was argued that the amount of royalty per ton payable on Aug. 31, 1939, was the full amount provided in the lease, because the calculation must be taken in two stages; before the Act can apply, the total amount of royalty payable under the lease must first be calculated by using the rate provided by the lease.

* See p. 96, letter H, ante.

In other words, the Act, so it was argued, has nothing to do with rate per ton, it is only concerned with the total. This argument is not without force, but, in their Lordships' judgment, it does not give sufficient weight to the word "payable" in the order. Nothing was payable in 1939 except what remained after the Act had operated the statutory reduction. Strictly speaking, it is not perhaps very accurate to refer to an amount per ton being payable—what is payable is a sum of money; but, in their Lordships' view, what is meant by "the amount per ton . . . payable" is the amount which the tenant has to pay in respect of each ton mined, and the tenant did not have to pay anything until the Act had operated to reduce his liability. Their Lordships must, therefore, reject the argument of the appellant.

For the reasons given, their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Galbraith & Best* (for the appellant); *Light & Fulton* (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

KEEBLE v. KEEBLE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Mr. Commissioner Latey, Q.C.), December 6, 7, 1955.]

Divorce—Estoppel—Separation agreement—Agreement that neither party should institute any proceedings for restitution of conjugal rights "or otherwise"
—*Petition by husband for divorce.*

The parties married in 1926. By cl. 1 of a separation agreement made in 1953 they agreed that they should "live and continue to live separate and apart from each other" and that neither of them should "molest annoy or interfere with the other or institute any proceedings for restitution of conjugal rights or otherwise". The agreement also provided, by cl. 2, that if the marriage should be dissolved by a final or absolute decree of a court of competent jurisdiction a net sum of £3 weekly payable thereunder to the wife should cease to be payable. The husband petitioned for divorce on the ground of the wife's cruelty and the wife contended that by virtue of cl. 1 of the agreement, particularly of the words "or otherwise" in that clause, the petition was barred.

Held: since the subject of the agreement was the separation of the husband and the wife the words "or otherwise" in cl. 1 thereof referred, on the true construction of that clause, to proceedings by which either party might compel the other to resume cohabitation; accordingly the proceedings which each party had agreed by cl. 1 not to institute did not include proceedings for divorce, as was confirmed by cl. 2 of the agreement which provided for the contingency of the marriage being dissolved, and the husband was not estopped from proceeding with the petition.

[**Editorial Note.** Covenants in separation deeds often provide against (i) either party taking proceedings against the other to compel a resumption of

A cohabitation, and (ii) either party taking proceedings in respect of misconduct prior to the date of separation; see, e.g., 7 ENCY. FORMS AND PRECEDENTS (3rd Edn.) 316. As in the present case a decree nisi on the ground of cruelty was granted, it is material to note that the separation agreement, which was not under seal, did not contain any provision on the lines indicated in (ii) above.

B As to the validity of covenants not to sue contained in deeds of separation, see 12 HALSBURY'S LAWS (3rd Edn.) 295, para. 587; and for cases on the subject, see 27 DIGEST (Repl.) 377, 3104.]

Cases referred to:

- (1) *Rowley v. Rowley*, (1866), L.R. 1 Sc. & Div. 63; 35 L.J.P. & M. 110; 27 Digest (Repl.) 376, 3103.
- (2) *Goldblum v. Goldblum*, [1938] 4 All E.R. 477; [1939] P. 107; 108 L.J.P. 19; 160 L.T. 56; 27 Digest (Repl.) 376, 3102.
- (3) *H— v. H—*, [1938] 3 All E.R. 415; 159 L.T. 525; 27 Digest (Repl.) 378, 3117.
- (4) *Rose v. Rose*, (1883), 8 P.D. 98; 52 L.J.P. 25; 48 L.T. 378; 27 Digest (Repl.) 433, 3616.
- (5) *L. v. L.*, [1931] P. 63; 100 L.J.P. 76; 144 L.T. 723; 27 Digest (Repl.) 377, 3105.
- (6) *Whittaker v. Kershaw*, (1890), 45 Ch.D. 320; sub nom. *Re Kershaw*, 60 L.J.Ch. 9; 63 L.T. 203; 27 Digest (Repl.) 248, 1998.
- (7) *National Asscn. of Local Government Officers v. Bolton Corpn.*, [1942] 2 All E.R. 425; [1943] A.C. 166; 111 L.J.K.B. 674; 167 L.T. 312; 106 J.P. 255; 2nd Digest Supp.

E Petition.

The parties were married on Jan. 9, 1926, and there were three children of the marriage. On Aug. 1, 1953, the parties entered into a separation agreement which provided by cl. 1:

F “The husband and the wife shall live and continue to live separate and apart from each other and neither of them shall molest annoy or interfere with the other or institute any proceedings for restitution of conjugal rights or otherwise”.

G By cl. 2 it was agreed that if the marriage should be dissolved “by a final or absolute decree of a court of competent jurisdiction” the provision, made by the agreement, that the wife should receive £3 a week net for life should cease; and there was also a common form cesser clause in the event of the resumption of cohabitation. The husband now petitioned for divorce on the ground of the wife's cruelty. By her answer the wife denied that she had been guilty of cruelty and pleaded that by reason of the words “or otherwise” in cl. 1 of the agreement the husband was estopped from prosecuting the suit. Mr. Commissioner LATEY, Q.C., ruled that the husband was not estopped and having heard the evidence granted a decree nisi in the husband's favour. This report deals solely with the question of estoppel.

H *R. Castle-Miller* for the husband.

A. E. Bolton for the wife.

I **MR. COMMISSIONER LATEY, Q.C.:** It is submitted on behalf of the wife that the words “or otherwise” in cl. 1 of the separation agreement bar this petition. The well known and somewhat antique case of *Rowley v. Rowley* (1) (1866) (L.R. 1 Sc. & Div. 63) was cited. In that case the wife sued for dissolution of marriage on the joint grounds of her husband's cruelty and adultery; the suit was not proceeded with on terms that the parties should execute a deed of separation, and on the wife's undertaking not to institute other proceedings in the divorce court. Notwithstanding that undertaking, the wife petitioned afresh for divorce, alleging the old charges of cruelty, and new charges of adultery.

One has to recall that as the law then stood a wife could obtain a divorce only by proving cruelty or desertion, coupled with adultery, apart from exceptional grounds which it is not necessary to mention. In that case there were plain unambiguous words which LORD CHELMSFORD, L.C. (L.R. 1 Sc. & Div. at p. 68) construed as preventing

“future proceedings in respect of matters forming the ground of a petition for a divorce which had occurred prior to the agreement.”

So the petition was dismissed on the exact language that the parties used in the agreement, as was pointed out by SIR WILFRID GREENE, M.R., in *Goldblum v. Goldblum* (2) ([1938] 4 All E.R. at p. 482). In the latter case, which was relied on by counsel for the husband, the wife's suit for judicial separation was compromised by a deed of separation, providing that the petition should be dismissed, but it contained no express provision that the charges of cruelty in that petition should be withdrawn. The Court of Appeal there held that on the true construction of the deed the wife had not undertaken to withdraw the charges, nor had she undertaken not to use them in subsequent divorce proceedings; therefore, the petition was heard and tried.

Counsel for the wife relied on *H— v. H—* (3) ([1938] 3 All E.R. 415). In that case the wife petitioned for divorce and it was submitted that she was barred by her withdrawal of charges of cruelty which had been made in a previous petition by her for judicial separation, those charges being withdrawn specifically in a deed of separation which compromised that petition. It was there held by SIR BOYD MERRIMAN, P., that as she had withdrawn the charges, she could not go on with them in the later petition. The President reviewed the leading cases on this particular subject, including *Rowley v. Rowley* (1), *Rose v. Rose* (4) (1883) (8 P.D. 98), a case which generated the well known and comprehensive *Rose and Rose* clause, and *L. v. L.* (5) ([1931] P. 63), in which LORD MERRIVALE, P., held that the husband's covenant in a deed of separation not to charge adultery committed before the deed was binding on him and therefore the husband was debarred from raising such charges later. It should be noted that, in the present case, in the correspondence between the solicitors leading up to the deed there was no allegation of cruelty or of any other form of matrimonial misconduct, and the husband told me that all that he had in his mind was to get away from a position which had become intolerable to him and thus he entered into this agreement to separate, and he said he had no intention of going back on it.

Counsel for the wife, in a very able submission, contended that the words “or otherwise” meant that the husband could bring no civil proceedings against the wife, and in support of that contention he cited two cases in which the words “or otherwise” had in his view been decided on the lines he maintained. There are numerous cases on the meaning of the words “or otherwise” or “or other” and counsel put before me two of them. I am afraid neither of them assisted me very much, owing to their peculiar context, but it is only fair to pay tribute to counsel's submission by dealing with them. In *Whittaker v. Kershaw* (6) (1890) (45 Ch.D. 320), it was a question of whether a married woman could be sued by an executor having regard to the words of s. 1 (2) of the Married Women's Property Act, 1882. That section* reads:

“A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole”

The Court of Appeal in that case applied the well established principle of ejusdem generis, that is to say that where general words follow particular ones the rule is

* Repealed by the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 5 and Sch. 2; see now s. 2 (1) of that Act: 11 HALSBURY'S STATUTES (2nd Edn.) 811.

A to construe the general words as meaning "other such like". In that case, applying that principle to the words "or otherwise" the Court of Appeal held that the genus was the "like" or the status of a feme sole in which capacity she could be sued. In *National Asscn. of Local Government Officers v. Bolton Corpn.* (7) ([1942] 2 All E.R. 425) the question arose from the statutory definition* of a "workman" as

B "any person who . . . works under a contract with an employer whether the contract be by way of manual labour, clerical work, or otherwise . . ."

The House of Lords had to construe the meaning of words in a statutory order, and VISCOUNT SIMON, L.C., said (*ibid.*, at p. 428) that the use of the words "or otherwise" did not bring into play the *eiusdem generis* principle because "manual labourer" and "clerical work" did not belong to a single limited genus. He held that "or otherwise" meant "or in another way".

C Those cases did not seem to assist me in the context of the present case. Clearly the *eiusdem generis* principle must be applied to the present case, otherwise the words "or otherwise" are no more than empty surplusage. The whole purpose of the agreement was to separate the parties on terms which excluded any reference to matrimonial misconduct of any kind. If I am compelled to give a meaning to the words "or otherwise", I have concluded (i) that the genus being the separation of the husband and wife, those words mean that neither by a process for restitution of conjugal rights, nor in any other possible way, could legal steps be taken by either party to compel the other to come together; and (ii) that the very much wider meaning sought to be put on those words is excluded by the fact that in cl. 2 the possibility of a divorce in the future is taken into consideration. Therefore, I find that this petition is not barred by those words in the agreement, and there is no estoppel.

E [HIS LORDSHIP reviewed the evidence and granted the husband a decree nisi.]

Rule accordingly.

Solicitors: *Theodore Goddard & Co.* (for the husband); *H. B. Wedlake, Saint & Co.* (for the wife).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

* Industrial Courts Act, 1919, s. 8: see 25 HALSBURY'S STATUTES (2nd Edn.) 781.

WILLIAMS v. OWEN.

[EXETER ASSIZES (Finnemore, J.), November 10, 1955.]

Inn—Damage to guest's property—Liability of innkeeper at common law—Guest's car left in garage of inn—Garage destroyed by fire and car ruined—No negligence on part of innkeeper.

Fire—Accidental fire—Action for damage to property of guest of innkeeper—Car burnt in garage—Statutory defence in absence of negligence—Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3 c. 78), s. 86.

The plaintiff, while staying as a guest at the defendant's hotel, placed his car in the garage attached to the hotel. During the night the garage was destroyed by fire and the plaintiff's car was so badly damaged that it was no longer of any value. The cause of the fire was not ascertained, but there was no negligence on the part of the defendant or of his servants. In an action against the defendant the plaintiff claimed the sum of £820, being the value of the car and its contents, as the loss which he had sustained owing to the fire.

Held: the defendant was under no such absolute liability as, independently of negligence, would render him responsible for the injury to the car because his responsibility as innkeeper did not extend to responsibility for injury to a guest's goods as distinct from their loss or theft (*Winkworth v. Raven*, [1931] 1 K.B. 652, applied; *Day v. Bather* (1863), 2 H. & C. 14, distinguished) and, even if it had, he would have been protected by s. 86 of the Fires Prevention (Metropolis) Act, 1774*; and, as negligence on the defendant's part had not been established, the claim failed.

[**Editorial Note.** Among the defences raised is that the liability of an innkeeper, in the case of fire, is limited to circumstances which show negligence attributable to him, since in other circumstances the fire will have occurred accidentally and he will be protected from liability under the Fires Prevention (Metropolis) Act, 1774, s. 86 (see p. 107, letter D, post). Authority for the proposition that "accidentally" in that section is equivalent to "without negligence" is afforded by *Collingwood v. Home & Colonial Stores, Ltd.* ([1936] 3 All E.R. at pp. 203, 204, citing *Filliter v. Phippard* (1847), 11 Q.B. 347).

As to an innkeeper's liability at common law in respect of a guest's property, see 18 HALSBURY'S LAWS (2nd Edn.) 150-154, paras. 208-211; and for cases on the subject, see 29 DIGEST 10-12, 128-160.

For the Fires Prevention (Metropolis) Act, 1774, s. 86, see 13 HALSBURY'S STATUTES (2nd Edn.) 10.]

Cases referred to:

- (1) *Winkworth v. Raven*, [1931] 1 K.B. 652; 100 L.J.K.B. 206; 144 L.T. 594; Digest Supp.
- (2) *Day v. Bather*, (1863), 2 H. & C. 14; 2 New Rep. 37; 159 E.R. 6; sub nom. *Bather v. Day*, 32 L.J.Ex. 171; 8 L.T. 205; 29 Digest 15, 188.
- (3) *Maclean v. Segar*, [1917] 2 K.B. 325; 86 L.J.K.B. 1113; 117 L.T. 376; 29 Digest 9, 120.
- (4) *Sochacki v. Sas*, [1947] 1 All E.R. 344; 36 Digest (Repl.) 145, 767.

Action.

The plaintiff claimed £820 damages against the defendant, the managing director of a hotel, for loss sustained by the plaintiff through a fire which broke out at about 11.30 p.m. on June 13, 1952, in the garage of a hotel where the plaintiff had placed his car while he was a guest at the hotel. In a corner of the garage was a small boiler for heating water for the rooms above the garage which were occupied by the hotel staff. The boiler, which was provided with a

* The terms of the section are set out at p. 107, letter C, post, and see also footnote on that page.

A closing door, was surrounded, so far as the garage was concerned, by a concrete wall seven feet six inches high and was stoked from the far side where there was a ramp. The usual practice was for the boiler to be lit at about noon and stoked until 2.30 p.m., when it was shut down and the fire was allowed to die out, and this practice was, apparently, followed on June 13. The boiler was usually out by 8 p.m. The plaintiff claimed the value of his car, which was ruined in the fire, and its contents. His claim was based on the liability of the defendant as an innkeeper, and, alternatively, on the negligence of the defendant in permitting a lighted stove to be in the garage.

John Stephenson for the plaintiff.

D. J. C. Ackner for the defendant.

C **FINNEMORE, J.:** This case arises out of a fire which happened at the Gara Rock Hotel, near Salcombe in Devonshire, on June 13, 1952. Mr. Emrys Williams, the plaintiff, and his family had been, for the first fortnight in June, guests at the hotel, the managing director of which was the defendant, Mr. Alban Lloyd Owen. On that night a fire broke out in the garage which was attached to the hotel; there were about five cars in the garage at the time. D The result of the fire was the complete destruction of the garage and the ruin of the cars which were in the garage, and, in particular, the plaintiff's Morris car which had been put there the previous night. The value of the car is agreed at £800, and the contents at some £20. The present action is brought by the plaintiff against the defendant for the sum of £820, being the loss in the fire.

E It was contended by counsel for the plaintiff that the liability which attaches to innkeepers covered this case, and that the defendant was responsible on the basis of absolute liability, irrespective of any negligence or actual default on his part. Counsel further submitted that, on the facts, the fire broke out owing to the negligence of the defendant or of those for whom he was responsible, and that, therefore, he was liable for the loss which the plaintiff sustained. It was F agreed that the defendant came within the category of an innkeeper and that he was subject to the liabilities attached to an innkeeper. It has long been the law in this country that an innkeeper, if he has the accommodation, must accept the traveller and also the traveller's goods and chattels, within the proper and obvious limits; and those goods and chattels, or belongings, which used to include the traveller's horse and carriage, now include the traveller's motor car.

G The real matter of dispute between the parties on this part of the case is whether an innkeeper is absolutely liable for injury done to goods while in his keeping, or whether he is absolutely liable only for their loss, and in particular for their loss by theft. Counsel for the plaintiff submitted that, as this car was reduced to a state in which it was quite valueless and, what is sometimes called in insurance cases "a total loss", it was, in any event, not a car which was merely H injured, but a car which was lost. I do not think that can be right. I am sure that is not what the word "lost" means in its application to the liabilities of an innkeeper; nor, indeed, could the car be said to be "lost" in any ordinary sense of the word. The car was still in existence, that is to say identifiable, after the fire, although it was no longer of any value as a motor car, being in such a state that it could be made to run again as a car only at a prohibitive cost.

I What is the duty of the innkeeper? He must receive travellers, and he must receive traveller's goods. If those goods are stolen—if they are "lost" in the literal sense, if they vanish—the innkeeper is responsible, without there being any default on his part. Does that liability apply to injury which may occur to the goods while in his possession if that injury is caused without any negligence on the part of the innkeeper or his servants? This matter was discussed in cases which were cited to me and it was decided in *Winkworth v. Raven* (1) ([1931] 1 K.B. 652), an appeal from the county court to the Divisional Court which,

at that date, used to hear appeals from the county courts. The Divisional Court consisted of SWIFT and MACNAGHTEN, JJ. In that case a motor car was put into the garage of a hotel, as in the present case, but it was the opposite element to fire, namely, cold, which afflicted the car. There was some exceptionally severe weather; some water was left in the radiator of the car, the car was badly injured, and the plaintiff sued the innkeeper. In the county court the matter seems to have been treated by the learned county court judge on the basis of a contract of bailment, but in the Divisional Court it was argued and dealt with as a plain case of the relationship of innkeeper and guest. In that case it was laid down clearly that, while the innkeeper, according to ancient custom, was responsible for the safe custody of the goods—that is, to prevent their being stolen and lost—he was not responsible, without negligence, if the goods became injured or damaged while in his custody. The principle has been succinctly stated in 18 HALSBURY'S LAWS OF ENGLAND (2nd Edn.), p. 151, in a passage which follows a statement of the general law on the subject:

“ . . . he is liable for keeping them safely unless they are lost by the fault of the traveller himself. But he is not an insurer of his guest's goods generally; that is to say, he is not responsible in case of injury to, as opposed to loss of, such goods unless negligence on his part is proved.”

In other words, an innkeeper is an insurer of his guests' goods against loss, and it does not signify, as far as that application is concerned, if they are stolen by burglars, or by the servants of the inn, or by any other cause.

The authority for the qualifying sentence in the passage which I have just quoted is *Winkworth v. Raven* (1). In that case SWIFT, J., laid down the law quite plainly. In the course of his judgment he said ([1931] 1 K.B. at p. 657):

“ I can find no case in which an innkeeper has been held liable for injury to goods as opposed to loss of the goods unless default on the part of the innkeeper has been proved. If a guest's goods are damaged while at an inn, he must prove that such damage arose from an act of the innkeeper concerned, or his servants, which was negligent, that is, was done in breach of some duty which the innkeeper owed to the guest.”

Day v. Bather (2) (1863) (2 H. & C. 14) was cited to me as indicating the contrary view. I think that possibly it does do so, but the facts there were very different from those in the present case. In that case a horse was brought to an inn by a traveller and was left at the inn while the traveller went away for some days. While the horse was out being exercised by an ostler, it got injured, and the innkeeper, who was responsible for the ostler, was held to be liable. There is no other case in which it has been held that the innkeeper, in the absence of negligence, is responsible for injury to goods. In *Winkworth v. Raven* (1) SWIFT, J., referred to *Maclean v. Segar* (3) ([1917] 2 K.B. 325), a decision of McCARDIE, J. I also think it useful to refer to that case because it seems to me to explain not only why this otherwise rather strange anomaly grew up in our law, but also the reasonable limits which the courts ought to apply to it. That was a case of personal injury to a guest in a hotel, and it was found on the facts that the hotel keeper had not taken proper precautions to keep the premises reasonably safe, quite apart from any duty which he owed as an innkeeper. McCARDIE, J., in dealing with this matter, said ([1917] 2 K.B. at p. 328):

“ He does not insure the personal safety of the guest. The reason for the graver liability in the case of goods (which is *prima facie* anomalous) is to be found in the social conditions which existed when the liability first became established. The prevalence of highway robbery and the risk of possible collusion between the thief and the innkeeper of those early days adequately account for the onerous burden on the latter with respect to goods: see JONES ON BAILMENT, p. 95.”

A To say to an innkeeper, "You are placed in this special position by keeping an inn. You have the responsibility of accepting travellers and their goods, and, moreover, you have the responsibility of seeing that those goods are not stolen," is very different from saying: "If you keep an inn, not only must you provide accommodation and meals for the traveller, not only must you receive his goods and see that they are not stolen, but you must also see that those

B goods are not injured, and, if they become injured, whether or not it is your fault or the fault of anyone for whom you are responsible, you will be held liable." The courts of today would, I think, hesitate to extend what is, after all, an anomalous position, by placing on innkeepers a greater degree of liability than that which has been established in the books. I think that *Winkworth v. Raven* (1) is good law, and, in any event, this court is bound by it.

C Counsel for the defendant took another point which was based on the Fires Prevention (Metropolis) Act, 1774, s. 86*, which reads:

"... no action, suit or process whatever shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall . . . accidentally begin, nor shall any recompence be made by such person for any damage suffered thereby, any law, usage or custom to the contrary notwithstanding . . ."

D The liability of the innkeeper was, plainly, a custom of the realm. It is true that it is embodied in what we call common law rules, but then common law is the legal expression of custom. It seems to me, therefore, that s. 86 of the Act of 1774 would also be an answer in this case. I suppose that by 1774 the legislature had appreciated the fact which LORD GODDARD, C.J., stated in *Sochacki v. Sas* (4) ([1947] 1 All E.R. at p. 345): "Everybody knows fires occur through accidents which happen without negligence on anybody's part." Parliament in 1774 apparently thought it right to enact that, whatever customs or usages there were to the contrary, in this country a man should not be held responsible for a fire which occurred accidentally—which I take to mean "without negligence on his

E part."

F The two points with which I have dealt are sufficient to show that in this case there was no absolute liability on the part of the innkeeper, because, first, there was injury to the car, and not theft or loss of the car, and, secondly, the damage having been caused by a fire, the Act of 1774 limited the liability of the innkeeper.

G That takes us to the second part of the case. Was this fire the result of negligence on the part of the defendant or those for whom he was responsible? It was accepted by counsel for the plaintiff that the doctrine *res ipsa loquitur* did not apply, and that, therefore, he had to prove that there was some default on the part of the defendant. That means two things: first, that there was negligence; and, secondly, that that negligence brought about the loss in this case.

H [His LORDSHIP reviewed the evidence, and continued:] It seems to me on the evidence that it is highly probable that the boiler [in the garage†] was not hot, and that, therefore, there was no glowing fire for some considerable time before the happening of the fire about which we have been inquiring in this case. There is no other suggestion which has been put forward. I do not think it is incumbent on the defendant to prove how the fire happened, although he ought

I to put all the evidence which he has before the court, and I do not think it is for this court necessarily to come to any decided view how the fire happened. One may well rest on the dictum of LORD GODDARD, C.J., in *Sochacki v. Sas* (4) ([1947] 1 All E.R. at p. 345): "Everybody knows fires occur through accidents which happen without negligence on anybody's part." Without anyone being

* This section of the Act is applicable to the whole of England, and not merely to the metropolis: see *Filliter v. Phippard* (1847) (11 Q.B. 347).

† See p. 104, letter I, ante.

able to say positively how the fire occurred, there was another possible source, and that is a 1927 baby Austin car which another guest placed in the garage at about 8.30 p.m. on the evening of the fire. It was a very old car. [His LORDSHIP referred to the evidence of expert witnesses which was to the effect that, if a short-circuit had occurred in the wires of that car, it could have been the cause of the fire. His LORDSHIP continued:] It is not for me to say whether I am satisfied, that that was the cause of the fire, but I think that, if I had to choose between the stove and the car, I should feel more attracted by the Austin car theory than by that of the stove; because I do not see any evidence to suggest that the stove caused the fire, and I think the evidence is very strong that the fire was not in fact "in", or alight, at the time when the accident happened. I am satisfied that the fire had nothing whatever to do with the stove, or with any fire that was in the stove. If that is right, it means that, in my opinion, there is no evidence of any negligence on the part of the defendant or his servants which brought about the fire. I am not satisfied that the stove, built-in and surrounded by the wall, was a dangerous or negligent thing to instal; and, in any event, I am satisfied that it did not cause the fire.

There was one other point which counsel for the defendant took before me, and which I do not propose to decide now, namely, whether it is possible to contract out of the innkeepers' liability. I am not prepared to say that it is; I am inclined at the moment to think that probably it is not possible. Anyhow, it is not necessary for the decision to which I have come, and I refer to it only in case this matter goes further, so that it can be appreciated that the point was taken by counsel, and argued by him. For the reasons which I have given, I think that the claim fails.

Judgment for the defendant.

Solicitors: *Bond, Pearce, Elliott & Knape*, Plymouth (for the plaintiff); *Nash, Howett, Cocks & Clapp*, Plymouth (for the defendant).

[Reported by CONRAD OLDHAM, Esq., Barrister-at-Law.]

WALDON v. THE WAR OFFICE.

[COURT OF APPEAL (Singleton, Jenkins and Parker, L.J.J.), November 30, December 1, 1955.]

Damages—Measure of damages for personal injuries—Consideration of similar cases by judge of first instance—Judge's discretion.

In an action for damages for personal injuries, counsel for the plaintiff sought to put before the court decisions in similar cases as affording some guidance on the amount of damages to be awarded. Counsel for the defendants objected to such material being before the court and his objection was upheld. On appeal,

Held: (i) the consideration by a judge sitting alone of cases similar to the one before him as a guide to the amount of damages to be awarded is a matter for the discretion of the judge, which should be exercised sparingly.

(ii) in the present case the injury sustained was not of a common kind, there had been decisions on it, one of which had been by the Court of Appeal, and the consideration of these might, in the particular circumstances, have been of assistance to the judge; the award of damages was too low and would be increased.

Rushton v. National Coal Board ([1953] 1 All E.R. 314) considered.
Appeal allowed.

[**Editorial Note.** SINGLETON, L.J., emphasises that the decision that a judge of first instance has a discretion to have regard to material showing the awards of damages in other cases similar to that which is before him is limited to

A trials by a judge without a jury (see p. 111, letter H, post). One consideration for allowing the discretion is that there is a general desire to approach regularity in assessments of damages (see p. 111, letter A, post). The present case was decided before the decision in *British Transport Commission v. Gourley* ([1955] 3 All E.R. 796) was reported, and in subsequent cases the factor of the incidence of income tax will require to be taken into account in relation to the assessment of damages for loss of earnings which was a substantial factor in the assessment in the present case (cf. at letter I below).

As to appeals from an award of damages by a judge alone, see 11 HALSBURY'S LAWS (3rd Edn.) 312, para. 508.]

Case referred to:

C (1) *Rushton v. National Coal Board*, [1953] 1 All E.R. 314; [1953] 1 Q.B. 495; 3rd Digest Supp.

Appeal.

The plaintiff appealed from a judgment of LLOYD-JACOB, J., dated July 25, 1955, at a trial without a jury at which he awarded the plaintiff £12,875 by way of damages for personal injuries.

D On Aug. 18, 1954, the motor car in which the plaintiff was a passenger collided with a lorry and trailer belonging to the defendants, and the plaintiff was injured. The defendants admitted liability and the only question for determination was the amount of the damages to be awarded. The plaintiff's spine was injured in the accident and the lower half of his body became paralysed. His injuries were medically summarised as follows: "Fracture (dislocation) of the twelfth dorsal vertebra resulting in a total transverse spinal syndrome below the eighth thoracic segment. Total paralysis of both lower limbs. Total paralysis of lower abdominal muscles. Total loss of sensation below the eighth thoracic segment. Total paralysis of bladder and bowels". As a result of his injuries the plaintiff was unable to do anything for himself, was unable to walk and needed the help of his wife for almost every action except one requiring only the use of his hands and arms. Further, the injuries caused the plaintiff great pain which, according to the medical evidence, was likely to persist. The plaintiff was twenty-eight years of age, was married and had one child, a son; his wish to have at least one more child had been rendered impossible by his condition.

G He had been apprenticed in his youth to an engineering company with whom he had remained until he reached the age of seventeen years. He spent the next four years in the Royal Navy and then worked for about five years with a firm as an engineer on the repair of instruments. At the time of the accident he was earning £9 15s. a week. A director of the company stated that the plaintiff had very bright prospects, described him as "one of the bright young men employed by the company" and said that he had a very good chance of a rise shortly to £10 10s. a week. There were good prospects of advancement, possibly H to the highest posts in the company. As a result of the plaintiff's injuries he would never be able to work again. He was attempting to do something with his hands in the way of clock repairing, but it was doubtful whether he would earn anything thereby.

At first instance the judge, acting on the assumption that the plaintiff would earn a little, assessed the damages at £12,875.

I The plaintiff appealed to the Court of Appeal on the ground that this figure was too low. In that court SINGLETON, L.J., said that there were three main points to be considered in the assessment of damages in the present case: (i) the loss of earnings; (ii) the suffering which the plaintiff had undergone or was likely to undergo and the loss of the "amenities of life"; and (iii) the necessity for the plaintiff's being attended day and night. He considered that a considerable sum should be awarded to the plaintiff by way of damages under head (i). As regards head (iii) he said that while the plaintiff had the services of his wife (and it was not suggested that any amount should be included in the damages on

account of her services) the plaintiff was not under the necessity of expending a large weekly sum for attendance, but that if she ceased to help the plaintiff he would need outside help. PARKER, L.J., emphasised the plaintiff's youth and that the injury to his spine was such as to result in deformity which did not always occur in such cases. The Court of Appeal increased the award of damages to £17,000. A

Gerald Gardiner, Q.C., and Elson Rees for the plaintiff. B
Rodger Winn for the defendants.

SINGLETON, L.J.: This is an appeal by the plaintiff, Mr. Peter Leslie Waldon. On Aug. 18, 1954, he was a passenger in a motor car which was in collision with a War Office lorry and trailer and he received injuries. The plaintiff brought this action against the War Office, who accepted responsibility for the accident. The only question which had to be determined was the amount of damages to which the plaintiff was entitled. That is often an extraordinarily difficult question. The desire of the judge of first instance is to do what is right and fair between the parties so that a person who is injured may have the correct sum of damages, in so far as damages can compensate for an accident of a serious character. C

[HIS LORDSHIP then reviewed the plaintiff's position and prospects and the medical evidence and the physical results of the plaintiff's injuries and continued:] The court does not readily allow an appeal from a judge of first instance on a question of damages for reasons which are well known; but if it be shown that the judge has made some mistake as to the position in law, or if he has made a wholly erroneous estimate of damages, the court can interfere. D

One point of law is raised. Counsel for the plaintiff raised a question of some interest before LLOYD-JACOB, J. He asked that he might be allowed to refer the learned judge to decisions of other judges and of this court in cases of a like nature in order to give some guidance as to the amount of damages which should be awarded. Counsel for the defendants objected to any such material being placed before the judge, and the judge, who dealt with the question as a preliminary issue, gave judgment on that question. He said that counsel for the plaintiff had referred him to the decision of this court in *Rushton v. National Coal Board* (1) ([1953] 1 All E.R. 314) and in particular to certain words of BIRKETT, L.J.*. LLOYD-JACOB, J., said: E

"As I understand the language, it is in main directed to a consideration of those cases in the Court of Appeal, and, indeed, the language of BIRKETT, L.J., in which he says ' . . . when, therefore, a particular matter comes for review one of the questions is, how does this accord with the general run of assessments made over the years in comparable cases ? ', is to my mind apt to indicate the practice in the Court of Appeal itself. I am disinclined to accept the view that the Court of Appeal would impose upon judges of first instance an additional burden to that which they must necessarily bear in assessing compensation in this type of case by requiring them to do other than consider such cases as containing the principles upon which the assessments are based." F

The learned judge's decision is in these words: G

"I do decide that in the circumstances it would not be right for me to permit counsel to refer to the quantum of damages awarded in similar cases. If I am wrong about that, he will be able to get the matter put right hereafter." H

I am sure the learned judge appreciates that this court is always most anxious not to put any additional burden on judges of first instance. They have quite enough to do. The decision of the Court of Appeal to which reference was made I

* Quoted by SINGLETON, L.J. ([1953] 1 All E.R. at p. 316), citing *Bird v. Cocking & Sons, Ltd.* ([1951] 2 T.L.R. at p. 1263).

A drew attention to the desirability of approaching, as far as possible, something in the nature of a standard in certain classes of injury so as to help judges of first instance as much as possible. No one knows what is the right sum of damages in any particular case, and no two cases are alike.

One of the cases to which counsel desired to direct the attention of the learned judge was a decision of BARRY, J.,* in a case of paraplegia, in which BARRY, J. B had given £18,675 damages to a man thirty-five years old, who was earning £12 10s. a week. There was an appeal in that case, and the Court of Appeal expressed the view that the damages were on the high side but that the assessment did not err to such an extent that it was the duty of this court to interfere. The appeal was dismissed. I think that reference to that case would have been of help to the judge. The circumstances were similar to those in this case, although C they were not quite the same. There were two or three other cases to which counsel would have referred the learned judge if he had been allowed, but as objection was taken and the learned judge ruled against the plaintiff's submission he had not the benefit of considering any of those cases. I do not think that a judge is bound to consider such cases. If counsel on one side or the other tenders such material, it is for the judge to say whether, in his discretion, he thinks it will D be of help to him or not. He may know all the recent cases on the subject, or most of them; he may not desire to complicate the issue, for it does mean some complication if that material is received. On the other hand, he may think that it would be of help to him. The danger of such material is that it is apt to take the mind of the tribunal from the particular facts of the case on which it is to give a decision. It would not be right that a claim for damages for personal injuries E should open by counsel for the plaintiff saying: "My Lord, I have here fifteen decisions of judges in the last five years on an injury like this one," say, the loss of a leg; and for counsel on the other side to say: "I have twenty-five similar decisions", the one quoting the high ones and the other quoting the low ones. That would not be of help to any judge. In this case, however, there was an injury of a kind which is not common. There have been decisions on it and one F of them reached the Court of Appeal. I am inclined to the view that it would have been of help to the judge, and if counsel on the one side desired the judge to look at the judgment he might well have done so. A judge in assessing damages draws on his own experience, which he acquires from knowledge of other judges' decisions as to amount, from knowledge of what is said in this court and in the House of Lords, and from his ordinary experience in life. It would not be wrong G for counsel appearing in such a case to say to a judge: "I have here the report of a decision in the Court of Appeal on an appeal on damages in a case very like this one; and I have another case, a decision of 'X', J., on a case again very like this one. Would your Lordship like to have them?" The learned judge could not be wrong if he said: "Yes, I should like that information. I should like to know what the Court of Appeal said and I should like to know how 'X', J. dealt H with this subject, for it is one of which no one has great experience". The receiving of material of this kind by a judge ought to happen seldom. The question is one for the discretion of the judge, to be exercised sparingly, as I think. I would add this. All that I have said on this subject is directed to the case of a judge sitting alone. It may be asked: "Why should a judge have something before him which a jury would not have?" I am not sure that there I is any good reason, except, perhaps, that if jurors, new to the task, are called on to assess damages in a case such as this, the more one can keep their minds directed to the actual issues the better. If numbers of other cases are mentioned in which damages have been given, the danger is confusion or complication, and I would not encourage that in a jury case. The judge realises that his task is to assess damages in the particular case before him, and on the evidence before him

* *Smith v. Alexander Findlay & Co., Ltd.* (Feb. 26, 1954, at Chester Assizes), affirmed by the Court of Appeal (SINGLETON, DENNING and MORRIS, L.J.J.) on May 7, 1954.

and on nothing else. If he can obtain help from decisions of other judges, or from this court, I am inclined to think that in his discretion he might well accept it. It is for him to judge. It was with that in view that the remarks of BIRKETT, L.J., quoted in *Rushton v. National Coal Board* (1), were used, and with the desire which everyone has had for years to get as near as one can towards some form of scale or regularity in assessing damages.

[His LORDSHIP then considered the principal factors material to the assessment of damages in the present case (see pp. 109, 110, ante), and assessed the damages at £17,000.]

JENKINS, L.J.: I agree, and although we are differing from the learned judge I find nothing that I can usefully add to what my Lord has said.

PARKER, L.J.: I also agree. [His LORDSHIP referred to certain matters relative to the amount of damages in the present case (see p. 110, letter A, ante) and continued:] So far as concerns the ruling of the learned judge whether other cases should be looked at I would only say this. In my view it would be calamitous if anything that this court said should impose an additional burden on judges of first instance, and particularly on judges on assize. It has been suggested that counsel on either side will come armed in every case of personal injuries with reports or transcripts in regard to other cases. I myself do not think that there is any fear of that. I think that counsel can be trusted to refer to other cases only very sparingly, bearing in mind that each case depends on its own facts and only rarely can another case be of real assistance to the judge. Secondly, I think that the discretion must always be in the judge himself to decide whether in his view the reference to such other cases would or would not assist him. I agree with the proposed order.

Appeal allowed.

Solicitors: *Evill & Coleman* (for the plaintiff); *Treasury Solicitor*.

[Reported by PHILIPPA PRICE, *Barrister-at-Law*.]

A GREAT YARMOUTH CORPORATION v. GIBSON.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.), December 15, 16, 1955.]

Sewer—Expenses—Recovery by local authority—Jurisdiction of county court—Public Health Act, 1936 (26 Geo. 5 & 1 Edw. 8 c. 49), s. 24 (1) (3), s. 293 (1). County Court—Jurisdiction—Sum recoverable by statute—Recovery of expenses of maintenance of sewer—Jurisdiction—Public Health Act, 1936 (26 Geo. 5 & 1 Edw. 8 c. 49), s. 24 (1) (3), s. 293 (1).

By an action in the county court a local authority sought to recover under s. 24 (1) of the Public Health Act, 1936, the apportioned costs of maintenance of a length of sewer serving, inter alia, premises of which the defendant was the owner. By s. 293 (1) of the Act any local authority might recover any sum under the Act "with respect to the recovery of which provision is not made by any other section of this Act" either summarily or in any court of competent jurisdiction. By s. 24 (3) of the Act it is provided: "Any question arising under this section . . . may be determined by a court of summary jurisdiction either in proceedings taken by the local authority for the recovery of expenses incurred by them, or on the application of any owner concerned". It was conceded that s. 293 (1) would confer jurisdiction on a county court if s. 24 were not a provision "with respect to the recovery" of the apportioned costs of maintenance. On the question whether the county court had jurisdiction,

Held (BIRKETT, L.J., dissenting): section 24 of the Public Health Act, 1936, was not a provision with respect to the recovery of expenses incurred by a local authority under that section, and, therefore, the county court had jurisdiction to entertain the action.

Appeal allowed.

[**Editorial Note.** The existence of jurisdiction in a county court is of practical importance particularly because the time limit imposed by s. 104 of the Magistrates' Courts Act, 1952, does not apply to proceedings in the county court. Difficulty may arise if questions which magistrates' courts are empowered by s. 24 (3) of the Public Health Act, 1936, to decide are raised in proceedings in the county court: it was not necessary for the Court of Appeal to decide in the present case how such difficulties should be resolved, but SIR RAYMOND EVERSHERD, M.R., indicated that he considered such questions to be open to challenge in the county court notwithstanding s. 24 (3) (see p. 117, letter D, and cf. p. 121, letter E, post). While the present case was decided on the construction of s. 24 and s. 293 of the Public Health Act, 1936, it may be noted that the decision is in accord with the intendment of s. 41 (a) of the County Courts Act, 1934.

As to jurisdiction of county courts where money is recoverable by statute, see 9 HALSBURY'S LAWS (3rd Edn.) 150, 151.

For the Public Health Act, 1936, s. 24 and s. 293, see 19 HALSBURY'S STATUTES (2nd Edn.) 331, 471, and for the County Courts Act, 1934, s. 41, see 5 HALSBURY'S STATUTES (2nd Edn.) 36.]

I Appeal.

Appeal of the plaintiffs, the corporation, from a judgment of His Honour JUDGE CAREY EVANS, given on Sept. 15, 1955, at Great Yarmouth County Court. The corporation claimed the sum of £13 16s. 5d. due to them from the owner in respect of the apportioned cost of works of maintenance carried out in pursuance of their statutory powers in July, 1951, to a length of sewer to which s. 24 of the Public Health Act, 1936, applied, serving, inter alia, the premises known as 8, Lichfield Road, Great Yarmouth, of which the defendant was the owner. The owner disputed the corporation's claim on the grounds

that (i) the length of sewer was outside s. 24 of the Act of 1936, (ii) the corporation failed adequately to consider representation made after the serving of notices required by s. 24 (1) of the Act, (iii) that the work was unnecessary, (iv) that the work conferred no benefit, and (v) alternatively that the expenses were not fairly apportioned. The county court judge found that the points taken by the owner were unfounded, but dismissed the action for want of jurisdiction. The corporation appealed. It was conceded that if the county court had jurisdiction, the action must succeed.

P. T. S. Boydell for the plaintiff corporation.

F. S. Laskey for the defendant owner.

SIR RAYMOND EVERSHED, M.R.: This was an action by the Mayor, Aldermen and Burgesses of the County Borough of Great Yarmouth, a local authority within the meaning of the Public Health Act, 1936, claiming a payment of a sum of £13 16s. 5d. alleged in the particulars of claim to be due

"in respect of the apportioned cost of works of maintenance carried out in pursuance of their statutory powers by the plaintiffs in July, 1951, to a length of sewer (being a length of sewer to which s. 24 of the Public Health Act, 1936, applies) serving, inter alia, the premises of which the defendant is the owner."

The defence challenged the right of the corporation so to claim, and particularly challenged the alleged grounds on which it was based; for example, the owner challenged the allegation that this was a length of sewer within the terms of s. 24, and it was also said that the work done was unnecessary, the charges made unreasonable and the apportionment incorrect. On all those matters of fact the learned county court judge found in the corporation's favour; but he reserved judgment at the time of the hearing, being doubtful whether he had any jurisdiction to give the relief sought. In a reserved judgment in which he has dealt fully with the whole matter, the learned judge came to the conclusion that the Act gave him no jurisdiction. That view depended on the joint effect of s. 24 and s. 293 of the Public Health Act, 1936. Though the point is a short one, it is necessary that I should read certain parts of both those sections.

Section 24 (1) provides:

"Where a local authority have carried out work for the maintenance of any length of a public sewer, being a length to which this section applies, they may, subject to the provisions of this section, recover the expenses reasonably incurred by them in so doing from the owners for the time being of the premises served by that length of sewer in such proportions as the authority deem it fair to fix . . ."

Then there is a proviso requiring the local authority, except in certain circumstances, to give notice of the proposed work, so that the owner can make representations as to its need and reasonableness. There is a definition of the word "maintenance" which I will pass over, and there is sub-s. (2) which empowers the local authority if, in lieu of executing works of maintenance only to the length of sewer, they improve or enlarge the length of sewer, to recover from the owners of the premises such sum only as might reasonably have been expended in the maintenance work. Sub-section (3) is, however, of vital importance; it provides:

"Any question arising under this section as to whether any length of sewer is one to which this section applies, as to the necessity for any work carried out by a local authority, as to the amount, or the reasonableness, of the expenses incurred by them, or as to the fairness of any division or apportionment of expenses made by them, may be determined by a court of summary jurisdiction either in proceedings taken by the local authority for the recovery of expenses incurred by them, or on the application of any owner concerned."

A I need not read more of that section, and I will turn to s. 293 (1), which is as follows:

“Any sum which a council are entitled to recover under this Act, and with respect to the recovery of which provision is not made by any other section of this Act, may be recovered either summarily as a civil debt, or as a simple contract debt in any court of competent jurisdiction.”

B The whole question with which we are concerned depends on that phrase “with respect to the recovery of which provision is not made by any other section of this Act”. It is conceded that if there is no such provision as is there mentioned, then s. 293 does, subject to one point with which I will deal in a moment, apply to confer on the county courts jurisdiction, in a case within the limits of the county courts’ jurisdiction, to adjudicate on a claim of this kind by a local authority.

C The one small point which I mentioned was that taken by counsel for the owner and arises out of the words “as a simple contract debt”. He said that whatever else might be said about the claim here made for doing work on a sewer, it bore none of the characteristics of a simple contract debt. With that I agree; but in my view it is quite plain from a general conspectus of the Act that the words “as a simple contract debt” do not mean, “where the debt is properly one of contract”, but do mean, “as though it were a simple contract debt”; the object being to determine the nature of the claim, and, particularly in a county court case, thereby to define the limits of the jurisdiction.

E The learned judge came to the conclusion, adverse to the corporation, that in this case there was provision made by another section of the Act with respect to the recovery of this sum, namely, the provision to be found in s. 24 (3) and that thereby the county court jurisdiction was excluded. It has to be confessed that there is something inelegant in the statute, to which counsel for the owner attributed the epithet “fragmentary”, having regard to the large variety of subject-matters with which it deals. None the less, as I construe these sections, and with all respect to the view taken by the learned judge, and with an added diffidence because BIRKETT, L.J., takes a different view, I have myself come to a conclusion different from that entertained by His Honour JUDGE CAREY EVANS; for I think it not true to say that s. 24 contains such a provision as is mentioned in s. 293 (1) and that it is, therefore, apt to exclude the generality of that section.

G The point is a short one and not capable of great elaboration; but first I would observe, as counsel for the owner indeed conceded, that nowhere in s. 24 is there to be found an express provision conferring jurisdiction on, or specifying, the magistrates’ court as being the appropriate tribunal where the corporation can recover their expenses. At most, the language in sub-s. (3) proceeds on the hypothesis and recognises that these sums may be recovered in the magistrates’ courts. Let me read again the words:

H “Any question . . . may be determined by a court of summary jurisdiction either in proceedings taken by the local authority for the recovery of expenses incurred by them, or on the application of any owner concerned.”

The words “in proceedings” mean “in the course of proceedings.” The subsection would have had, as it seems to me, exactly the same effect if it had been:

I “may be determined by a court of summary jurisdiction either in proceedings taken under s. 293 of this Act by the local authority or on the application of any owner concerned.”

Sub-section (3) of s. 24 of the Public Health Act, 1936, is a provision defining the right of the owner to raise certain questions in a particular manner, but I cannot construe that provision fairly as “a provision with respect to the recovery” of these expenses made by s. 24.

In the course of the argument attention was drawn to the language in sub-s. (1):

"Where a local authority have carried out work . . . they may, subject to the provisions of this section, recover . . ."

Had that language run "they may in accordance with the provisions of this section recover", it might, I think, then have produced the result that by sub-s. (1) Parliament was limiting the right to recover to such right as was found, either expressly or implicitly, in the section and nowhere else. The words "subject to the provisions of this section" to my mind mean, however, no more and no less than "subject to such limitations of their right to recover as are found in this section"; and those limitations undoubtedly include the privileges of challenge conferred on the owner by sub-s. (3). With the assistance of the learned counsel we went through the Act to see what other instances there were in which the problem posed by the formula "and with respect to the recovery of which provision is not made by any other section of this Act" might arise. It is plain that there is no other section which in its language provides an exact parallel. It is perhaps on that ground that counsel for the owner justified the appellation "fragmentary" to the Act; but I will refer to one of the sections in order to illustrate a point that emerges from the whole.

Section 38 of the Public Health Act, 1936, is in the same Part of the Act, and it deals with the case, according to a sidenote, of "Drainage of buildings in combination". Sub-section (2) provides that the local authority who make such a requirement as is provided in the preceding sub-section shall fix the proportions in which the expenses of constructing and maintaining the sewer are to be borne by the owners concerned; and in a separate paragraph the same sub-section then provides:

"An owner aggrieved by the decision of a local authority under this sub-section may appeal to a court of summary jurisdiction; but, subject to any such appeal, any expenses reasonably incurred in constructing, or in maintaining or repairing, the private sewer shall be borne in the proportions so fixed, and those expenses, or, as the case may be, contributions thereto, may be recovered accordingly by the persons, whether the local authority or owners, by whom they were incurred in the first instance."

It is not in doubt that there is in s. 38 no such provision with respect to the recovery of the sums mentioned as excludes the general jurisdiction of the courts under s. 293; so that s. 293 applies in that case. It will be observed, however, that the general jurisdiction is linked with a particular right of the owner to appeal to a court of summary jurisdiction. It is true that the parallel is not perfect, because the right of the owner under s. 24 is not limited to an appeal of his own motion to a court of summary jurisdiction; he is told by sub-s. (3) that he can also raise these matters of challenge in the course of proceedings taken against him in that court. In s. 38 that is impossible; if he omits to appeal, he loses his opportunity of challenge. Here it is otherwise. The point, however, is that throughout the Act there seem to be the linked conceptions that there may be a special right in the owner to appeal to, and have matters determined by, courts of summary jurisdiction, and that there may be, at the same time, general jurisdiction in the courts, the courts of summary jurisdiction, the county courts and the High Court, i.e., to deal with claims made to recover the various sums with which the Public Health Act, 1936, deals. This point is reflected also in other sections, e.g., s. 290.

One other point should be mentioned. The learned judge was much moved towards the conclusion at which he arrived by this kind of consideration: he observed the special right conferred on the owner to have questions raised as to the length of sewer and other matters* before the courts of summary jurisdiction. As follows from the Acts of Parliament regulating the courts of summary jurisdiction, the effect is to impose a strict time limit on the jurisdiction to deal with

* See s. 24 (3) of the Public Health Act, 1936, printed at p. 114, letter I, post.

A these questions. Similarly, if the local authority allows six months* to elapse, they will be liable to be met with a complete answer by an owner sued in a court of summary jurisdiction that they had allowed the matter to get out of time. In the present case it will be recalled from my reading of the particulars of claim, that this work was done as long ago as 1951; and the question then arises, is it right that a county court should have jurisdiction when the authority to determine a claim would be barred in the courts of summary jurisdiction? More difficult still: can the owner raise in the county court at any time as matters of defence these questions which sub-s. (3) puts into the jurisdiction of the courts of summary jurisdiction? If the answer is that he cannot raise them at all in the county court, it might be that a county court case would have to be adjourned while these matters were disposed of by the courts of summary jurisdiction, if still within the time limit imposed for those courts. It was partly those grounds and the anomalies that the apparent conflict might cause which led the judge to feel that the right view here was that Parliament intended the whole matter to be disposed of exclusively by the courts of summary jurisdiction. It is not in the circumstances strictly necessary for me to express any view on this aspect of the matter. I have said that the owner raised as substantive matters of defence various points which are comprehended by s. 24 (3), and the county court judge found as a fact against him on all of them. What is more, the corporation have conceded throughout that it is open to an owner, or was, at any rate, in this case open to the present owner, to raise by way of challenge these various defences. Nevertheless, since the question has been argued and it may well be that the matter is of some importance, I will express my view as at present advised that, in so far as any of these questions are really involved as matters of necessary allegation in any case in the courts, then they would be open to challenge.

Let me illustrate what I am saying by a second reference to the particulars of claim in this case: the corporation claim the sum of £x in respect of the apportioned costs of works of maintenance carried out in pursuance of their statutory powers to a length of sewer. Let it be assumed that the owner merely denied all the allegations in the particulars of claim. It would presumably then be necessary for the corporation to prove the facts which they alleged, and which they must allege to recover the sum of money claimed. That is not, however, to say that all the matters which are raised or intimated in sub-s. (3) are necessarily open as matters of defence. For example, the question whether the work was necessary may stand on a somewhat different footing from the question whether the expenses were reasonable. On that matter I express no view, as it is not necessary in this case. No doubt a council who for one reason or another sues in the county court may think it proper not to stand in the way of any question that an owner wants to raise being dealt with: but as a matter of strict jurisdiction I confine myself to saying that, as far as I at present see the matter, an owner sued in the county court or the High Court would be entitled to raise as matters of defence such questions as were necessarily involved in the allegation which lays the foundation for the claim being made. I think that the possible anomalies which the judge mentioned, if his view is right that these points cannot be taken where there is special provision made for the courts of summary jurisdiction to determine them, would indeed arise in other instances in the Act, and I do not find it necessary to pursue the matter further. For the reasons which I have stated, I have myself come to a different conclusion from the learned judge. I think he had jurisdiction to determine this case, and that, having regard to his conclusion on the matters of defence, he should have given judgment for the plaintiff corporation for the sum of £13 16s. 5d.

BIRKETT, L.J.: I am naturally very sorry to differ from the judgment of SIR RAYMOND EVERSLED, M.R., which has just been delivered, and it is scarcely

* See s. 104 of the Magistrates' Courts Act, 1952; 32 HALSBURY'S STATUTES (2nd Edn.) 303.

necessary to say I differ with all due deference; but, having formed a fairly clear opinion about the matter, I think it right just to give expression to it. The point is a very short point, and I can deal with it with brevity. I think the learned county court judge was right, that he came to a proper conclusion, that his judgment ought to be supported and that this appeal ought to be dismissed. A

The history of the matter was that when the case had been heard in the county court by His Honour JUDGE CAREY EVANS, he gave an interim judgment dealing with the questions of fact which had been raised, and he decided all those questions of fact against the owner. The learned judge then expressed doubt whether in fact proceedings in the county court were open to the corporation so that they could recover these expenses; and he said this in a reserved and written judgment: B

"In this case the [corporation] claim by way of action for recovery of expenses the cost of repairs to a certain length of sewer from the owner of a house served by it. At the hearing I gave my reasons orally for reaching the conclusion that if the issues raised in the case as to the corporation's right to recover the amount claimed were proper for my determination, I should decide those issues in favour of the corporation; but at the same time I indicated my doubt as to whether these issues could be decided, or the claim be properly made, in the county court, and reserved my judgment on these latter points." C D

After saying that there was no direct authority dealing with this matter either one way or the other, he continued:

"First it may be observed that this is a general section occurring in an Act of Parliament of nearly 350 sections and numerous schedules; and it is I think designed to create a right of recovery of any sum recoverable under the Act if by chance it should happen that a mode of recovery is not otherwise provided." E

I think that it would have been better to say "designed to create a right of recovery of any sum recoverable under the Act if under the Act no method is laid down for the recovery", but the learned judge used the words "if by chance no provision had been made". Then he goes on to deal with the various sections, and he then came to the conclusion that he did. F

The short point in the matter is this, as I see it: under s. 293 (1) of the Public Health Act, 1936, it is provided:

"Any sum which a council are entitled to recover under this Act, and with respect to the recovery of which provision is not made by any other section of this Act, may be recovered either summarily as a civil debt, or as a simple contract debt in any court of competent jurisdiction." G

The important words, therefore, are—"of which provision is not made by any other section of this Act". We have had cited to us sections where no provision was made, where the terms of s. 293 (1) would automatically come into operation. The learned county court judge said and counsel for the owner submitted that that section did not come into operation at all, because s. 24 (1), (2), (3) made provision for the recovery of the sum. Section 24 (1) provides: H

"Where a local authority have carried out work for the maintenance of any length of a public sewer, being a length to which this section applies, they may, subject to the provisions of this section, recover the expenses reasonably incurred by them in so doing from the owners for the time being of the premises served by that length of sewer in such proportions as the authority deem it fair to fix, regard being had by them to all the circumstances of the case, including the benefit derived by each owner from that length of sewer, the distance for which it is laid in land belonging to each owner, the point at which any work was necessary and the responsibility for any act or default which rendered the work necessary." I

A That lays down general terms for the recovery of the expenses; but it is said that that does not go far enough, that the section must do more than say you can recover the expenses, that the section must say how, where and when, if it is to prevent s. 293 (1) coming into operation.

B First of all, with regard to s. 24 (1), I think the words "they may, subject to the provisions of this section" are important. The corporation cannot recover without having regard to the provisions of the section. Then there is a proviso that if the work is not urgent, they must give notice before beginning the work, so that objections can be heard and made; and then there is sub-s. (3), which I think is the important enactment:

C "Any question arising under this section as to whether any length of sewer is one to which this section applies, as to the necessity for any work carried out by a local authority, as to the amount, or the reasonableness, of the expenses incurred by them, or as to the fairness of any division . . . may be determined by a court of summary jurisdiction . . ."

D The first thing, then, is that the recovery of expenses under s. 24 (1) is made conditional and subject to the provisions of s. 24 (3), so that the expenses cannot be recovered unless the matters, which are set out in s. 24 (3) for the protection of the owner, have been determined by a court of summary jurisdiction.

Then the next question which arises is this: how is that to be done? It may be done in two ways, and they are both set out in the sub-section:

E ". . . may be determined by a court of summary jurisdiction either in proceedings taken by the local authority for the recovery of expenses incurred by them, or on the application of any owner concerned."

F I myself find it quite impossible, in view of that language, to say that there is no provision laid down by the Act. It is saying quite plainly, as I think, that in a court of summary jurisdiction the local authority may recover its expenses, and in those proceedings the owner may raise all these questions. He can take the initiative and go to the magistrates' court and raise these matters. The important thing is the words in sub-s. (3)

"may be determined by a court of summary jurisdiction either in proceedings taken by the local authority for the recovery of expenses incurred by them . . ."

G The sub-section clearly contemplates that there should be proceedings in the magistrates' court by the local authority for the recovery of the expenses incurred under s. 24 (1).

H Section 293 (1) of the Public Health Act, 1936, only comes into operation if no provision is made by any other section with respect to the recovery of these expenses. Is there any other provision? There are these plain words that the expenses "may be determined by a court of summary jurisdiction either in proceedings taken by the local authority for the recovery of expenses incurred by them". I find it myself impossible to say that there is no provision made for the recovery of the expenses by the local authority. It is on that main ground that I would support the learned county court judge.

I The other questions of great interest which are raised by the learned county court judge furnish supporting arguments. They are not absolutely vital to the decision. The learned county court judge said certain questions could not be raised in the county court because s. 24 (3) has said that the place to raise them is the court of summary jurisdiction. It so happens that in this case, as SIR RAYMOND EVERSHED, M.R., pointed out, there had been great delay; and so if proceedings were confined to the jurisdiction of the magistrates' court, the time within which they could be brought would have expired. That difficulty was met in this case by the corporation saying that they conceded that all these matters might be raised in the county court. The learned county court judge

did consider them, and he decided them all in favour of the corporation. The learned judge said:

"The fact that it is plainly provided in express terms that all these questions may be determined in a court of summary jurisdiction (in proceedings initiated by one party or the other) to my mind clearly prevents a county court judge from deciding these questions—though I have in fact given my views upon them in case on appeal it shall be held that my decision on the point of law is erroneous. It is fair to the corporation to point out that they were willing to concede that I could decide all such questions; as they were anxious not to shut out the defendant from raising these questions merely because they had chosen to sue in the county court. Nevertheless in my judgment I have no power to do so; and no concession by the corporation in a particular case can alter the construction of s. 24 (3)."

Then he goes on to deal with certain anomalies which might arise; and he concludes as follows:

"The conclusion which I have reached is that the corporation's contention is unsound; that s. 24 (3) is intended, though perhaps somewhat ambiguously worded, to provide for the recovery of the expenses in a court of summary jurisdiction, where alone practically all questions as to liability may be determined, and that the sub-section makes provision with respect to the recovery of these expenses in a court of summary jurisdiction with the result that there is no room for any remedy in the county court. The claim must therefore be dismissed with costs."

It is common knowledge that under Acts of Parliament such as the Public Health Act, 1936, matters of disputation which inevitably arise between local authorities and individual owners must in some way be determined, and it has always been the desire that there should be a cheap and expeditious method by which those matters could be determined, and therefore the courts of summary jurisdiction were used for that purpose. When s. 24 (3) of the Public Health Act, 1936, is considered, it is not possible, I think, to say that the Act of Parliament has not shown any way or made any provision for the recovery of these expenses incurred by the local authority. In my view the decision of the learned judge is right and ought to be affirmed.

ROMER, L.J.: This case is obviously one of some difficulty, but for myself I have arrived at the same conclusion as SIR RAYMOND EVERSHED, M.R., in thinking that the county court judge did have jurisdiction to entertain the proceedings. There is no doubt but that the plaintiffs, the corporation, are suing for a sum which they are entitled to recover under the Public Health Act, 1936, within the meaning of that phrase as used in s. 293, because it is a sum which they are entitled to recover under s. 24 (1). Under s. 293 (1) they can proceed either summarily or in a court of competent jurisdiction for recovery of this sum, unless provision is made with respect to its recovery in any other section. I take this to mean unless provision is made for the manner of its recovery in any other section. It is suggested that s. 24 not only entitles the corporation to recover this sum, the sum for which they are suing, under sub-s. (1), but that sub-s. (3), either standing by itself or in conjunction with sub-s. (1), provides also for the manner of its recovery, viz., before a court of summary jurisdiction. Sub-section (1), in my opinion, is quite silent on the point. It would have been otherwise if it had said "in accordance with" instead of "subject to the provisions of this section", or if it had said "may recover by the proceedings in this section mentioned", or the like; but it seems to me that the phrase "subject to the provisions" merely places a qualification on the right to recover which is conferred by sub-s. (1). Then as to sub-s. (3), I cannot read this as providing for the manner in which the sums can be recovered. It appears to me to be no more than a recognition or an assumption of the right to proceed in a

- A summary way. That is one of the two ways which are authorised or contemplated by s. 293 (1); and I do not regard the incidental recognition—for that I think is all it is—of one way as providing that that is the way of proceeding to the exclusion of the other. Sub-section (3) is not providing for a way at all, but is merely prescribing two methods by which an owner who thinks himself aggrieved can obtain redress, viz., either by himself applying to the magistrates under the sub-section, or by raising his complaint by way of defence if a local authority proceeds against him before the magistrates under s. 293.

- Then there is the other point which, as my Lord has said, is not necessary for our decision. I think it is a difficult one. On the hypothesis, which I believe to be the true hypothesis, that proceedings can be taken before the county court, the question is as to what defences the owner can raise and which could be adjudicated on by the county court judge or other competent court before which the matter is brought. It does not seem to me that the question is likely to arise very often, because I suppose that generally speaking proceedings would be before the magistrates, and an owner most probably, nine times out of ten, if he were aggrieved, would take the necessary steps himself, as he is entitled to do under sub-s. (3). If the matter were brought, as it has been brought in the present case, before the county court by the local authority, I think that it is probably true to say, as my Lord has indicated, that the owner could put the local authority to proof of their case, and they would have to establish, therefore, to the satisfaction of the county court judge or other judge that the necessary conditions precedent to their right to recover under sub-s. (1) existed. I think myself that s. 24 (3) does largely provide a code in which certain matters are mentioned specifically, which in the minds of the legislature were matters which were to be dealt with by the courts of summary jurisdiction. I quite appreciate the inconvenience of this view, but if some of those matters arose or the owner desired to raise them when he found himself defending an action in the competent court, it might well be that the action would have to stand adjourned until the owner had had resort to the court of summary jurisdiction in the manner contemplated by sub-s. (3). It is, however, unnecessary to express any concluded view on the scope of the jurisdiction of the county court once the matter has been brought before it, and I prefer to express no concluded view on the question. I content myself with saying merely that I am satisfied that the county court has jurisdiction to entertain such proceedings as these, and I would accordingly allow the appeal.

- G *Appeal allowed. Leave to appeal to the House of Lords granted.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for Town clerk, Great Yarmouth (for the plaintiff corporation); *Smith & Hudson*, agents for *Wiltshire, Sons & Tunbridge*, Great Yarmouth (for the defendant owner).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

ELLIOTT v. ELLIOTT.

[COURT OF APPEAL (Morris and Parker, L.JJ.), December 19, 1955.]

Divorce—Practice—Pleading—Answer—Striking out allegations—Petition alleging desertion—Reasonable cause for leaving the wife—Belief in her adultery—Belief induced by statements of third party—Truth of statements not alleged—Allegations inadmissible.

In his answer to a petition for divorce on the ground, inter alia, of desertion the husband denied the desertion and alleged that the wife had deserted him. He pleaded also that in July, 1953, he "was informed by his mother that the petitioner had been admitted to . . . hospital . . . in July, 1953, suffering from a miscarriage and in the month of April, 1954, he was further informed by his mother that the petitioner was again pregnant and he himself met the petitioner by chance during that month and she appeared to be pregnant. That in the premises your respondent has had good cause for living separate and apart from the petitioner from the month of July, 1953, or alternatively from the month of April, 1954, by reason of the fact that he had reasonable grounds for believing and did believe that the petitioner had been guilty of adultery as hereinafter alleged." He further pleaded that the petitioner had committed adultery with a man unknown between November, 1952, and June, 1953, and between December, 1953, and June, 1954. He did not allege that it was true that his wife had been admitted to hospital in July, 1953, suffering from a miscarriage or that she was pregnant in April, 1954.

Held: the passage in the pleadings relating to the statements made by the husband's mother should be struck out since it did not allege that the statements were true and did not allege conduct on the part of the wife inducing the husband's belief in his wife's adultery.

Glenister v. Glenister [1945] 1 All E.R. 513, distinguished; *Wood v. Wood* [1947] 2 All E.R. 95, and *Beer v. Beer* [1947] 2 All E.R. 711, approved and applied.

Appeal dismissed.

[As to conduct and reasonable belief in adultery as a just cause for separation, see 12 HALSBURY'S LAWS (3rd Edn.) 257, 258, paras. 484-486; and for cases on the subject, see 27 DIGEST (Repl.) 367, 3040-3042.]

As to particulars of just cause for separation to be included in an answer, see 12 HALSBURY'S LAWS (3rd Edn.) 338, 339, paras. 700 and 706.]

Cases referred to:

- (1) *Glenister v. Glenister*, [1945] 1 All E.R. 513; [1945] P. 30; 114 L.J.P. 69; 172 L.T. 250; 109 J.P. 194; 27 Digest (Repl.) 367, 3040.
- (2) *Wood v. Wood*, [1947] 2 All E.R. 95; [1947] P. 103; [1948] L.J.R. 784; 111 J.P. 428; 27 Digest (Repl.) 320, 2667.
- (3) *Beer v. Beer*, *Beer v. Beer & Neilson*, [1947] 2 All E.R. 711; [1948] P. 10; [1948] L.J.R. 743; 112 J.P. 50; 27 Digest (Repl.) 367, 3041.
- (4) *Gaskill v. Gaskill*, [1921] P. 425; 90 L.J.P. 339; 126 L.T. 115; 27 Digest (Repl.) 320, 2666.

Appeal.

In his answer to the wife's petition for divorce on the ground, inter alia, of his desertion, the husband pleaded statements made to him by his mother that the wife had had a miscarriage and afterwards was again pregnant as affording reasonable grounds for the belief that she had been guilty of adultery and so as being good cause for his living separate and apart from her. On Nov. 7, 1955, at Newcastle-upon-Tyne, Mr. Commissioner CHARLESWORTH ordered the statements to be struck out of the answer on the ground that they would be

A inadmissible in evidence and therefore that they were irrelevant, and gave leave to appeal. The husband appealed.

K. M. McHale for the husband.

N. Lermom for the wife.

B **MORRIS, L.J.:** The wife alleges by her petition that her husband, without cause, deserted her for a period of at least three years immediately preceding the presentation of the petition: she in fact alleges desertion from a day in September, 1951. By an amendment to her petition which is not now material, she also alleges that her husband committed adultery. By his answer, the husband denies that he deserted the wife, and he alleges that the wife deserted him. He alleges desertion for a period of at least three years preceding the presentation of the answer: and he also alleges desertion from September, 1951. He sets out in his pleading in para. 5 various allegations of fact on which he relies to prove that it was not he who deserted, but his wife who deserted him. Then he pleads in para. 6 of the answer in these terms:

D “Further and in any event, in the month of July, 1953, your respondent was informed by his mother that the petitioner had been admitted to the general hospital, Shotley Bridge, in July, 1953, suffering from a miscarriage and in the month of April, 1954, he was further informed by his mother that the petitioner was again pregnant and he himself met the petitioner by chance during that month and she appeared to be pregnant. That in the premises your respondent has had good cause for living separate and apart from the petitioner from the month of July, 1953, or alternatively from the month of April, 1954, by reason of the fact that he had reasonable grounds for believing and did believe that the petitioner had been guilty of adultery as hereinafter alleged.”

E In para. 7 he pleads:

F “That the petitioner committed adultery with a man whose name and identity are at present unknown to your respondent on a date between the month of November, 1952, and the month of June, 1953”;

and by para. 8:

G “That the petitioner committed adultery with a man whose name and identity are at present unknown to your respondent at a place at present unknown to your respondent on a date between the month of December, 1953, and the month of June, 1954.”

H So the husband is saying that his mother told him in July, 1953, that the wife had been admitted to hospital in that month suffering from a miscarriage and further in April, 1954, that the wife was pregnant. By his pleading, he says that he therefore had good cause for living separate and apart from July, 1953, or, alternatively, from April, 1954,

“by reason of the fact that he had reasonable grounds for believing and did believe that the petitioner had been guilty of adultery as hereinafter alleged.”

I That refers to paras. 7 and 8. The pleading is somewhat curious, for it is not alleged that it was true that the wife had been admitted to the general hospital, Shotley Bridge, in July, 1953, suffering from a miscarriage or that in April, 1954, she was pregnant. The pleading does not say that the husband made any inquiry.

The learned commissioner decided that the first [4½] lines of para. 6 of the answer, ending with the words “again pregnant”, should be struck out from the pleading. It has been argued by counsel for the husband that those lines should be allowed to remain on the ground that the husband’s state of mind was material and relevant, and that these words allege his state of mind. It is said that he was

justified in remaining apart from his wife because he was of the state of mind which resulted from what he was told. The desertion was alleged to have begun in September, 1951. It is said that the husband was justified in remaining apart from his wife as from the time when he was told these things. A

It seems to me that the learned commissioner came to a correct conclusion, and that to hold otherwise would involve departing from what I think has properly been laid down in some of the authorities, and departing (as I think) from what would be fair. If the husband is entitled to say that he was told something, that he heeded what might have been idle chatter, and was entitled to remain apart from his wife because he believed it, the result would be that the wife would be prejudiced, even though there might have been no conduct on her part such as would lead a reasonable person to believe her guilty of adultery. B

In *Glenister v. Glenister* (1) ([1945] 1 All E.R. 513) it was decided that C

"though no adultery was, in fact, committed, the respondent had so conducted herself as to give the appellant reasonable ground for supposing that she had committed adultery. In those circumstances the appellant ought not to be held to have left the respondent without reasonable cause."

LORD MERRIMAN, P., said (*ibid.*, at p. 518): D

"If the wife has so conducted herself as to lead any reasonable person to believe, until she gives some explanation, that she has committed adultery, the husband, becoming aware of the facts and honestly drawing that inference and leaving his wife on that ground ought not to be held to have left her without reasonable cause."

In that passage the learned President speaks of the wife having "conducted herself" so as to lead to a belief in the mind of a reasonable person. In my judgment, that is very different from a state of affairs where a wife has done nothing, but where some statement is made about her which a husband may choose to believe. E

In *Wood v. Wood* (2) ([1947] 2 All E.R. 95) the learned President said (*ibid.*, at p. 97): F

"The whole point is that it is the wife's misconduct which induces the reasonable belief on the part of the husband."

Again, the reference to the "wife's misconduct" shows that a sharp distinction must be drawn between a case in which there has been some conduct or misconduct on the part of a wife, of which the husband acquires knowledge and in regard to which he forms a belief, and a case where, without conduct or misconduct on the part of the wife, a statement is made in regard to her which may be merely idle gossip but which a husband chooses to believe. G

In *Beer v. Beer* (3) ([1947] 2 All E.R. 711), WILLMER, J., summarises some considerations in regard to a matter of this kind very helpfully. He said (*ibid.*, at p. 712): H

"It is argued that, even if the charge of adultery has not been proved to the satisfaction of the court, the husband still has a good defence to proceedings based on desertion if the conduct of the wife has been such as to create in his mind a reasonable belief that she has been guilty of adultery. In *Glenister v. Glenister* (1), in which a husband surprised his wife in circumstances of a most compromising character, it was held by the Divisional Court that, although the husband's charge of adultery was not made out, he was entitled to succeed in his defence to his wife's charge of desertion, on the basis that the circumstances were such as to induce in his mind a bona fide and reasonable belief in his wife's guilt. This decision was distinguished in *Wood v. Wood* (2), where the only evidence of adultery was the birth of a child 346 days after the last date on which the parties were proved, by admissible evidence, to have cohabited. The Divisional Court, following I

- A *Gaskill v. Gaskill* (4) ([1921] P. 425), declined to hold that the evidence was sufficient to convict the wife of adultery. They further held that, since the husband's belief in his wife's guilt was not induced by such conduct on her part as would lead a reasonable person to believe her guilty of adultery, but was induced only by the apparently unusual period of gestation, no sufficient excuse for absenting himself from cohabitation had been made out.
- B In both these cases, it will be observed, the husband failed to make good his charge of adultery against the wife, but in the one his belief in her guilt was held to be sufficient to absolve him from a charge of desertion, whereas in the other it was not. I apprehend that the distinction between the two cases is that where the husband's belief is induced by actual conduct on the part of the wife of a suspicious or incriminating nature, it is sufficient—provided it is bona fide held, and in the absence of explanation (which must, of course, be a reasonable explanation)—to furnish the husband with a good excuse for absenting himself, but where the belief is induced, not by actual conduct of the wife, but by extraneous circumstances, the result is different, even though the belief be bona fide held."
- D The learned judge then asked to which class of case did the case then under consideration belong.
- E These words refer to a case in which a belief is induced, not by any actual conduct of the wife, but by extraneous circumstances, and where the belief is bona fide held. It seems to me that, if the husband says "I was told by somebody"—for this purpose it matters not whether by his mother or by someone else—"that my wife had gone to hospital because of a miscarriage", and does not allege the truth of that statement, or does not allege any conduct on the part of the wife inducing a belief in its truth, he is not entitled to say: "I believed the statement which was made to me, and so I was justified in remaining away from my wife". I say nothing as to whether the pleading might have been different, or whether there might have been any application for an amendment.
- F On this pleading, as drawn, the learned commissioner came to a correct conclusion when he decided that the part of it to which I have referred should be struck out.

PARKER, L.J.: I entirely agree.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co.*, agents for *Swinburne & Jackson*, Gateshead (for the husband); *Crossman, Block & Co.*, agents for *Richmonds*, Consett (for the wife).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

SZUMCZYK v. ASSOCIATED TUNNELLING CO., LTD. AND OTHERS.

[LIVERPOOL ASSIZES (Ashworth, J.), November 11, 15, 16, 17, 1955.]

Master and Servant—Duty of master—Safe system of working—Mining—Support for roof—Advice of mine owner followed by tunnelling contractor—Accident to contractor's employee due to fall of stone from roof of mine—Insufficient support to roof—Whether contractor liable to employee.

The plaintiff, who was employed by the first defendant, Associated Tunnelling Co., Ltd., was injured while at work by the fall of a stone from the roof of a mine which was owned and occupied by the second defendants, the National Coal Board, and in which the company was, under contract with the board, carrying out tunnelling operations. The board were under a statutory duty to secure the roof*, but in fact it was not sufficiently supported. The system of working, as regards support for the roof, was that advocated by officials of the board, whom the company was entitled to regard as experts and whose advice the plaintiff, as an employee of the company, was instructed to follow. The plaintiff brought an action for damages for personal injuries against the company and the board, alleging against the company a failure to fulfil the duty of a master towards his servant at common law. On the question whether the company was liable for breach of duty,

Held: the company was not liable because the duty owed by the company was a duty to take reasonable care, not an absolute duty, and the company, being aware that the board were under a statutory duty regarding support of the roof and that there was controversy as to the method of support, was not in breach of duty in following the advice of the board as experts.

Dictum of LORD WRIGHT in *Thomson v. Cremin* ([1953] 2 All E.R. at p. 1192) applied.

[As to the master's duty to provide a safe system of work, see 22 HALSBURY'S LAWS (2nd Edn.) 188, para. 314; and for cases on the subject, see 34 DIGEST 194-198, 1583-1623.]

Cases referred to:

- (1) *Thomson v. Cremin*, [1953] 2 All E.R. 1185; 3rd Digest Supp.
- (2) *M'Lachlan v. The Peverill S.S. Co., Ltd. & Macgregor & Ferguson*, (1896), 23 R. (Ct. of Sess.) 753; 33 Sc. L.R. 634; 4 S.L.T. 19; Digest Supp.

Action.

The plaintiff was employed by the first defendant, Associated Tunnelling Co., Ltd., which was under a contract with the second defendants, the National Coal Board, to construct a tunnel in Sutton Manor Colliery, which was owned and occupied by the board. After the tunnel had been driven a distance of about a thousand yards, it reached a point where it made a junction with an old airway, and the board instructed the company that all the old timber from that area was to be removed for fear of the danger of fire. As the space between the new tunnel and the old airway increased, it became necessary to support that space while the operations of packing the old airway and the intervening space and of driving the tunnel forward were carried out. The company's supervisor, Mr. Chester, was of the opinion that substantial support was needed and advocated "chocks" (that is, piles of timber built up so as to surround packing stones and other material right up to the roof) and "goalposts" (two vertical props joined by a horizontal prop). The board's officials, however, took the view that single props were sufficient to carry the weight, provided that an

* See the Coal Mines Act, 1911, s. 49, s. 52; 16 HALSBURY'S STATUTES (2nd Edn.) 133, 136; compare Mines and Quarries Act, 1954, s. 48 (1), s. 49, s. 52; 34 HALSBURY'S STATUTES (2nd Edn.) 555, 556, 558.

- A adequate number was set, and would not allow Mr. Chester to use the method of support which he thought advisable. After a fall of dirt had occurred, Mr. Chester wished to keep in some of the old timber to support the roof and also to use chocks, but the board's under-manager refused to allow him to do so, and insisted on the board's method of support being employed. Mr. Chester reported the situation to Major Greenhalgh, the company's senior official, who ordered
- B Mr. Chester to carry on the work in accordance with the board's instructions but conveyed the substance of Mr. Chester's complaints to the board's officials. On Sept. 23, 1953, after the work in the tunnel had been in progress for some eight or nine months, and some five or six weeks after the junction with the old airway had been reached, a stone fell from the roof and the plaintiff was seriously injured. The plaintiff claimed damages against the company and the board
- C on the ground that they were both liable for the personal injuries which he had suffered. The company denied liability and contended that, if there were any liability for the accident, it was to be attributed to the board. The board admitted that, if the roof were insufficiently supported, they were liable for breach of their statutory duty under the Coal Mines Act, 1911, but they contended that the company was responsible for the accident. The case is reported only
- D on the question of the legal consequence, in relation to alleged breach of the common law duty of a master to his servant, of the company having followed the advice of the board regarding support to the roof of the mine.

J. S. Watson, Q.C., and *G. J. Bean* for the plaintiff.

D. J. Brabin, Q.C., and *J. M. Davies* for the first defendant, Associated Tunnelling Co., Ltd.

E *J. R. D. Crichton, Q.C.*, and *H. S. L. Rigg* for the second defendants, the National Coal Board.

Cur. adv. vult.

- Nov. 17. ASHWORTH, J., stated the facts and found that the fall of the stone from the roof was due to the roof being insufficiently supported, that it would have
- F been reasonably practicable to avoid the breach of the National Coal Board's statutory duty under the Coal Mines Act, 1911*, involved by this failure to support the roof, and that, in any event, the major responsibility for the accident was on the board. Dealing next with the board's contention that the company was partly responsible because the company's officials should have been more emphatic than they were in trying to persuade the board to change their minds
- G in regard to the method of support to be employed, HIS LORDSHIP held, on the facts, that the company's officials, Mr. Chester and Major Greenhalgh, had acted reasonably, and, accordingly, rejected the board's contention. His LORDSHIP then dealt with the plaintiff's contention that the company was partly responsible for the accident, and said: Counsel for the plaintiff contended that the company, as the plaintiff's employer, was under a duty to take reason-
- H able care to provide a safe system of work and that the company could not escape from the consequence of the system being unsafe by saying that it relied on the National Coal Board. Counsel referred to authority which laid down that it is not enough to rely on the provision of a competent foreman and cited a passage from the speech of LORD WRIGHT in *Thomson v. Cremin* (1) ([1953] 2 All E.R. at p. 1192):

I "To hold a master stevedore, in the absence of special circumstances of suspicion, subject to a general duty towards his men to inspect the structure of the vessel, whether permanent or temporary, whether shifting-boards, stanchions or the like, would, I think, be contrary to practice and inconsistent with the exigencies of the case. He comes on board the vessel, the shipowner's premises, to carry out the loading or discharging, and, unless

* See footnote on p. 126 ante.

there are special stipulations in the contract, is *prima facie* entitled to assume that the shipowner has discharged his duty of care in regard to the safety of the premises. He is on board the ship for a special and limited purpose and has in the ordinary course no right to interfere with the structure, temporary or permanent, of the vessel. No doubt, if there are apparent indications which he observes, or ought to observe, that the structure is defective, he owes a duty to take reasonable measures for the protection of his men. But there was nothing of the sort in the present case. I agree generally with what was said on this question by the Lord Justice-Clerk (RT. HON. J. H. A. MACDONALD) in *M'Lachlan v. The Peverill S.S. Co., Ltd.* (2) (1896) (23 R. (Ct. of Sess.) at p. 757), though, if there was something manifestly wrong and dangerous, I think the stevedore should refuse to go on with the work until the defect was remedied."

It must be kept in mind that the employer's duty is not an absolute duty; it is a duty to take reasonable care, as has been laid down in many cases. I ask myself the question, "Did the company in this case take reasonable care to provide a safe system of work?" No authority precisely covering the present point has been cited, but there were sentences in the extract from LORD WRIGHT's speech which lead me to a conclusion in favour of the company.

I take the view that the company was aware, as it must have been aware, that the National Coal Board were under a statutory duty regarding the support of the roof. The company knew that there was a controversy as to the method of support. The company reported the controversy, it knew that the board were experts, and, even although the board's method of support proved wrong, I am prepared to hold that the company was not in breach of its duty to the plaintiff in what it did.

It seems to me that in a case of this sort there are, on the one hand, the board who are under a statutory duty which is almost absolute to take steps for the support of the roof. The board said to the relevant witnesses that the board's method of support was the one which was adequate, and the one which must be employed. I ask myself whether it is right to hold that the company, which was aware of that situation, was in breach of its duty because it followed the advice of the board and instructed the company's men to do what the board, charged with the statutory duty, were insisting on being done. I answer that question "No". Quite clearly the company could not insist on Mr. Chester's method being used, and, short of withdrawing its men, which was not suggested by counsel for the plaintiff as being incumbent on the company in the circumstances, there was nothing more, in my view, which the company ought to have done and which it omitted to do. I therefore hold that the plaintiff's claim fails against the company.

[HIS LORDSHIP assessed the damages to which the plaintiff was entitled at £13,553 11s., which included the agreed sum of £1,053 11s. as special damages.]

Judgment for the plaintiff against the second defendants. Judgment for the first defendant against the plaintiff.

Solicitors: *Canter, Levin & Mannheim*, Liverpool (for the plaintiff); *Weightman, Pedder & Co.*, Liverpool (for the first defendant); *P. E. Lissant*, Manchester (for the second defendants).

[Reported by M. DENISE CHORLTON, Barrister-at-Law.]

A

Re HELBERT WAGG & CO., LTD.

Re PRUDENTIAL ASSURANCE CO., LTD.

[CHANCERY DIVISION (Upjohn, J.), October 11, 12, 13, 14, 17, 18, 19, December 8, 1955.]

B

Enemy—German enemy property—Loan agreement in 1924—Proper law of contract German—Debt extinguished under German moratorium law on payment to Konversionskasse—Decision of administrator as to effect of German law—Whether effect a question of law or of fact—Distribution of German Enemy Property Act, 1949 (12, 13 & 14 Geo. 6 c. 85), s. 8 (1)—Distribution of German Enemy Property (No. 2) Order, 1951 (S.I. 1951 No. 1899), art. 7 (2).

C

Chose in Action—Locality—Debt—Debtor's sole residence abroad—Effect of express provision for payment at place other than debtor's place of residence.

Conflict of Laws—Foreign legislation—Foreign exchange law—Recognition by English courts—Grounds for withholding recognition.

D

Trading with the Enemy—Loan agreement—Contract fully executed by lender—Debtor becoming an enemy—Effect on contract.

E

By a loan agreement dated Dec. 19, 1924, and made between a German company and the claimant, a company incorporated in England, the claimant created a sterling loan on terms which included provisions to the following effect. The principal and interest was to be paid in sterling in London free from all German taxes, and the loan was to be redeemed by an annual cumulative sinking fund which was to begin in 1925 to redeem the whole loan by January, 1945. The loan was to be secured by a specific mortgage on certain coal fields in Germany belonging to the company. The company undertook, when called on by the claimant to do so, to issue bearer bonds for the loan which were to conform to the usual text and practice ruling in the City of London. Clause 12 of the loan agreement provided:

F

"This agreement shall be construed in accordance with German law. An English and German text have been drawn up, but the parties agree that in the event of any conflict between the English and German texts, the English text shall prevail . . ." The loan was made and the company discharged its obligations under the agreement until 1933 when a moratorium law was passed in Germany. The law provided that interest, regular redemptions and similar regularly recurring obligations resulting from credits, loans, mortgages, etc., must be paid into the Konversionskasse in reichsmarks; that to the extent of a debtor's payments into the Konversionskasse (in Germany) the debtor was discharged from liability for the debt:

G

that the amounts paid into the Kasse were to be credited to the accounts of the foreign creditors concerned, and the Reichsbank was to fix the date at which such a credit balance could be paid out. Following the passing of the moratorium law, the company made payment of reichsmarks into the Konversionskasse and on Sept. 3, 1939, when war with Germany was declared, £174,142 remained owing to the claimant in respect of capital.

H

After the outbreak of war, the company continued its payments into the Konversionskasse with the result that by Jan. 13, 1945, the company had paid at the appropriate rates of exchange the full equivalent in reichsmarks of the whole of the loan and interest thereon. For the purpose of participating in the distribution of German enemy property the claimant claimed to be entitled to a German enemy debt, viz., the £174,142 and interest, at the relevant time which, so far as is material for the present case, was a

I

time not before Dec. 16, 1949,* the date of the passing of the Distribution of German Enemy Property Act, 1949. The Administrator of German Enemy Property determined that the claim was not established as the payments made to the Konversionskasse wholly discharged all liabilities of the company under German law, and the claimant appealed.

Held: no sum was due to the claimant at the time relevant for the purpose of a claim under the Distribution of German Enemy Property Act, 1949, and the claimant accordingly failed to establish its claim because—

(i) the moratorium law applied to the loan agreement, since (a) the power of legislation to affect a contract by modifying or annulling its terms depended on the proper law of the contract, not on the local situation of the debt (*Kahler v. Midland Bank, Ltd.*, [1949] 2 All E.R. 621, applied; *Jabbour v. Custodian of Israeli Absentee Property*, [1954] 1 All E.R. 145, distinguished), and (b) the proper law of the loan agreement, on its true construction and especially in view of cl. 12, was German law, and

(ii) the moratorium law would be recognised by the court in England in relation to a contract of which the proper law was German, since the court was satisfied that the moratorium law was genuine foreign exchange control legislation passed for the protection of its economy and was not a law passed ostensibly with that object but in reality with some object not in accordance with the usage of nations (principle stated in *Anglo-Iranian Oil Co., Ltd. v. Jaffrate (The Rose Mary)*, [1953] 1 W.L.R. 246, dissented from), and

(iii) the moratorium law must be taken to have extinguished the debt created by the loan agreement when the company had completed payments into the Konversionskasse, because the administrator had so decided and, the effect of the moratorium law being a question of foreign law and thus in English law a question of fact, no appeal lay under art. 7 (2) of the Distribution of German Enemy Property (No. 2) Order, 1951, from his decision on that point, and

(iv) the outbreak of war in 1939 did not abrogate the loan agreement, which was then wholly executed on one side, although, if the obligation on the company to pay in London had not been modified by the moratorium law, that obligation would have been suspended on the outbreak of war.

Dictum of LORD RUSSELL OF KILLOWEN in *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag*, [1946] 1 All E.R. at p. 45, applied.

Per CURIAM: the debt was situated in Germany, as that was the only place where the debtor resided, notwithstanding the express provision in the loan agreement that the debt was payable in London (see pp. 137, 138, post).

Deutsche Bank und Disconto Gesellschaft v. Banque des Marchands de Moscou (1930 D. No. 1435) (unreported on this point) followed.

New York Life Insurance Co. v. Public Trustee, [1924] 2 Ch. 101, and dictum of EVE, J., in *Re Russo-Asiatic Bank, Re Russian Bank for Foreign Trade*, [1934] Ch. at p. 738, considered.

Limits on the principle that every civilised state must be recognised as having power to legislate in respect of movables situate within its territory and in respect of contracts governed by the law of the state considered (see p. 138, letter E, to p. 142, letter H, post).

[**Editorial Note.** The Distribution of German Enemy Property (No. 2) Order, 1951, has been amended by the Distribution of German Enemy Property (No. 2) (Consolidated Amendment) Order, 1952 (S.I. 1952 No. 633), but, save

* The term "German enemy debt" is defined in s. 8 (1) of the Distribution of German Enemy Property Act, 1949, under which the meaning is limited to debts due at the passing of the Act, which was Dec. 16, 1949. Under the Distribution of German Enemy Property (No. 2) Order, 1951 (S.I. 1951 No. 1899), art. 2 (1) (f) as substituted by S.I. 1952 No. 633 another "relevant time", viz., Nov. 7, 1951, became material for the purposes of claim.

A possibly as stated in the footnote at p. 130, ante, the amendments are not material to the claims in the cases here reported. See, for the terms of the order as amended, 23 HALSBURY'S STATUTORY INSTRUMENTS 136 et seq.

As to the proper law of a contract, see 7 HALSBURY'S LAWS (3rd Edn.) 72, para. 137, and as to that law being chosen by the contracting parties, see *ibid.*, p. 73, para. 138; and for cases on the subject, see 11 DIGEST (Repl.) 420-422, 715-721.

As to the withholding of recognition of foreign laws because of their penal or confiscatory nature, see 7 HALSBURY'S LAWS (3rd Edn.) 8-10, paras. 10-13; and for cases on the subject, see 11 DIGEST (Repl.) 325, 16-20.

As to the location of property, see 7 HALSBURY'S LAWS (3rd Edn.) 44, paras. 86, 87; and for cases on the subject, see 11 DIGEST (Repl.) 384-386, 454-465.]

Cases referred to:

- (1) *Jabbour v. Custodian of Israeli Absentee Property*, [1954] 1 All E.R. 145; 3rd Digest Supp.
- (2) *Kahler v. Midland Bank, Ltd.*, [1949] 2 All E.R. 621; [1950] A.C. 24; [1949] L.J.R. 1687; 2nd Digest Supp.
- (3) *Mount Albert Borough Council v. Australasian Temperance & General Mutual Life Assurance Society, Ltd.*, [1937] 4 All E.R. 206; [1938] A.C. 224; 107 L.J.P.C. 5; 157 L.T. 522; Digest Supp.
- (4) *Vita Food Products, Incorporated v. Unus Shipping Co., Ltd.*, [1939] 1 All E.R. 513; [1939] A.C. 277; 108 L.J.P.C. 40; 160 L.T. 579; Digest Supp.
- (5) *The Torni*, [1932] P. 78; 101 L.J.P. 44; 147 L.T. 208; Digest Supp.
- (6) *Deutsche Bank und Disconto Gesellschaft v. Banque des Marchands de Moscou*, (1931-32), reported in part, 107 L.J.K.B. 386; 158 L.T. 364; Digest Supp.
- (7) *Re Russo-Asiatic Bank, Re Russian Bank for Foreign Trade*, [1934] Ch. 720; 103 L.J.Ch. 336; 152 L.T. 142; Digest Supp.
- (8) *New York Life Insurance Co. v. Public Trustee*, [1924] 2 Ch. 101; 93 L.J.Ch. 449; 131 L.T. 438; Digest Supp.
- (9) *Bank Voor Handel en Scheepvaart v. Slatford*, [1952] 2 All E.R. 956; [1953] 1 Q.B. 248; 3rd Digest Supp.
- (10) *Folliott v. Ogden*, (1789), 1 Hy. Bl. 123; 126 E.R. 75; *affd.* sub nom. *Ogden v. Folliott*, (1790), 3 Term Rep. 726; 100 E.R. 825; 11 Digest (Repl.) 537, 1471.
- (11) *Wolff v. Oxholm*, (1817), 6 M. & S. 92; 105 E.R. 1177; 11 Digest (Repl.) 386, 466.
- (12) *Re Fried Krupp Act.*, [1917] 2 Ch. 188; 86 L.J.Ch. 689; 117 L.T. 21; 11 Digest (Repl.) 448, 866.
- (13) *Banco de Vizcaya v. Don Alfonso de Borbon y Austria*, [1935] 1 K.B. 140; 104 L.J.K.B. 46; 151 L.T. 499; 11 Digest (Repl.) 323, 10.
- (14) *Anglo-Iranian Oil Co., Ltd. v. Jaffrate (The Rose Mary)*, [1953] 1 W.L.R. 246; 97 Sol. Jo. 81.
- (15) *Aksionairnoye Obschestvo A.M. Luther v. Sagor (James) & Co.*, [1921] 3 K.B. 532; 90 L.J.K.B. 1202; 125 L.T. 705; 11 Digest (Repl.) 325, 19.
- (16) *Paley (Princess Olga) v. Weisz*, [1929] 1 K.B. 718; 98 L.J.K.B. 465; 141 L.T. 207; 11 Digest (Repl.) 612, 421.
- (17) *Oetjen v. Central Leather Co.*, (1918), 246 U.S. 297.
- (18) *Ricaud v. American Metal Co.*, (1918), 246 U.S. 304.
- (19) *Re Russian Bank for Foreign Trade*, [1933] Ch. 745; 102 L.J.Ch. 309; 149 L.T. 65; Digest Supp.
- (20) *Perry v. Equitable Life Assurance Society of U.S.A.*, (1929), 45 T.L.R. 468; 11 Digest (Repl.) 422, 721.

- (21) *Re Banque des Marchands de Moscou (Koupetschesky)*, [1952] 1 All E.R. 1269; 11 Digest (Repl.) 425, 734. A
- (22) *R. v. International Trustee for Protection of Bondholders Aktiengesellschaft*, [1937] 2 All E.R. 164; [1937] A.C. 500; 106 L.J.K.B. 236; 156 L.T. 352; Digest Supp.
- (23) *Merwin Pastoral Co. Proprietary, Ltd. v. Moolpa Pastoral Co. Proprietary, Ltd., Moolpa Pastoral Co. Proprietary, Ltd. v. McKindlay*, [1933] B Argus L.R. 401; 7 A.L.J. 167; 48 C.L.R. 565; 11 Digest (Repl.) 426, 362.
- (24) *Frankfurter v. Exner, Ltd.*, [1947] Ch. 629; [1948] L.J.R. 553; 177 L.T. 257; 11 Digest (Repl.) 612, 422.
- (25) *Arab Bank, Ltd. v. Barclays Bank (Dominion, Colonial & Overseas)*, [1954] 2 All E.R. 226; [1954] A.C. 495; 3rd Digest Supp. C
- (26) *Ertel Bieber & Co. v. Rio Tinto Co.*, [1918] A.C. 260; 87 L.J.K.B. 531; 118 L.T. 181; 11 Digest (Repl.) 444, 850.
- (27) *Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag*, [1946] 1 All E.R. 36; [1946] A.C. 219; 115 L.J.Ch. 58; 174 L.T. 49; 12 Digest (Repl.) 436, 3334.
- (28) *Re Ferdinand (Ex-Tsar of Bulgaria)*, [1921] 1 Ch. 107; 90 L.J.Ch. 1; D 11 Digest (Repl.) 637, 610.

Cases Stated.

Cases Stated by the Administrator of German Enemy Property on the request of Helbert Wagg & Co., Ltd., and the Prudential Assurance Co., Ltd., pursuant to art. 7 (2) of the Distribution of German Enemy Property (No. 2) Order, 1951, for the opinion of the court on the questions of law whether a sum was due to Helbert Wagg & Co., Ltd., or to the Prudential Assurance Co., Ltd., such as was necessary to constitute a "German enemy debt" within s. 8 (1) of the Distribution of German Enemy Property Act, 1949, at Dec. 16, 1949 (the date of the passing of the Act). E

Milner Holland, Q.C., and *M. M. Wheeler* for Helbert Wagg & Co., Ltd. and for the Prudential Assurance Co., Ltd., the claimants. F

Denys B. Buckley and *N. C. H. Browne-Wilkinson* for the Administrator of German Enemy Property.

Cur. adv. vult.

Dec. 8. **UPJOHN, J.**, read the following judgment: These cases come before me as Cases Stated by the Administrator of German Enemy Property under the provisions of the Distribution of German Enemy Property Act, 1949 (which I shall refer to as "the Act"). G

The Act provides that Orders in Council may be made for the collection and realisation of German enemy property and for the distribution thereof to persons who establish claims in respect of German enemy debts. By s. 8 (1) of the Act a German enemy debt is defined as being a sum due at the passing of the Act, namely, Dec. 16, 1949, in respect of an obligation incurred before Sept. 3, 1939. By art. 7 (1) (2) of the Distribution of German Enemy Property (No. 2) Order, 1951 (S.I. 1951 No. 1899), made in pursuance of the Act, it is provided that the Administrator of German Enemy Property is to determine whether any claim is established for the purposes of the order, but that if the claimant is dissatisfied with the determination as being erroneous in point of law, he may require the administrator to state a Case for the opinion of the High Court. The administrator has decided against the claim in each case. H

It will be convenient to consider the claim of Helbert Wagg & Co., Ltd. (whom I will refer to as "the claimant") first. The claim of the claimant arises under a loan agreement made on Dec. 19, 1924, between a German company under its then name of Rombacher Huttenwerke of the one part (whom I will refer to as "the company") and the claimant of the other part. The agreement provided I

A that the claimant should create a sterling loan of £350,000 carrying interest at $7\frac{1}{2}$ per cent. payable half-yearly. The claimant agreed to make the said loan at a discount of $3\frac{1}{4}$ per cent. and by cl. 2 it was provided that the principal and interest should be paid in sterling free from all German taxes in London. It was further provided by cl. 3 that the principal should be redeemed by an annual cumulative sinking fund beginning in 1925 and calculated to redeem the whole loan by January, 1945, the payments being made in accordance with Sch. 1 to the loan agreement.

B By cl. 5 it was provided that the loan should be secured by a specific mortgage on certain coal fields in Germany belonging to the company. In addition by cl. 6 the company agreed to pay to the claimant a royalty for each ton of coal produced by the company's coal fields during the currency of the loan. By C cl. 8 the company undertook when called on to do so by the claimant, to issue bearer bonds for the loan, the claimant undertaking to pay any German stamp duty on such bonds. The bonds were to be secured by a trust deed and they were to conform to the usual text and practice ruling in the City of London. By cl. 9 it was contemplated that the loan might become a public loan with quotations in London, New York, Berlin and Amsterdam stock exchanges and D cl. 12 was in these terms:

"This agreement shall be construed in accordance with German law. An English and German text have been drawn up, but the parties agree that in the event of any conflict between the English and German texts, the English text shall prevail with the exception of cl. 10 para. 2*."

E The loan was duly made and the company discharged its obligations thereunder until 1933, when the matter was complicated by the passing of a German moratorium law on June 30 of that year. A translation of the law is annexed to the Case Stated; it is not a very grammatical translation, but its terms are not in dispute although the legal effect may be.

The relative part of the moratorium law is in these terms:

F "1. (1) Interests, dividends and regular redemptions, rent and similar regularly recurring satisfaction of obligations resulting from credits, loans, mortgages, etc., must be paid into the Konversionskasse if the amount is due and payable in reichsmark. If the debtor has to pay in foreign currency the amount must be converted into reichsmark according to the official middle price of the Berlin Stock Exchange, valid on the working day preceding the day of payment . . . (2) As far as the debtor has paid into the G Konversionskasse he is discharged from his liability. The relationship between the Kasse and the creditor is defined by s. 3. (3) The provisions of sub-para. (1) do not apply if the property, credit, loan, mortgage, land mortgage, participation and any other type of property originates from H funds which have been coming into the country after July 15, 1931, in foreign currency or in free reichsmark. 2. A Konversionskasse for foreign debts will be created. The Kasse is a corporation publici juris supervised by the Board of the Reichsbank and has its accounts with the Reichsbank. The Board of the Reichsbank shall instal the responsible officers. A statute to be drafted by the Ministry of Economy and the Board of the Reichsbank shall regulate the legal relations of the Konversionskasse . . . 3. The I amounts paid into the Kasse (s. 1 (1)) are to be credited to the accounts of the foreign creditors. These claims of the foreign creditors on the amounts so credited will be regulated by the aforesaid statute. The Reichsbank shall fix the date at which such a credit balance can be paid out."

The statute regulating the Konversionskasse was passed on July 3, 1933, and entitled the Konversionskasse to issue non-interest bearing promissory notes for money received in reichsmarks and also to issue interest-bearing bonds so far

* Clause 10 (2) is not relevant to this case.

as reichsmark payments had not been made to satisfy a capital liability, but it is not suggested that any such promissory notes or bonds were issued to the claimant. A

Following on the passing of the moratorium law the company, I am informed, although it does not appear in the Case Stated, duly made payment of reichsmarks into the Konversionskasse at the appropriate rates of exchange until the outbreak of war and some limited payments of special marks, expendable only in Germany and then only for certain purposes, were made thereout to the claimant. I mention that solely by way of history and it is not suggested that the de facto acceptance of the position during the pre-war years by the claimant can affect its legal rights. B

On Sept. 3, 1939, there was outstanding under the terms of the loan agreement £174,142 in respect of capital and the claimant claims to be entitled to rank as creditor in respect of that amount and to interest thereon. No claim is made in respect of any sums falling due before Sept. 3, 1939, all of which had been paid into the Konversionskasse. After the outbreak of war the company continued to make payments in reichsmarks into the Konversionskasse in accordance with the agreement as varied by the moratorium law with the result that by Jan. 13, 1945, the company had paid at the appropriate rates of exchange the full equivalent in reichsmarks of the whole of the loan outstanding at the passing of the law and interest thereon. The administrator has held that such payments had the effect under the municipal law of Germany then in force, i.e., the moratorium law of 1933, of wholly discharging all liabilities of the company in respect of the loan both as to principal and interest. He held that as the payments of such sums into the Konversionskasse gave the company a complete discharge under German law, there was no sum due to the claimant at Dec. 16, 1949, and he accordingly refused to allow the claimant's claim. C D E

I have been told that there was no formal hearing before the administrator and that he determined the matter solely on the question as to the effect of the moratorium law by the municipal law of Germany. He did not consider, because they were not put to him, any of the many interesting questions which have been argued before me, and which I must now mention. F

I will assume, though it is not conceded, that the administrator was right in his determination as to the domestic effect of the moratorium law. On that footing counsel for the claimant submits four main points: (i) That as the debt is by the terms of the contract made payable in London, the debt of the company to the claimant is situate in London. (ii) The moratorium law will not be recognised as having any extra-territorial effect so that if the debt is situate in London there was on Sept. 3, 1939, and remains, a debt due from the company in sterling to the claimant. (iii) If, however, the situs of the debt be German, he submits that the moratorium law is confiscatory and would not be held in an English court to be effective to destroy or vary the rights of any person other than a German national. (iv) Finally he says if he is wrong on all the foregoing points, further performance of the loan agreement as varied by the terms of the moratorium law became illegal on the outbreak of war with the result that the contract is abrogated but the debt remains. G H

Counsel for the administrator submits: (i) That the effect of the moratorium law depends not on the local situation of the debt, but on the proper law of the contract, which he submits is German. (ii) On that footing the English courts must give effect to all German laws unless they are discriminatory against some particular person or class of persons and the moratorium law, he contends, is not such a law. (iii) That the outbreak of war suspended, but did not abrogate, the contract, for all that remained to be done thereunder was payment of a liquidated sum of money. I

The first question that I must determine is whether the applicability of the moratorium law is to be tested by reference to the local situation of the debt or

A by the proper law of the contract. I am concerned with the effect of a law passed in 1933 on a series of debts which, although accrued, only became payable on or after Sept. 3, 1939.

In my judgment the question whether a liability to pay a debt payable on a future date has become modified or annulled by legislation must depend on the question whether such legislation affects the contractual obligation, for the matter still rests in contract. It does not seem appropriate to speak of a debt having a local situation until it is payable and can be recovered by suit, and its situs primarily depends on the residence of the debtor when it is recoverable. I think that distinction was recognised by PEARSON, J., in *Jabbour v. Custodian of Israeli Absentee Property* (1) ([1954] 1 All E.R. 145) where he was concerned with debts or choses in action such as a claim for unliquidated damages which could be sued for at the date of the modifying legislation. The power of legislation to affect a contract by modifying or annulling some term thereof is a question of discharge of the contract which in general is governed by the proper law (see *Kahler v. Midland Bank, Ltd.* (2) ([1949] 2 All E.R. 621) a case to which I return later). It is clear that the proper law of the contract depends on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties and generally on all the surrounding facts; the parties may have actually expressed their intention on the matter and in such a case prima facie their intention will be effectuated by the court: *Mount Albert Borough Council v. Australasian Temperance & General Mutual Life Assurance Society, Ltd.* (3) ([1937] 4 All E.R. at p. 214).

In favour of the view that English law is intended to govern the contract, the following indications are to be found in the loan agreement. First, the debt is payable in London in sterling without deduction for any German taxes. Secondly, the English translation is the governing translation and it would appear that the form of the agreement is one which is appropriate to English law. There was no evidence before me whether it is appropriate to German law. Thirdly, the agreement contemplates the issue of bonds which are to be in accordance with the text and practice ruling in the City of London. In favour of German law there are the following indications. First, that there are to be mortgages on German immovable property; such mortgages are to be inscribed in a German register. The loan agreement also provides that if the company makes any default, it would submit to immediate seizure in execution after formal authorisation by a notary public. Those considerations are not conclusive on the question, for the parties may well contemplate that different parts of their contract shall be governed by different law. Secondly, it is provided that the loan agreement is to be construed in accordance with German law. That is very important for if an agreement is to be construed in accordance with German law it can scarcely be doubted that the parties contemplate that their rights will be governed by German law, for it would be strange indeed to construe an agreement by German law (although the English text is to prevail) and then to apply to the construction so reached rules of English law. LORD WRIGHT made some observations on this in the Privy Council case of *Vita Food Products, Incorporated v. Unus Shipping Co., Ltd.* (4) ([1939] 1 All E.R. 513). He had mentioned the case of *The Torni* (5) ([1932] P. 78) where the Court of Appeal had held that a clause providing that certain bills of lading were to be construed in accordance with English law did not mean that the whole contract was to be governed by English law. LORD WRIGHT said ([1939] 1 All E.R. at p. 526):

“There were certain differences between that case and the present. One was that the bills of lading had a clause providing that they were ‘to be construed in accordance with English law,’ not, as in the present case, ‘shall be governed by English law’. In their Lordships’ judgment, that distinction is merely verbal, and is too narrow to make a substantial difference. The construction of a contract by English law involves the

applications to its terms of the relevant English statutes, whatever they may be, and the rules and implications of the English common law for its construction, including the rules of the conflict of laws. In this sense, the construing of the contract has the effect that the contract is to be governed by English law."

The Torni (5) was rather a special case and is an illustration of the principle that the parties' expression of intention is only prima facie evidence as to the proper law. This court will not necessarily regard that as being the governing consideration where a system of law is chosen which has no real or substantial connection with the contract looked on as a whole. No such considerations arise in the present case. Counsel for the claimant argued in the alternative that even if German law were the appropriate law, the parties intended that only German law as it stood in 1924 should govern their relationship. He pointed to the provision for payment free of all German taxes as showing the parties could not have contemplated that subsequent German legislation was to govern their rights. I cannot so interpret the intentions of the parties as evinced in the language they have used.

I regard cl. 12 as decisive of the matter and in my judgment the parties intended that German law was to govern their relationship, i.e., German law as it exists from time to time, and that is the proper law of the loan agreement. For the reasons which I have already given, I do not think that the situs of the debt is the relevant consideration, but as the matter has been very fully argued before me and as I have been referred to an unreported decision of the Court of Appeal of over twenty years standing, *Deutsche Bank und Disconto Gesellschaft v. Banque des Marchands de Moscou* (6) (1930 D. No. 1435), which is much in point, I think I ought to express my views thereon.

The general rule is clear that the debt is locally situate where the debtor resides, in this case Germany. Counsel for the claimant, however, submits that that rule is altered by the terms of the contract between the parties, and he relies on the statement to be found in DICEY'S CONFLICT OF LAWS (6th Edn.) at p. 304:

"If the place of payment of a debt be stipulated it will be there situate, the general rule notwithstanding."

He also relies on a statement of the law by EVE, J., in *Re Russo-Asiatic Bank, Re Russian Bank for Foreign Trade* (7), where he said ([1934] Ch. at p. 738):

"... although as a general rule the location of simple contract debts is the place in which the debtor is to be found, that rule, in my opinion, does not apply here, where the obligation is in terms to pay in sterling in London."

It is to be noted that in that case the debtor resided both in Russia and in England, and in those circumstances it was a perfectly accurate statement of the law, whatever interpretation is to be placed on the judgments in the Court of Appeal in *New York Life Insurance Co. v. Public Trustee* (8) ([1924] 2 Ch. 101) to which I now turn.

In that case all the three members of the court pointed out that strictly a debt can be sued on only in the place where it is payable and although no doubt in a proper case the creditor may have a right to sue the debtor in another place, such right is to sue not for debt but for breach of contract for the failure to pay the debt in the due place of payment; the conclusion would seem to follow that the debt is situate where the debt is payable. On the other hand counsel for the administrator submits that when properly understood the Court of Appeal decided that the place of payment becomes relevant to this question of situs only when it is established that the debtor has two or more residences and certainly some passages in the judgments of the learned judges who formed the court support that view. In this court the matter is concluded by the unreported case in the Court of Appeal already referred to, namely, *Deutsche Bank und Disconto Gesellschaft*

A v. *Banque des Marchands de Moscou* (6)*. A transcript of the judgments has been made available to me. I have sent for the pleadings in that case and it is clear that the plaintiffs were assignees of a bank (the Deutsche Bank) whose principal office was in Berlin, but who had a branch in England. The defendant, a Russian bank with no branch in England, was indebted to the London branch of the Deutsche Bank on current account and therefore in accordance with the
B general rule of banking law the debt was payable in London. It is clear that there was no express term of any contract making the debt payable in London. The point now under discussion was not dealt with by SCRUTTON, L.J., but GREER, L.J., formulated a number of propositions, among them these:

C “ (4) On Jan. 10, 1920, the Treaty of Peace Order in Council came into operation whereby enemy choses in action having a situs in this country became vested in the custodian, afterwards called the administrator, of German property. (5) At this time the bank had no residence in this country, but the debt was payable in this country. (6) The debt in question, therefore, did not pass to the administrator, residence of the debtor being an essential element in deciding the situs of the debt.”

D Later on he says:

E “ With regard to the propositions numbered (4) (5) and (6). At the date when the Treaty of Peace Order in Council came into operation, namely, Jan. 10, 1920, the defendants had no place of business in, and were therefore not resident in, the United Kingdom, and I think it is established by the decision in this court in *New York Life Insurance Co. v. Public Trustee* (8) that the debt had no situs in this country. I regard that case as establishing that it is an essential element in determining the situs of a debt due to a foreign corporation that at the material date the corporation should have a residence within the jurisdiction in which the debt is payable.”

F ROMER, L.J., after discussing *New York Life Insurance Co. v. Public Trustee* (8) said:

G “ As the debt in question was, in terms of the contract creating it, payable in this country, and in addition was recoverable here, its locality was held to be English. In the present case the debt is payable in this country, but the defendant bank was not residing here on Jan. 10, 1920. It was in May of the same year, but that will not help the plaintiffs. The debt was also
H recoverable here on Jan. 10, 1920, had the plaintiffs been successful in obtaining leave to serve the defendant bank out of the jurisdiction. But I know of no authority for the proposition that a simple contract debt is situate in this country at a time when the debtor is not resident here, namely, because he can be sued by putting into operation the provisions of Ord. 11.”

I It is true that in that case the decision of the court was ultimately of no effect on this point for it was found on further evidence that the defendant bank had no existence at the relevant time, but it is clear that the majority of the court intended to lay down finally their views on the law “ de bene esse ” in the words of GREER, L.J., in case on further inquiry the bank was found to be in existence. Therefore I do not think I can treat the observations of GREER, L.J., and ROMER, L.J., as obiter dicta and they are binding on me if applicable to the present circumstances. It seems to me that the only distinction that can be drawn between that case and this is that in this case the debt is payable in

* The passages cited by UPJOHN, J., from the judgment of GREER, L.J., in this case are the only parts of that judgment relevant to the question of the locality of the debt there under consideration. The judgment of ROMER, L.J., so far as it relates to the same question, is quoted in full in *Re Banque des Marchands de Moscou* (*Koupetschesky*), [1954] 2 All E.R. at p. 752.

London by the terms of the contract and not by virtue of the general law applicable thereto and that circumstance is indeed strongly relied on by the claimant. In my judgment, however, that forms no proper ground of distinction, for the law must be the same whether the debt is payable in a particular place by virtue of the express terms of the contract or by general law applicable thereto. Nor can I accept the argument that, as on one construction of s. 8 of the Act there is no appeal from my decision, I am at liberty to disregard a well settled canon of procedural law, that decisions of the Court of Appeal are binding on this court. Accordingly in my opinion the locality of the debt in this case is Germany, the only place where the debtor resides. A B

Concerning the claimant's second point does not arise on the view I have formed and I turn to his third main point, viz., that the moratorium law of 1933 is confiscatory and will not be recognised as affecting the contractual rights of the parties even where the debt is situate in Germany and the proper law is German, save only in cases where German nationals are concerned. C

I start with the elementary proposition that it is part of the law of England and of most nations that in general every civilised state must be recognised as having power to legislate in respect of movables situate within that state and in respect of contracts governed by the law of that state and that such legislation must be recognised by other states as valid and effectual to alter title to such movables and to sustain, modify or dissolve such contracts. The substantial question I have to determine is what limit is to be imposed on that proposition when the effect of such legislation comes to be debated in the courts of other states. I may note in passing that the modern tendency is to deny extra-territorial validity to legislation, for example, on movables situate outside the state at the time of the legislation: *Bank Voor Handel en Scheepvaart v. Slatford* (9) ([1952] 2 All E.R. 956). D E

To this general principle of recognition in foreign courts of the territorial validity of legislation there are undoubted limitations or exceptions as the following examples show: (i) No state will enforce the fiscal laws, however proper, of another state, nor penal statutes, using that phrase in the strict sense of meaning statutes imposing penalties recoverable by the state for infringement of some law. F

"The penal laws of foreign countries are strictly local, and affect nothing more than they can reach and can be seized by virtue of their authority,"

per LORD LOUGHBOROUGH in *Folliott v. Ogden* (10) (1789) (1 Hy. Bl. at p. 135). (ii) English law will not recognise the validity of foreign legislation intended to discriminate against nationals of this country in time of war by legislation which purports to confiscate wholly or in part movable property situated in the foreign state. As long ago as 1817 such confiscation was described by LORD ELLENBOROUGH, C.J., in *Wolff v. Oxholm* (11) (1817) (6 M. & S. at p. 106) as "not conformable to the usage of nations". That case also shows that legislation tending to preserve enemy property by the appointment of a custodian will be recognised. Another case illustrative of the principle is *Re Fried Krupp Act*. (12) ([1917] 2 Ch. 188) where YOUNGER, J., while recognising the validity of German legislation which prohibited payment to enemy nationals in time of war, held that a German law passed shortly after the outbreak of war which purported to cancel and not merely to suspend liability for payment of interest by a German to a British firm would not be recognised in these courts although the proper law of the contract was German. YOUNGER, J., said (*ibid.*, at p. 192): G H I

"And this ordinance, as well as similar German ordinances enacted at the same time and made applicable to France and Russia, have this feature common to all, that their intention plainly is to penalise particular classes of persons, and incidentally to injure the enemy countries to which these persons belong."

A (iii) English courts will not recognise the validity of foreign legislation aimed at confiscating the property of particular individuals or classes of individuals (see *Banco de Vizcaya v. Don Alfonso de Borbon y Austria* (13) ([1935] 1 K.B. 140) where the Spanish laws purporting to expropriate the ex-King of Spain's property were treated as examples of penal legislation; and see *Anglo-Iranian Oil Co., Ltd. v. Jaffrate (The Rose Mary)* (14) ([1953] 1 W.L.R. 246) where CAMPBELL, J., sitting in the Supreme Court of Aden, held certain laws of the State of Persia which he found to be passed to nationalise the plaintiff company only without compensation were confiscatory and ineffectual to pass title). Another example suggested by PROFESSOR LAUTERPACHT in OPPENHEIM'S INTERNATIONAL LAW (8th Edn.), Vol. I at p. 268, is a law passed by a foreign state expropriating the property in such state of British Protestants.

C I do not challenge the correctness of the decision in *The Rose Mary* (14) on the facts of that case but CAMPBELL, J., came to the conclusion that the authorities both of this and other countries justified the formulation of a more general principle, viz., (i) all legislation that expropriates without compensation is contrary to international law; and (ii) that such law is incorporated in the domestic law of Aden and accordingly such legislation will not be recognised as valid in the courts of Aden. Unless the law of England takes a different view of international law from the law of Aden, the learned judge's conclusions can only be correct if his interpretation of *Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co.* (15) ([1921] 3 K.B. 532) and *Princess Olga Paley v. Weisz* (16) ([1929] 1 K.B. 718) is correct. Those cases, both in the Court of Appeal, were concerned with the effect of Russian legislation introduced shortly after the Russian revolution of 1917 which in fact expropriated certain types of private property situate in Russia without any compensation. They established the principle that this court will not inquire into the legality of acts done by a foreign government in respect of property situate in its own territory. CAMPBELL, J., in *The Rose Mary* (14) considered that principle to be valid only where the property confiscated belongs (as in both those cases) to subjects of the confiscating state. However, all three judgments in *Luther v. James Sagor & Co.* (15) laid down the principle in perfectly general terms and it was in no way limited, at any rate in express terms, to a recognition of the validity of such legislation in relation only to nationals of the confiscating state. BANKES, L.J., said ([1921] 3 K.B. at p. 546):

G "Even if it was open to the courts of this country to consider the morality or justice of the decree of June, 1918, I do not see how the courts could treat this particular decree otherwise than as the expression by the de facto government of a civilised country of a policy which it considered to be in the best interest of that country. It must be quite immaterial for present purposes that the same views are not entertained by the government of this country, are repudiated by the vast majority of its citizens, and are not recognised by our laws. Taking the view I do of the point I do not consider it necessary to discuss the authorities to which our attention has been called."

H The authorities he did not think it necessary to discuss included *Folliott v. Ogden* (10) and *Wolff v. Oxholm* (11). I do not understand the learned lord justice to be purporting to overrule those cases without examination, but to be treating them as irrelevant because they were exceptions to the general rule as examples of penal legislation (in the strict sense) and of discriminatory legislation respectively which in his view had no application to the case before him.

I In equally general terms were the judgments of two members of the court in *Princess Olga Paley v. Weisz* (16). It seems clear that SCRUTTON, L.J., drew no distinction between the operation of legislation on the property of a national of the confiscating state and a foreigner who had movables in the state, for he said ([1929] 1 K.B. at p. 724):

"The United States, situate in the neighbourhood of South and Central American Republics, where the life of any government is precarious and its

death rarely by natural causes, frequently found in its territory property seized by a revolutionary force which ultimately succeeded in establishing itself in power and there sold the goods it had seized to persons who exported them to the United States, where they were claimed by their original owners. In *Oetjen v. Central Leather Co.* (17) (1918) (246 U.S. 297) these facts occurred with reference to a seizure in Mexico of property of a Mexican citizen which when sold came into the United States, and in *Ricaud v. American Metal Co.* (18) (1918) (246 U.S. 304) they occurred again with respect to the property of a citizen of the United States."

He then went on to state the general principle, which I need not re-state. It is true that RUSSELL, L.J., in that case said ([1929] 1 K.B. at p. 736):

"This court will not inquire into the legality of acts done by a foreign government against its own subjects in respect of property situate in its own territory,"

but it was sufficient for the decision of the case before him and he dealt with the point very briefly. MAUGHAM, J., in *Re Russian Bank for Foreign Trade* (19) ([1933] Ch. 745) also stated the principle in the same limited way but his remarks were obiter.

On the other hand in *Perry v. Equitable Life Assurance Society of U.S.A.* (20) (1929) (45 T.L.R. 468) the plaintiff, a British subject residing in Russia, took out a policy of life assurance with the defendants, the proper law of the contract being Russian. It was held that certain confiscatory decrees of the Russian government were effective to annul the contract, though it is true that no point was taken that such decrees could be valid only against Russian nationals. This case was quoted without disapproval by LORD RADCLIFFE in *Kahler v. Midland Bank, Ltd.* (2).

In *Re Banque des Marchands de Moscou (Koupetschesky)* (21) ([1952] 1 All E.R. 1269) (which does not appear to have been cited to CAMPBELL, J.), VAISEY, J., expressed the view that the general principle was not limited to nationals of the confiscating state. I respectfully agree with him, for it seems to me that nationality on this question must be irrelevant. If the principle be true in respect of a state in relation to its own nationals, it must surely be conceded in relation to those persons who, though not subjects of the state, nevertheless bring their movables within its jurisdiction for business or private reasons, or for the like reasons enter into contracts governed by the law of the state and in general enjoy the same benefits and protection and are subject to the same disadvantages and disabilities as subjects of the state. With all respect to CAMPBELL, J., I think *Luther v. James Sagor & Co.* (15) and *Princess Olga Paley v. Weisz* (16) laid down principles of general application not limited to nationals of the confiscating state.

In my judgment the true limits of the principle that the courts of this country will afford recognition to legislation of foreign states in so far as it affects title to movables in that state at the time of the legislation or contracts governed by the law of that state rests in considerations of international law or in the scarcely less difficult considerations of public policy as understood in these courts, ultimately I believe the latter is the governing consideration. But whatever be the true view the authorities I have reviewed do show that these courts have not recognised any principle that confiscation without adequate compensation is per se a ground for refusing recognition to foreign legislation. That view is further supported by the authorities on exchange control legislation which I must now consider. It cannot be doubted that legislation intended to protect the economy of the nation and the general welfare of its inhabitants regardless of their nationality by various measures of foreign exchange control or by altering the value of its currency, is recognised by foreign courts although its effect is usually partially confiscatory. Probably there is no civilised country in the world which has not at some stage in its history altered

A its currency or restricted the rights of its inhabitants to purchase the currency of another country. Most countries, including the United Kingdom, are restricting those rights at this very moment. In individual cases the result of such legislation is in fact to confiscate in some degree private rights of property but the right of the state to do so has never been challenged.

B A few examples may be cited. In *R. v. International Trustee for Protection of Bondholders Aktiengesellschaft* (22) ([1937] 2 All E.R. 164) His Majesty's government in a contract made in 1917, whose proper law was that of the United States of America, contracted to pay a debt by instalments at the option of the holder in New York in gold coin of the United States of a certain weight and fineness or in London at a certain rate. A resolution of Congress in 1933 which had the force of law of the United States of America held that such a provision was against public policy, as it obstructed the power of Congress to regulate the value of money of the United States and that such an obligation was discharged by payment dollar for dollar of coin which at the time of payment was legal tender. As in the meantime the U.S.A. had devalued the dollar, the direct result of that legislation was to reduce the value of the debt sued on and pro tanto to confiscate without compensation the property rights of the holder, but it was never suggested that such a resolution was not thereby applicable as part of the proper law of the contract.

D Another case is *Kahler v. Midland Bank, Ltd.* (2) already mentioned. In that case certain exchange regulations of Czechoslovakia which had in effect been in force since 1934 made unlawful without the permission of the Czechoslovakian National Bank transfers of foreign securities from (among other cases) currency "inlanders" to currency "foreigners". LORD SIMONDS said ([1949] 2 All E.R. at p. 623):

E "It is necessary only to say that the relevant law relating to foreign exchange, under which the delivery without a consent that was in fact withheld would be illegal, is not, in my opinion, a law of such a penal or confiscatory nature that it should be disregarded by the courts of this country."

F LORD REID said (*ibid.*, at p. 636):

"I have already stated that, in my opinion, an exchange control regulation of the kind here in question is not within the kind of foreign law which an English court cannot recognise."

And LORD RADCLIFFE said (*ibid.*, at p. 641):

G "There is nothing in the contract that would prevent him from calling for the shares at any time, but the law of Czechoslovakia to which the contract is subject has so far modified his right so to recover possession of the shares as to make the consent of the National Bank a condition precedent. If, then, the courts of this country are to recognise that modification, the appellants lack a present right to possession. It seems to me that we should ignore an established rule of our private international law if we were not to give effect to the currency regulation in question. If the proper law of the contract is the law of Czechoslovakia, that law not merely sustains, but also, because it sustains, may also modify or dissolve, the contractual bond. The currency law is not part of the contract, but the rights and obligations under the contract are part of the legal system to which the currency law belongs. So to decide is to give effect to the same principle as was upheld by our courts when the obligations of the government of the United Kingdom under its American loan of 1917 were treated as modified by American legislation: see *R. v. International Trustee for Protection of Bondholders Aktiengesellschaft* (22); or when Mr. Perry's life assurance policy was annulled by supervening legislation in the U.S.S.R.: see *Perry v. Equitable Life Assurance Society of U.S.A.* (20)."

I *Merwin Pastoral Co. Proprietary, Ltd. v. Moolpa Pastoral Co. Proprietary, Ltd.* (23) (1933) (48 C.L.R. 565), a decision of the High Court of Australia, also affords

a useful illustration. The State of New South Wales passed a law providing A
inter alia that all personal rights to payment under mortgages of or agreements
for sale of land in New South Wales should be void, leaving the parties to their
remedies against the land. The parties litigated in the State of Victoria. On
appeal to the High Court, EVATT, J., said (*ibid.*, at p. 587):

“ I therefore think that the governing law of the contract was that of B
New South Wales. But MACFARLAN, J., was also, I gather, prepared to
decide against the present appellant upon the separate ground that the
ex post facto New South Wales legislation was very unmeritorious and its
application would probably ‘ work manifest injustice to or, in effect, a
fraud on one of the parties ’. It is true that, very occasionally, upon grounds C
of public policy, English courts have refused to accord recognition to some
part of the law of a foreign country, which might otherwise be treated as
governing or underlying a transaction. It is, in my view, not permissible
for a Victorian court to adopt such an attitude here. All that the legislature
of New South Wales did was, in a period of unexampled economic crisis, to
revise, alter, suspend or discharge certain contractual obligations over which
it could exert its constitutional power. The legislature of Victoria too D
enacted a law which differed in degree only from that of New South Wales.”

In my judgment, these courts must recognise the right of every foreign state
to protect its economy by measures of foreign exchange control and by altering
the value of its currency. Effect must be given to those measures where the
law of the foreign state is the proper law of the contract or where the movable
is situate within the territorial jurisdiction of the state. That, however, is E
subject to the qualifications that this court is entitled to be satisfied that the
foreign law is a genuine foreign exchange law, i.e., a law passed with the genuine
intention of protecting its economy in times of national stress and for that
purpose regulating (inter alia) the rights of foreign creditors, and is not a law
passed ostensibly with that object, but in reality with some object not in
accordance with the usage of nations. The title and expressed purpose of such F
legislation are not conclusive on the point. For example, in *Frankfurter v. Exner,*
Ltd. (24) ([1947] Ch. 629) a law was passed under the Hitler régime in Austria
with the apparently innocent object of providing for receivers in certain cases,
but with the real object of confiscating the property of Jews and others. ROMER,
J., expressed the view that this court is entitled to inquire what manner of
legislation it really was, and for that purpose to see what was done under it. G
Again, if it had not been for the difficulties which arose on the pleadings in that
case, I do not think the House of Lords in *Kahler v. Midland Bank, Ltd.* (2)
would have hesitated to investigate the question whether an exchange control
statute passed in 1934 with the genuine object of protecting the state’s economy
had not by 1946 become an instrument of oppression and discrimination. Further,
while every state is in the best position to know what measures of control are
best suited to its particular needs, and must be allowed much latitude in its H
choice of control weapons, there are limits in the recognition to be afforded to
such legislation, and this court must be entitled to consider whether, looking
at all the circumstances, the law is so far-reaching in its scope and effect as really
to offend against considerations of public policy of this country. *

I turn to a more detailed consideration of the moratorium law. As the point I
was never taken before the administrator, there is unfortunately no statement
in the Case Stated of the circumstances in which the moratorium law came to
be passed. I am told it was passed in the earliest days of the Hitler régime,
but counsel for the claimant has conceded that there is nothing sinister in that,
and that the law was passed in an honest attempt to solve Germany’s economic
position. Now the moratorium law did three things: (i) It permitted the debtor
to pay in marks instead of sterling. That is not only a usual, but almost essential
part of currency control. (ii) It altered the place of payment from London to

A Berlin, not in time of peace and free communication between nations in itself a very serious matter. (iii) It altered the method of discharge, for instead of being compelled to pay the creditor in sterling in London, it enabled the debtor to pay a government agency in marks in Berlin. So far as the creditor was concerned, he could not complain so long as such payments were made, but it did not cancel the balance of the debt, either principal or interest, for it appears that
B the original obligation was only discharged pro tanto on payment of marks into the Konversionskasse. On the other hand, on such payments being made the creditor could no longer sue his debtor for payment in sterling in respect of the instalments discharged by such payment, and I assume that on the last due payment being made into the Konversionskasse (as it was) the creditor could no longer proceed to enforce his rights as mortgagee. Briefly, in such case his
C rights were extinguished as against the debtor.

Counsel for the claimant submitted that the wording of the relevant laws and the obligations thereby cast on the Konversionskasse were so vague and indefinite that it could not properly be said that in exchange for such extinction the creditor received any rights against the Konversionskasse; and that, he said, amounted to pure confiscation which was also discriminatory against a class
D consisting of Germany's foreign creditors. There is much force in that argument. On the other hand, accepting the view that this was a genuine attempt to protect Germany's economy and not, for example, an attempt to build up a secret war fund for use against this and other countries some years later, the legislation appears to create a state of affairs with which in this country we are not wholly unfamiliar. The general scheme of the legislation is this. The debtor is to make
E payments into a government agency on behalf of the creditor. Such payments are to be credited to each creditor and payment out is to be made at such date as the Reichsbank shall fix. That is not unlike a blocked account. There was an economic blizzard blowing in the early 1930's; even the United States felt its force, as we are reminded by *R. v. International Trustee for Protection of Bondholders Aktiengesellschaft* (22). It had led this country to suspend the gold
F standard in September, 1931. I must assume that the genuine object and purpose of this moratorium law was to prevent a scramble for payment among Germany's foreign creditors, which might have resulted in another collapse of the mark; I must assume that the intention of the German law was to ensure so far as possible that when the storm had passed trading and debtor and creditor relationships might be resumed in an orderly manner. In my judgment this was foreign
G exchange control legislation which must be recognised by this country as effective to modify contractual obligations where the proper law is German.

The next question is as to the effect of the outbreak of war on Sept. 3, 1939, on the rights of the contracting parties. At that date the position was that the claimant had long since performed all its obligations under the contract and all that remained to be done by the company was payment of a liquidated sum of
H money by instalments of principal and interest as set out in great detail in the schedule to the loan agreement. By the moratorium law this obligation could be discharged by payment in reichsmarks to the Konversionskasse. It is argued that on the outbreak of war the provision for payment to the Konversionskasse became illegal as it tended to increase the resources of the enemy, for it was said the German government would no doubt have the use of the money paid into
I the Konversionskasse. On that footing it was said that the provision permitting the discharge of the contract by payment to the Konversionskasse became illegal but, as it was admitted that one cannot abrogate a particular term of a contract, whether expressed or implied by the general law governing the contract, the result must be that the whole contract was abrogated in the sense that no part of it could legally be performed thereafter but the original debt with all its characteristics remains: see *Arab Bank, Ltd. v. Barclays Bank (Dominion, Colonial & Overseas)* (25) ([1954] 2 All E.R. 226).

The principles of law to be applied are well settled by the highest authority. **A**
 In *Ertel Biebr & Co. v. Rio Tinto Co.* (26) LORD DUNEDIN said ([1918] A.C.
 at p. 274):

"From these cases I draw the conclusion that upon the ground of public
 policy the continued existence of contractual relation between subjects and
 alien enemies or persons voluntarily residing in the enemy country which **B**
 (1) gives opportunities for the conveyance of information which may hurt
 the conduct of the war, or (2) may tend to increase the resources of the enemy
 or cripple the resources of the King's subjects, is obnoxious and prohibited
 by our law."

It is clear, however, that in the words of LORD RUSSELL OF KILLOWEN in
Schering, Ltd. v. Stockholms Enskilda Bank Aktiebolag (27) ([1946] 1 All E.R.
 at p. 45) **C**

"... a contract which is completely executed on one side, and under
 which nothing remains to be performed except payment to be made by the
 other of a liquidated sum whether already due, or debitum in praesenti
 solvendum in futuro, is unaffected by the outbreak of war."

LORD MORTON OF HENRYTON quoted that passage with approval in *Arab*
Bank, Ltd. v. Barclays Bank (25) ([1954] 2 All E.R. at p. 233). If, therefore, **D**
 the claimant had been under an obligation to the company to pay a liquidated
 sum by instalments, that obligation would have been suspended, not abrogated.

This is the converse case, but in my judgment the same principles apply. The
 contract is wholly executed on one side, and no question of any continued
 intercourse between subjects and alien enemies arises. Had the original obliga- **E**
 tion to pay in sterling in London remained, that obligation, in my judgment,
 would not have been abrogated but suspended; the German government under
 legislation passed for that purpose could have directed payment to a German
 Custodian of Enemy Property without offending any principle of public policy
 of this country or of international law. In fact the proper law permits payment
 in Germany to a German agency. I cannot see that transfer of German marks **F**
 from one person to another in Germany increases the resources of the enemy
 unless such transfer is the result of some seizure of enemy funds by the German
 government for use against its enemies. Whether such a seizure would in itself
 be illegal I do not pause to consider (see *Re Ferdinand (Ex-Tsar of Bulgaria)* (28)
 ([1921] 1 Ch. 107)), as no such seizure is suggested here. I must assume that
 payments made by the company into the Konversionskasse remained at all **G**
 material times to the credit of the claimant in some blocked account. In my
 judgment this point also fails.

I have so far assumed the correctness of the administrator's decision that the
 moratorium law did in the events which have happened operate, by the municipal
 law of Germany, to extinguish the debt. The claimant challenges that decision
 and desires to tender evidence of German law to prove the contrary. Whether **H**
 the claimant is entitled to do so depends on the construction of art. 7 (2) of the
 Distribution of German Enemy Property (No. 2) Order, 1951 (S.I. 1951 No. 1899).
 Article 7 is in the following terms:

"(1) The administrator shall determine whether any claim is established
 for the purposes of this order and the amount for which it may be admitted
 for payment, and shall serve written notice of the determination on the **I**
 claimant. (2) The determination of the administrator in relation to any
 claim shall be final: Provided that the claimant, if dissatisfied with the
 determination as being erroneous in point of law, may by notice in writing
 given within six weeks after being served with notice of determination as
 aforesaid and setting out the question or questions of law in respect of which
 it is alleged that the determination of the administrator was erroneous,
 require the administrator to state and sign a case for the opinion thereon
 of the High Court and the decision of the High Court shall be final. (3) The

- A administrator shall be entitled to appear at the hearing of any case stated by him under this article. (4) If the question at issue between a claimant and the administrator falls to be decided according to the law of Scotland, the reference to the High Court shall be construed as a reference to the Court of Session."
- B Paragraphs (5) to (8) inclusive of art. 7 are in terms identical with that of para. (4) except that they substitute for "Scotland" and "Court of Session" respectively "Northern Ireland" and "High Court of Justice in Northern Ireland"; "Jersey" and "Superior Number of the Royal Court of Jersey"; "Bailiwick of Guernsey" and "Royal Court of Guernsey" and finally "Isle of Man" and "[Her] Majesty's High Court of Justice of the Isle of Man, Chancery Division".
- C Counsel for the claimant concedes that *prima facie* a question of German law is by the law of this country a question of fact on which, therefore, the administrator's decision would be final, but he submits that on the true construction of art. 7 all questions of foreign law that may arise are to be treated as questions of law. He submits that this is shown by para. (4) to para. (8) inclusive.
- D The Act is an Act passed for the benefit of Her Majesty's government, British subjects or British protected persons resident or carrying on business in the United Kingdom and any body of persons corporate or unincorporate, incorporated or constituted under the laws in force in the United Kingdom, for they alone are creditors as defined in s. 8 (1) of the Act. Such persons or bodies may be resident in any part of the United Kingdom and if they desire to challenge the correctness of the administrator's decision in law they must do so, so it seems to me, by reference to some system of law operating within the United Kingdom. It would
- E be highly inconvenient if, for example, a Jerseyman made a claim in this court claiming that Jersey law ought to be applied; the Act therefore refers the matter to the Jersey court. It may then be found that the parties intended that the law of some foreign state (probably, though not essentially, Germany) should govern their relations. If so, that law must be then ascertained and applied by the Jersey courts to such extent and in such manner as the rules of Jersey law provide.
- F I do not think that the clause was intended to have any greater operation than that or inferentially to alter a well settled rule of English municipal law. If the draftsman of the order had intended that German law was to be treated as a question of law, even in those parts of the United Kingdom where the municipal law treats it as a question of fact, surely he would have said so in clear and unmistakable terms. This point also fails.
- G I dismiss the claimant's appeal with costs.

Re **PRUDENTIAL ASSURANCE CO., LTD.**

- I turn now to the claim of the Prudential Assurance Co. Ltd. (whom I will call "the Prudential"). I can deal with it very shortly. In 1937 the Prudential had a charge to secure repayment of £40,000 on land in Germany belonging to a company known as Korting Grundbesitz (whom I will call "the vendor").
- H On Apr. 9 of that year the vendor entered into a contract of sale of the land subject to the charge to another German company (whom I will call "the debtor"). There was a third party to that contract (whom I will call "the surety"). It was a condition of that contract that the Prudential should release the land from the debt of £40,000 and accept instead an obligation of the debtor and the
- I surety to repay the debt with interest by eleven annual instalments. The exact terms were set out in a letter of the same date from the debtor and the surety to the Prudential and agreed to by the latter. The letter provided for payment of the principal and interest in sterling in London free of all present and future German taxes and charges but expressly mentioned the fact that payment in pounds sterling by the debtor would for an indefinite time be prevented by the German exchange regulations and that in accordance with those regulations the debtor would be released from liabilities in foreign currency falling due by payment of reichsmarks to the Konversionskasse. The claim was dismissed by

the administrator on the short ground that by German municipal law the debt was extinguished. As in the *Helbert Wagg* case, no other point was taken before him.

Before me counsel for the Prudential has conceded that, having regard to the terms of the letter, he cannot succeed unless he can prove that further performance was abrogated by the outbreak of war or unless he is entitled to tender further evidence as to the effect of German municipal law. On these issues the case is on all fours with the *Helbert Wagg* case and I dismiss it with costs.

Appeals dismissed.

Solicitors: *Slaughter & May* (for the claimants); *Solicitor, Board of Trade.*

[Reported by R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

UNIPRODUCTS (MANCHESTER), LTD. v. ROSE FURNISHERS, LTD.

[MANCHESTER ASSIZES (Glyn-Jones, J.), November 29, 1955.]

Landlord and Tenant—Repair—Landlord's covenant—Obligation to repair not arising in the absence of notice of want of repair or actual knowledge—Collapse of floor owing to dry rot—Injury to manager of lessee company—Action by lessee to recover compensation paid to manager.

The plaintiff company was the lessee of a shop and premises under a lease dated Feb. 5, 1953, for a term of five years. By the lease the lessor covenanted, among other things, to keep the main structure of the premises in good and tenable repair. Before the lease was granted representatives of the plaintiff company inspected the premises to see if they were suitable for the company's business. The company entered into possession of the premises soon after the date of the lease and opened its business on the premises at the end of March, 1953. On Nov. 10, 1953, the floor of a store room situated on the ground floor of the premises collapsed into the basement and the company's manager, who was standing in the room at the time, was seriously injured. It was later discovered that the joists of the store room floor had been badly affected by dry rot and were in an advanced state of decay. The plaintiff company, having been advised that it was under a legal liability to its manager in respect of the accident, paid him the sum of £2,052 10s. in compromise of a claim made by him. The company sought to recover this sum from the lessor in an action for damages for breach of the covenant to repair. No express notice of the defect in the premises was ever given to the lessor by the plaintiff company, and it was not established that the lessor had actual knowledge of the defect prior to the accident.

Held: whether the defect was or was not in existence before the tenancy began, the lessor's obligation under the covenant to repair did not arise until the lessor had notice of the defect unless he had actual knowledge of it, and, therefore, since no express notice of the defect was given to the lessor by the plaintiff company and actual knowledge of the defect on the part of the lessor was not proved, the company's claim failed.

Makin v. Watkinson (1870) (L.R. 6 Exch. 25) and *Murphy v. Hurly* ([1922] 1 A.C. 369) considered.

A [As to the liability of a landlord under a covenant on his part to repair, see 20 HALSBURY'S LAWS (2nd Edn.) 218, para. 238; and for cases on the subject, see 31 DIGEST (Repl.) 344-346, 4752-4779.]

Cases referred to:

- B (1) *Makin v. Watkinson*, (1870), L.R. 6 Exch. 25; 40 L.J. Ex. 33; 23 L.T. 592; 31 Digest (Repl.) 346, 4768.
 (2) *Murphy v. Hurly*, [1922] 1 A.C. 369; 91 L.J.P.C. 116; 127 L.T. 49; 31 Digest (Repl.) 346, 4774.

Action.

C The plaintiff company, as the lessee of a shop and premises under a lease dated Feb. 5, 1953, claimed damages against the defendant company, the lessor, for breach of a covenant in the lease on the part of the lessor to keep the main structure of the premises in good and tenantable repair.

The facts appear in the judgment.

Fenton Atkinson, Q.C., and *W. D. T. Hodgson* for the plaintiff company.

N. J. Laski, Q.C., and *J. Zigmond* for the defendant company.

D **GLYN-JONES, J.:** This case raises a point in the law of landlord and tenant on which there appears to be no precise and binding authority. The facts are these. By a lease dated Feb. 5, 1953, the defendant company let to the plaintiff company a shop and premises at 244, Regent Road, Salford, for a term of five years. The lessor covenanted to keep the roof, main structure and outside walls of the demised premises, except the glass windows thereof but including boundary walls, in good and tenantable repair. Before the lease was granted there had been the usual negotiations between the parties, and representatives of the plaintiff company had looked over the premises to see if they would be suitable. A day or two after Feb. 5 the plaintiff company entered into possession for the purpose of taking some fittings, including new shop windows, into the premises. When the fittings had been arranged to its satisfaction, the plaintiff company took in its stock-in-trade, and on Mar. 29 opened its business.

G On the ground floor there was a small room, described as a store room, which was towards the back of the shop. In the centre of that room on the floor there was a metal plate which had, apparently, been put there by way of repairing some damage or defect in the floor-boards. An inspector of the local authority had advised, or required, that this plate should be removed and that the floor-boards should be properly repaired, and in June the plaintiff company employed a builder or contractor to take up the metal plate and insert portions of new floor-boards to repair the hole. On Nov. 10, 1953, while Mr. Morehen, the manager of the shop on behalf of the plaintiff company, was standing in the store room, the floor of the room collapsed into the basement, and Mr. Morehen was badly hurt. The plaintiff company was advised that it was under a legal liability to compensate Mr. Morehen for his injuries and Mr. Morehen's claim was compromised by a payment of £2,000 and fifty guineas costs, being £2,052 10s. in all. The reason why the floor fell was discovered by an architect and surveyor who investigated the fall of the floor a week or two after the accident. He discovered that all the joists of the floor were very badly affected by dry rot at the point where they entered the walls, and he was surprised, having regard to the advanced state of decay of the joists at those points, that the floor had stayed up as long as it had. He observed that, while there was no sign that anything had ever been done to support the floor of the store room, in other parts of the basement props had been placed under the ground floor with "padstones", that is, pads of timber, between the top of the posts and the bottom of the joists. These props had obviously been in position for a long time because many of the pads of timber at the top of the posts were in a rotten state.

I The plaintiff company claim that the defendant company, as lessor, is in

breach of the obligation put on the defendant company by the covenant in the lease to keep the main structure in good and tenable repair. Unquestionably, the joists of the floor are part of the main structure and the covenant applies to them. Looking at the language of the covenant and no further for the moment, counsel for the plaintiff company submitted that the defendant company had covenanted to keep the joists and the floor in good and tenable repair, that they were not in good and tenable repair, and that was why the accident happened and that, therefore, the plaintiff company should recover from the lessor the amount of damages and costs which were paid to Mr. Morehen. A number of issues were raised in the pleadings, but only two of them are before me. It was rightly conceded by counsel for the defendant company that the plaintiff company was under a legal liability to compensate Mr. Morehen, that the compensation paid was reasonable, and that the loss suffered by the plaintiff company in having to pay that compensation was a consequence of the breach by the defendant company of the covenant, assuming that there had been any breach.

The question for me, then, is whether or not the defendant company is in breach of the covenant. Counsel for the defendant company says that since the decision in *Makin v. Watkinson* (1) (1870) (L.R. 6 Exch. 25) there has had to be read into a covenant by a lessor to keep premises in repair an implied condition that the lessor shall have notice of the want of repair before he can be called on, under the covenant, to make it good. Counsel for the defendant company contends that every covenant by a landlord to keep the demised premises in repair must be read as if there were imported into it, in unqualified terms, an absolute provision that the landlord's obligation is not to have effect unless and until notice has been given to him of the defect. Counsel goes farther, and says that the notice must be given by the tenant. This, I think, goes too far.

I bear in mind what was said in the speeches of the noble and learned Lords who decided *Murphy v. Hurly* (2) ([1922] 1 A.C. 369), which was, broadly speaking, to this effect: the reason why the condition that the lessor must not be liable unless he has notice is that, since he is out of possession of the premises and the tenant is in possession of the premises, it would be wholly unreasonable, and, indeed, unrealistic, to hold the lessor liable for not having effected repairs if he did not know, and could not know, that the repairs needed doing. Certainly LORD BUCKMASTER and LORD SUMNER, in their speeches in *Murphy v. Hurly* (2), indicated that the principle laid down in *Makin v. Watkinson* (1) was not an absolute and unvarying rule to the effect that every covenant by a landlord had to be qualified by a proviso that he was not obliged to repair unless and until he had notice from the tenant of the want of repair. LORD BUCKMASTER, for instance, said ([1922] 1 A.C. at p. 375):

"The principle upon which notice is required to be given to a lessor requiring him to repair demised premises in accordance with his covenant before proceedings are taken to obtain damages for the breach is not inherent in the relationship between landlord and tenant. The doctrine depends upon the actual facts existing in each case and upon the consideration whether the circumstances are such that knowledge of what may be required to be done to comply with the covenant cannot reasonably be supposed to be possessed by the one party while it is by the other."

LORD SUMNER said (*ibid.*, at p. 387):

"The rule requiring a notice of want of repair by the tenant to the landlord, in the case of an ordinary landlord's repairing covenant for dwelling-houses, warehouses and similar structures, is well settled, and no one proposes to alter or restrict it. The nature and the conditions of this rule are, however, equally well settled. As a rule of construction, which reads into the covenant words—namely, 'upon notice'—which are not there,

A its application naturally depends on the existence of those strong circumstances of necessity, which alone justify the implication of a condition upon an obligation, which is itself expressed unconditionally."

B On this point, counsel for the plaintiff company submitted that, in respect of defects which existed at the time when the term began, the facts which rendered necessary the implication of notice into the landlord's covenant as a general rule did not exist, because the landlord was in a perfectly good position to know what the state of the premises was at the time when the letting took place, and, if, being in a position to know, he chose to covenant that he would keep the place in repair, he was bound by his covenant, and there need not be imported into the covenant any condition requiring notice to be given to him. Although
C counsel for the plaintiff did not put it exactly in this way, the effect of his contention was that, since, so far as defects generally were concerned, the landlord at the time of letting was in a position to know what they were if he chose to make the necessary inquiry, if he wanted to exclude liability to make good what I would call latent defects there would be nothing to prevent his framing his covenant so as to exclude his liability for such defects.

D I have perhaps begged the question whether or not a landlord is liable under a covenant to keep in repair to put right defects which existed at the time of the letting; that liability is sometimes expressed as being an obligation not only to keep in repair but also to put in repair. It is well settled that, where a landlord undertakes to keep premises in repair, he may not, when a notice is given to him of a defect, say: "That defect existed at the time when I let the premises. If
E you make me repair that, you will, in effect, be making me put the premises into repair and I have not covenanted to do so." If the landlord has covenanted to keep premises in repair and a notice is given to him of a defect, he is bound to repair that defect, whether it existed at the time of the demise or has come into existence later. That, in my opinion, is the sense in which a covenant by a landlord to keep in repair may be said to be a covenant to put into repair, and I
F reject the contention of counsel for the plaintiff company that, merely because a covenant to keep in repair has been construed as requiring the landlord to put the premises into repair in the sense that he is liable to repair defects which existed at the time of the beginning of the lease as well as defects which have subsequently come into existence, the obligation to put the premises into repair by curing any defect existing at the start of the lease rests on the landlord at the moment the lease begins to run, whether he has notice of the existence of the defect or not, and whether the defect is apparent or concealed. Counsel for the
G plaintiff company, therefore, fails in his main contention. I am of the opinion that, whether the defect existed at the beginning of the tenancy or not, the obligation of the defendant company to repair it did not come into existence until the defendant company had notice, and it is conceded that no express notice of this defect was ever given to the defendant company.

H A second issue arose in the case, namely, whether or not the defendant company actually knew of this defect at the time of the letting. When counsel for the plaintiff company first suggested that I ought to find that the defendant company knew of the defect, counsel for the defendant company objected—rightly, in my view—that on the pleadings there was no plea of actual knowledge of the defect on the part of the defendant company. I therefore gave counsel for the
I plaintiff company leave to deliver a reply, in which he answered the defendant company's defence that it had had no notice by saying, in effect, that the defendant company had actual knowledge. Counsel for the plaintiff company conceded, rightly, that nothing short of actual knowledge would take the place of notice, and that it was not enough to show that the defendant company had the means of knowledge. If counsel had not made this concession, I should, nevertheless, have found against him. I do not think that anything short of proof by the tenant of actual knowledge on the part of the landlord can relieve the tenant

of the necessity of showing that he gave notice to the lessor before the lessor can be held liable for breach of the covenant to repair. Having allowed witnesses for the plaintiff company to be recalled and cross-examined by counsel for the defendant company, and having heard a witness called on behalf of the defendant company, I have no hesitation in coming to the conclusion that the plaintiff company has failed to establish actual knowledge by the defendant company of the state of the joists. A

Whether or not, in an action for negligence against the occupier of the premises, brought by some person who had been injured as a result of the collapse of this floor, the plaintiff in such an action would have succeeded in proving that the state of the floors ought to have been known to the occupier is another matter. If I had had that question to decide, I might have had no difficulty in deciding it, but, as between lessor and lessee, I can see no reason why I should assume that the lessor let this building with knowledge of the defect, any more than I should assume that the lessee took it with knowledge of the defect. Neither the defendant company nor the plaintiff company took the slightest trouble to find out whether or not the floor of this comparatively old building was in such a state that it was safe to store heavy weights on it. However, to say that both of them failed to make the inquiry which they should have made is not to say that either of them had actual knowledge of the defect which any sort of proper examination would have revealed. Since I am not satisfied that the plaintiff company has proved actual knowledge on the part of the defendant company, it becomes unnecessary for me to consider what my decision in this case would have been had actual knowledge been established. B

Judgment for the defendant company. E

Solicitors: *James Chapman & Co.*, Manchester (for the plaintiff company);
Laurence Marks, Manchester (for the defendant company).

[Reported by M. DENISE CHORLTON, *Barrister-at-Law.*] F

LOWER v. PORTER.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), December 9, 1955.]

Rent Restriction—"Dwelling-house"—*Premises converted by tenant into two self-contained flats*—*Assignment of tenancy*—*Whether a tenancy of a dwelling-house for which a premium prohibited*—*Landlord and Tenant (Rent Control) Act, 1949 (12 & 13 Geo. 6 c. 40), s. 2 (2) (3).* G

With the consent of the landlord, the defendant, a tenant under a seven-year lease of a dwelling-house subject to the Rent Restrictions Acts, converted it into two self-contained flats, at a cost of £280. He assigned the lease to the plaintiff under a contract which provided that the whole of the purchase price of £600 should be for the goodwill of the business of a guest house stated to be carried on there and no part of it for the premises. In fact no guest house was carried on on the premises and the provision for payment for goodwill was a device to obtain a premium. The plaintiff brought an action for the recovery of the £600 as being a premium prohibited by s. 2 (2) of the Landlord and Tenant (Rent Control) Act, 1949. That section applied (by sub-s. (3)) to "any tenancy of a dwelling-house, being a tenancy to which" the Rent Restrictions Acts applied and being "such that when the dwelling-house is let under the tenancy it is a dwelling-house to which" those Acts applied. The defendant contended that the tenancy was not such a tenancy at the time of the assignment because the premises had become two dwelling-houses. H

Held: the plaintiff was entitled to recover the £600 less the £280 spent on the conversion, as being a premium prohibited by s. 2 (2) of the Act of 1949, I

A since the Rent Restrictions Acts applied to the tenancy assigned notwithstanding the conversion of the premises into two self-contained flats before the assignment.

Langford Property Co., Ltd. v. Goldrich, [1949] 1 All E.R. 402, and *Whitty v. Scott-Russell*, [1950] 1 All E.R. 884, applied.

Appeal dismissed.

B [For the Landlord and Tenant (Rent Control) Act, 1949, s. 2 (2) (3), see 13 HALSBURY'S STATUTES (2nd Edn.) 1097.]

Cases referred to:

(1) *Minns v. Moore*, [1949] 2 All E.R. 800; [1950] 1 K.B. 241; 31 Digest (Repl.) 689, 7803.

C (2) *Langford Property Co., Ltd. v. Goldrich*, [1949] 1 All E.R. 402; [1949] 1 K.B. 411; [1949] L.J.R. 663; 31 Digest (Repl.) 717, 8021.

(3) *Whitty v. Scott-Russell*, [1950] 1 All E.R. 884; [1950] 2 K.B. 32; 31 Digest (Repl.) 645, 7507.

Appeal.

D The defendant assigned to the plaintiff his seven-year lease of a dwelling-house, 110, Southbourne Road, Bournemouth, which with the consent of the landlord he had converted into two self-contained flats at a cost of £280. Under the contract he was paid £600, which was expressed to be in respect of the goodwill of a guest house stated to be, but not in fact, carried on on the premises. The plaintiff brought an action for the recovery of this sum, and on Aug. 26, 1955, His Honour JUDGE ARMSTRONG in Bournemouth County Court held that it was an unlawful premium and made an order for its return to the plaintiff less the £280 expended on the conversion of the premises. The defendant appealed.

E *J. R. L. Southam* for the defendant.

June Verrall for the plaintiff.

F DENNING, L.J.: By a lease of Nov. 28, 1950, a landlord let to the defendant a house, 110, Southbourne Road, Bournemouth, at a rent of £200 a year for seven years with an option of renewal. The house was one to which the Rent Restrictions Acts applied. During the next two or three years the defendant, with the consent of the landlord, made alterations at a cost of £280, turning the house into two self-contained flats with separate entrances. Then in 1954 he entered into a contract to sell the premises to the plaintiff. According to the contract he sold the house and the goodwill of the business of a guest house carried on there for £600. It was provided that no part of the purchase money should be apportioned to the leasehold premises; it was all to be for the goodwill of the guest house. But in fact no guest house was carried on there and no goodwill was to be sold. It was simply a device to get a premium.

G The assignment was made, and the plaintiff went into occupation. Then she claimed a return of the £600 because, she said, it was an unlawful premium, prohibited by s. 2 (2) of the Landlord and Tenant (Rent Control) Act, 1949. The judge held that it was an unlawful premium, but he allowed the defendant to have credit for the £280 he had spent on the premises, a credit which is provided for by s. 2 (4) (b); and he ordered the return of £320. Now there is an appeal to this court.

H Counsel for the defendant has argued that the Act does not apply because the dwelling-house was converted into two dwelling-houses. He refers to s. 2 (3) of the Act, which provides:

I "This section applies to any tenancy of a dwelling-house, being a tenancy to which the principal Acts apply, such that when the dwelling-house is let under the tenancy it is a dwelling-house to which the principal Acts apply."

Counsel says that the relevant time for applying the second half of that subsection is the time of the assignment; and that at the time of the assignment the dwelling-house was not "a dwelling-house" to which the principal Acts

applied but two dwelling-houses. He says that the Act is not apt to cover such a situation and that, having penal consequences, it should be construed in favour of the defendant and not against him. A

I cannot accept that construction. It seems reasonably plain to me that the second half of the sub-section is inserted simply to make sure that, where the house has not been previously let, there is to be no premium, not even on the first letting. *Minns v. Moore* (1) ([1949] 2 All E.R. 800) shows that in any event that result would have been achieved without the added words; but I think that is why Parliament added the words. The section covers a case like the present, because, even though the house has been converted into two flats, the dwelling-house is certainly one to which the principal Acts apply. Indeed, counsel for the plaintiff drew our attention to *Langford Property Co., Ltd. v. Goldrich* (2) ([1949] 1 All E.R. 402) and *Whitty v. Scott-Russell* (3) ([1950] 1 All E.R. 884), where, despite the fact that two physically separate premises were comprised within the lettings, they were nevertheless held to be lettings of dwelling-houses to which the principal Acts applied. B C

In my judgment the added words in s. 2 (3) were really inserted in the Act by way of precaution and do not derogate from the effect of the first part, which provides that the section D

“applies to any tenancy of a dwelling-house, being a tenancy to which the principal Acts apply.”

This was such a tenancy. The £600 was a premium, and it is recoverable by the tenant, subject to the credits allowed by the county court judge for the cost of work done, £280. I think that the county court judge was quite right in his decision, and I would dismiss the appeal. E

HODSON, L.J.: I agree. Counsel for the defendant has contended that at the time of the assignment there was not one but two dwelling-houses, and, therefore, by reason of s. 2 (3) of the Landlord and Tenant (Rent Control) Act, 1949, the county court judge was wrong in finding that the prohibition of premiums imposed by s. 2 (2) applied. Section 2 (3) begins: F

“This section applies to any tenancy of a dwelling-house, being a tenancy to which the principal Acts apply. . .”

If the sub-section had stopped there, counsel concedes that his argument would have fallen to the ground; but he relies on the remaining words of the sub-section, which are G

“ . . . such that when the dwelling-house is let under the tenancy it is a dwelling-house to which the principal Acts apply ”,

and in particular on the word “when”. Reading it in full, he contends that the effect of the second part of the sub-section is this: it should read “but only such that when the dwelling-house is let under the tenancy it is and remains a single and separate dwelling-house and one to which the principal Acts apply”. H He said that this was, not a single and separate dwelling-house, but two dwelling-houses, and, therefore, it was outside the scope of the section; and he relies on the last part of the sub-section as containing limiting words.

I think that is a wrong way of reading the second part of the sub-section. In its context, the word “when” does not fall to be construed in a temporal sense. It is used merely to make the phrase equivalent to “in the case of a dwelling-house if let under the tenancy”, so as to identify the particular dwelling-house. The effect of that reading is that the dwelling-house to be looked at is a dwelling-house the subject-matter of this tenancy. Accordingly the last phrase has no limiting effect on the sub-section taken as a whole. I agree, therefore, that the appeal should be dismissed. I

MORRIS, L.J.: In this case a tenancy was assigned. Section 2 (2) of the Landlord and Tenant (Rent Control) Act, 1949, provides that

- A " . . . a person shall not, as a condition of the assignment of a tenancy to which this section applies, require the payment of any premium."

At the time of the assignment in this case a sum of £600 was paid. By contemporary documents it was made to appear that that £600 was in respect of the goodwill of the business of a guest house being carried on, but it is now common ground that there never was a guest house. As to £320, the payment

B was a premium not covered by s. 2 (4). So the prohibition of the payment of a premium as a condition of the assignment imposed by sub-s. (2) applies if the assignment was of a tenancy to which the section applied.

- C The assignment was of the tenancy from Mrs. Falcon to the defendant, and the question is therefore whether that tenancy was one to which the section applied. To see if it was entails looking at s. 2 (3). I think that counsel for the plaintiff is right when she says that the first part of that sub-section refers to the word "tenancy" and the second part to the word "dwelling-house". Read in reference to the facts of this case, sub-s. (3) provides:

- D " This section applies to the tenancy from Mrs. Falcon to the defendant of 110, Southbourne Road, if it is a tenancy to which the principal Acts apply such that, when 110, Southbourne Road is let under the tenancy from Mrs. Falcon to the defendant, 110, Southbourne Road is a dwelling-house to which the principal Acts apply."

It is not doubted that the principal Acts did apply to the tenancy of the defendant, and, when No. 110 was let by Mrs. Falcon to him, it was a dwelling-house to which the Acts applied. It seems to me, therefore, that this was a tenancy to

E which the section applied.

The words of SOMERVELL, L.J., in *Langford Property Co., Ltd. v. Goldrich* (2) make it clear that two houses may be let as one. He said ([1949] 1 All E.R. at p. 404):

- F " In my opinion, if the facts justify such a finding, two flats or, indeed, so far as I can see, two houses, could be let as a separate dwelling-house within the meaning of the definition."

So that, even if, in considering s. 2 (3), the time of the assignment by the defendant is to be regarded and not, as I think, the time of the letting from Mrs. Falcon to the defendant, 110, Southbourne Road could still be a dwelling-house. The assignment was of the tenancy of 110, Southbourne Road as a whole. I agree, therefore, that this appeal fails.

G

Appeal dismissed.

Solicitors: *Jaques & Co.*, agents for *John W. Richardson*, Christchurch (for the defendant) ; *Vivash Robinson & Co.*, agents for *Harold G. Walker*, Bourne-mouth (for the plaintiff).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A

PERRY v. KENDRICKS TRANSPORT, LTD.

[COURT OF APPEAL (Singleton, Jenkins and Parker, L.J.J.), December 7, 8, 9, 1955.]

Nuisance—Principle of Rylands v. Fletcher—Motor vehicle in parking ground—Explosion caused by act of strangers—Whether occupiers of parking ground liable.

B

Child—Negligence—Vehicle park—Open parking ground—Motor coach adjacent to boundary—Explosion caused by child throwing lighted match into petrol tank—Injury to another child outside vehicle park—Whether occupiers of vehicle park liable.

C

The defendants were garage and coach proprietors and owned and occupied a garage and adjacent vehicle park bordered on the east and west by waste land and on the south by a low wall and a bank. The vehicle park was open, save for this low wall on the south. Parked in the south-west corner of the vehicle park was a motor coach which was not in use. The defendants had removed the petrol from its tank and had replaced the screw petrol cap, which, as the coach stood, was alongside the bank. The defendants regularly inspected the vehicle park and the vehicles therein, and they did all that they could to turn children away from the vehicle park. On Oct. 29, 1952, the infant plaintiff was crossing the waste land and approaching two boys aged about ten years who were standing on the bank by the coach. As he came near, the boys jumped back, and there was an explosion from which the plaintiff suffered injuries. In an action for damages for personal injuries against the defendants, it was found that the cap of the petrol tank had been removed and that one of the two boys had thrown a lighted match into the petrol tank.

D

E

Held: (i) the defendants were not liable under the rule in *Rylands v. Fletcher** as they were within an exception to that rule, since the acts which brought about the explosion were the acts of a stranger over whom the defendants had no control (*Rickards v. Lothian* [1913] A.C. 263 and *Box v. Jubb* (1879) 4 Ex.D. 76 applied); moreover it was immaterial for the purposes of this exception to the rule in *Rylands v. Fletcher* whether the stranger was or was not incapable of deliberate volition.

F

G

H

(ii) the defendants were not liable in negligence.

Per JENKINS, L.J.: if the facts are such as to show that the dangerous thing was left by the defendants in such a condition that it was a reasonable and probable consequence of their action, which they ought to have foreseen, that children might meddle with the dangerous thing and cause it to escape, then the defendants could not maintain [for the purpose of bringing themselves within the exception to the rule in *Rylands v. Fletcher*] that the mischievous acts of the children constituted the acts of strangers (see p. 160, letter E, post; cf. per SINGLETON, L.J., at p. 158, letter D, and per PARKER, L.J., at p. 161, letter D, post).

Appeal dismissed.

[**Editorial Note.** The Court of Appeal here accept that liability for personal injuries can arise by virtue of the rule in *Rylands v. Fletcher*, notwithstanding that some doubts have been expressed in *Read v. Lyons & Co., Ltd.* ([1946] 2 All E.R. at p. 479); see particularly per PARKER, L.J., at p. 160, letter I, post. The decision in the present case on the defence that the escape of the dangerous thing was due to the act of a stranger over whom the defendants had no control may be compared with the decision in *A. Prosser & Son, Ltd. v. Levy* ([1955] 3 All E.R. 577) on a similar defence to a claim in negligence, viz., a defence

I

* The rule is stated at p. 157, letter B, post.

A that an escape of water was due to the mischievous acts of some unknown person.

As to the rule in *Rylands v. Fletcher*, see 24 HALSBURY'S LAWS (2nd Edn.) 46, para. 83; and for cases on the subject, see 36 DIGEST (Repl.) 282-285, 334-341, and 298, 423-429.

As to the exception to the rule in *Rylands v. Fletcher* where the escape is due to the act of a stranger, see 24 HALSBURY'S LAWS (2nd Edn.) 95, para. 169.]

B Cases referred to:

(1) *Fletcher v. Rylands*, (1866), L.R. 1 Exch. 265; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; *affd.* H.L. sub nom. *Rylands v. Fletcher*, (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; 36 Digest (Repl.) 282, 334.

C (2) *Box v. Jubb*, (1879), 4 Ex.D. 76; 48 L.J.Q.B. 417; 41 L.T. 97; 36 Digest (Repl.) 298, 424.

(3) *Rickards v. Lothian*, [1913] A.C. 263; 82 L.J.P.C. 42; 108 L.T. 225; 36 Digest (Repl.) 293, 396.

(4) *Cooke v. Midland Great Western Ry. of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 36 Digest (Repl.) 118, 590.

D (5) *Nichols v. Marsland*, (1875), L.R. 10 Exch. 255; 44 L.J.Ex. 134; 33 L.T. 265; *affd.* C.A., (1876), 2 Ex.D. 1; 46 L.J.Q.B. 174; 35 L.T. 725; 41 J.P. 500; 36 Digest (Repl.) 297, 421.

(6) *Musgrove v. Pandelis*, [1919] 2 K.B. 43; 88 L.J.K.B. 915; 120 L.T. 601; 36 Digest (Repl.) 285, 345.

(7) *Read v. Lyons & Co., Ltd.*, [1946] 2 All E.R. 471; [1947] A.C. 156; [1947] L.J.R. 39; 175 L.T. 413; 36 Digest (Repl.) 292, 379.

E Appeal.

The plaintiff appealed from an order of LYNSEY, J., at Birmingham Assizes, made on July 26, 1955, whereby he dismissed the plaintiff's claim for damages for personal injuries.

The facts appear in the judgment of SINGLETON, L.J.

F *M. A. B. King-Hamilton, Q.C.*, and *C. P. Burke* for the plaintiff.
D. P. Draycott for the defendants.

SINGLETON, L.J.: This is an appeal from a judgment of LYNSEY, J., given at Birmingham Assizes on July 26, 1955. The claim was brought by a boy named Trevor Perry suing by his father as next friend. An accident occurred at Dudley on Oct. 29, 1952, when the boy was ten years old. He lived in Jasmine Road, Dudley, and went to St. John's School, which is in St. John's Road. The defendants, Kendricks Transport, Ltd., who were garage and coach proprietors, had premises and a garage in Brewery Street, which had waste land on either side of it. At the south end of their premises there was an open vehicle park, which was clearly marked on the south side by a bank and a small wall.

H People who wished to cross the waste land might go through the defendants' vehicle park, where coaches were often parked, although they were not supposed to do so. The defendants objected to it and if boys played in the vehicle park or passed through it, they were chased away whenever they were seen. At the end of October, 1952, there was, in the south-west corner of the parking ground, a Leyland coach which had been there for some three months.

I Before the coach was left there the tank was emptied of petrol and the cap of the tank was replaced. The coach was then towed and left on the south side of the parking ground, the petrol tank being near the bank. There was regular inspection of the parking ground and any vehicle which might be in it. On Oct. 29 Trevor Perry left school in the afternoon; he crossed the waste ground and came close to the bank at the south end of the defendants' parking ground. There he saw two other boys, Whittaker and Rawlinson. According to his evidence, they were standing on the bank at the side of the coach. There were

three coaches nearby at the time. He went towards them and, just as he was nearing them, they jumped away. Thereafter there was some kind of explosion and he remembered no more, so he said. The infant plaintiff was dreadfully burned as a result.

The infant plaintiff's father brought an action on his son's and his own behalf in regard to some loss which he had sustained. It was pleaded that the boy was on the defendants' land as a licensee. He had not in fact reached their land at the time of the accident, although the other boys may well have been on the land, and trespassing in so far as they were touching the coach. In para. 5 of the statement of claim it was pleaded:

"On Oct. 29, 1952, the plaintiff by the defendants' licence was upon the said land and in the vicinity of the aforesaid Leyland coach whilst returning from school when, owing to the negligence of the defendants, an explosion took place in consequence of a child throwing a lighted match into or near the petrol tank of the coach and the plaintiff sustained severe personal injury."

The plaintiff said that he did not know what had happened. A police officer who saw him in hospital said that when he asked him what had happened the boy said that a lighted match had been thrown into the petrol tank and there was an explosion. One cannot pay much attention to what a boy, suffering as he was, said, but it seems to have been common ground at the hearing and it was found by LYNSEY, J., that the fire or explosion had been caused by a lighted match being thrown into the petrol tank, from which the cap had been removed. That involved two separate acts; first, the removal of the cap by someone at some time; and, secondly, the throwing of the lighted match into the tank.

The plaintiff's case was pleaded as an action based on negligence. At the hearing and on this appeal it was submitted, however, that there is another matter to be considered in that the defendants brought on their land something of a dangerous character, to wit, a coach in the tank of which there had been at one time petrol and in that they allowed something of a dangerous nature to escape on to someone else's land and cause injury to the plaintiff.

I propose to deal first with the case which was based on negligence. LYNSEY, J., found that there was no negligence on the part of the defendants, and with that finding I respectfully agree. The defendants did all they could to keep children away from their coaches, which they wished to safeguard. They did not want boys on their parking ground, nor did they want men to cross it, and they did their best to stop them. Before they put the Leyland coach in the parking ground they caused the petrol to be removed from the tank, not by siphoning it, but by some other means in order to ensure that all the petrol was out. Apart from that, they inspected the vehicles in the parking ground from time to time. Evidence was given by their employees, one of whom was called on behalf of the plaintiff, that so far as any one could tell the cap was on the petrol tank the day before this accident happened. Counsel on behalf of the plaintiff submitted that there was no evidence on which the judge could find, as he did, that the cap was on the petrol tank the day before the accident. He may be right in saying that there was no direct evidence. One employee of the defendants said that he inspected the vehicles regularly and that he knew that he had looked at this coach and seen the petrol cap on it a week before the accident. He and others inspected regularly afterwards and no one noticed that the petrol cap was missing. The judge was of opinion that, if it had been taken off before the day of the accident, someone would have noticed it, for there was a careful inspection and he was entitled to come to that conclusion. It is a fact that the petrol cap was not found after the accident happened. Whether it had been removed earlier that day or the night before, I cannot say. There was no evidence to show what the position was, but someone took it off before the

A accident. On the evidence the learned judge was satisfied that there was no negligence on the part of the defendants, and the appeal on that ground must fail.

B The second ground of appeal is, that the coach placed on the defendants' land was something of a kind likely to do mischief if it or something from it escaped, and that the defendants, having it on their land, must keep it and fumes or flames from it at their peril. The submission is based on the rule in *Rylands v. Fletcher* (1). I read the words of BLACKBURN, J. (1866) (L.R. 1 Exch. at p. 279), which were expressly approved in the House of Lords:

C "We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape."

D I assume for this purpose that an action for damages for personal injuries will lie in such a case and I further assume for this purpose that a motor coach which had had petrol in the tank is covered by the words "anything likely to do mischief if it escapes". I suppose that an ordinary person would have thought that the coach and the tank would be safer if the petrol were removed. On the evidence given by the inspector of the Dudley Fire Brigade, however, it may be said that an empty tank in which there has been petrol is more dangerous than a full tank. On that evidence counsel for the plaintiff submitted that the coach was dangerous, for there might well have been an accident through fumes from the tank escaping if the cap was taken off.

E It appears clear on the facts and on the case put forward by the plaintiff that there was interference with the coach and with the cap on the top of the tank. If the damage is caused by the mischievous, deliberate and conscious act of a stranger the occupier of land can escape liability under the rule in *Rylands v. Fletcher* (1). That is clear from a number of authorities. The one referred to by F the learned judge is *Box v. Jubb* (2) (1879) (4 Ex.D. 76) which was cited by LORD MOULTON in *Rickards v. Lothian* (3) ([1913] A.C. 263). LORD MOULTON, having referred to *Fletcher v. Rylands* (1), said ([1913] A.C. at p. 279):

G "Following the language of this judgment their Lordships are of opinion that no better example could be given of an agent that the defendant cannot control than that of a third party surreptitiously and by a malicious act causing the overflow. The same principle is affirmed in the case of *Box v. Jubb* (2). In that case the defendants had a reservoir on their land which was connected both for supply and discharge with a watercourse or main drain. Through the sudden emptying of another reservoir into the drain at a higher level than their reservoir and by the blocking of the main drain below, the defendants' reservoir was made to overflow, and damage was done to the lands of the plaintiff. The defendants were guilty of no negligence either in the construction or maintenance of the reservoir, and the acts which led to its overflow were done by persons over whom they had no control. In giving judgment KELLY, C.B., says: 'The question is, what was the cause of this overflow? Was it anything for which the defendants are responsible? Did it proceed from their act or default, or from that of a stranger over which they had no control? The case is abundantly clear on this, proving beyond a doubt that the defendants had no control over the causes of the overflow and no knowledge of the existence of the obstruction. The matters complained of took place through no default or breach of duty of the defendants, but were caused by a stranger over whom and at a spot where they had no control. It seems to me to be immaterial whether this is called vis major or the unlawful act of a stranger; it is sufficient to say that the defendants had no means of preventing the occurrence. I think the

defendants could not possibly have been expected to anticipate that which happened here and the law does not require them to construct their reservoir and the sluices and gates leading to it to meet any amount of pressure which the wrongful act of a third person may impose'. Their Lordships agree with the law as laid down in the judgments above cited, and are of opinion that a defendant is not liable on the principle of *Fletcher v. Rylands* (1) for damage caused by the wrongful acts of third persons."

In the present case there were two acts which had to happen before the damage could be done. The first was the removal of the cap. There is nothing to show by whom that was done. The second is the throwing into the tank of a lighted match which immediately brought about flames which caused injury to the plaintiff. The two boys who were near the plaintiff and who were up against the coach as he approached were about the same age as the plaintiff. It is submitted by counsel for the plaintiff that, in view of their age, they cannot have been capable of a deliberate or a conscious act, and junior counsel, who followed, put this general proposition, that children are incapable of deliberate volition. That submission was sought to be reinforced by the reading of a passage from the speech of LORD ATKINSON in *Cooke v. Midland Great Western Ry. of Ireland* (4) ([1909] A.C. 229). I do not think that to read the passage at p. 237 because I do not think that it affects anything which has to be decided in this case. Counsel for the plaintiff sought to use it in this way: the defendants knew that boys played on their parking ground; they knew that coaches were an attraction to them; a coach should be regarded as an allurement; and thus the defendants should have anticipated any action of any kind on the part of those boys of ten years of age, and they ought to have guarded against it. I regard that as placing much too high a duty on the occupiers of property. I am prepared to accept this position: If the person who interferes with something of the defendants is a person whom they might expect to be on their ground and if the character of the interference is something which they ought to anticipate, then they do owe some duty. The measure of that duty depends on the circumstances, the nature of the object, and the age of the children. I do not think that it can extend to that which happened in this case. Someone removed the cap; someone threw the lighted match into the tank. There is no evidence to show that either of those things should have been anticipated. If it is said that because boys pass through a parking ground there is a duty on the occupier of the parking ground who has a vehicle there to see that the cap is not removed from the petrol tank, that is something new, in my view. I do not know the basis on which it can be said that the occupier must anticipate that kind of thing: still less do I think that the occupier ought to anticipate that a boy of ten would throw a lighted match into the tank. There is nothing to show that it has ever been done before and I hope that it will never be done again. A boy of ten years of age knows that it is wrong. He knows that he is asking for trouble if he does it. That I think is shown by the fact that both boys jumped back. The match was thrown into the tank mischievously and deliberately. It cannot be said that it was something which the defendants ought to have anticipated and it was the act of one who was not under their control in any sense. He was a stranger. Having considered both aspects of the case I think the appeal should be dismissed.

JENKINS, L.J.: I agree. So far as the plaintiff's claim is founded on negligence it seems to me that he has wholly failed to make out his case. As the learned judge found, the defendants did all that could reasonably be expected of them to prevent children meddling with the disused motor coach. The tank was emptied, no doubt as a safety precaution, although it seems to be open to question whether in fact the emptying of the tank may not have made it more dangerous than it would have been if full. Be that as it may, the tank was empty.

- A That, at any rate, had the advantage of immobilising the vehicle, so that children could not set it in motion, and it prevented their removing petrol from the tank, which they might have done if the tank had been full. The defendants also took proper steps to see that the cap was on the orifice of the petrol tank when they carried out inspections, which they seem to have done at sufficient intervals. Whenever they saw children on the site they shouted at them and drove them
- B away. They seem to have complained both to the school and to the police that children were making a nuisance of themselves on their vehicle park. The happening which brought about the accident was one which the defendants could not reasonably have been expected to foresee. As my Lord has pointed out, it involved not only the removal by some mischievous person of the cap on the orifice of the tank, but also the dropping of a lighted match into the tank.
- C These two mischievous acts seem to me to be wholly beyond anything which the defendants could reasonably have anticipated.

As to the alternative contentions that the defendants are liable, even if they were not negligent, on the principle of *Rylands v. Fletcher* (1), I am prepared to accept the view that this motor coach in the condition in which it was on the defendants' land was an object of the class to which the rule in *Rylands v.*

- D *Fletcher* (1) applies, that is to say, that it was, for this purpose, a dangerous thing, because the tank contained inflammable petrol vapour and the defendants were under an obligation under the rule to prevent it, or the dangerous element in it, escaping on to a neighbour's land and doing damage there. It was a dangerous thing for this purpose in that its tank contained inflammable petrol vapour. The fact that it was a thing to which the rule in *Rylands v. Fletcher* (1) applied, and the fact that the vapour escaped, was ignited and did damage, cannot, however, conclude the matter against the defendants. It is well settled that an occupant of land cannot be held liable under the rule if the act bringing about the escape was the act of a stranger and not any act or omission of the occupier himself or his servant or agent, or any defect, latent or patent, in the arrangements made for keeping the dangerous thing under control. In this case,
- F it seems to me plain that the escape was caused by the act of a stranger or strangers in the shape of one or both of the two small boys Whittaker and Rawlinson. Counsel for the plaintiff submitted that a child cannot for this purpose be a stranger because ability should not be imputed to a child of doing a conscious and deliberate act when he does such a thing as setting fire to petrol vapour in the tank of a vehicle. Speaking for myself, I see no necessity to confine
- G the exception from the rule in *Rylands v. Fletcher* (1) of acts of strangers to acts which proceed from the conscious volition or the deliberate act of the stranger. It seems to me that the relevance of the exception is that the stranger is regarded as a person over whose acts the occupier of the land has no control. Then the real cause of the escape is not the occupier's action in having the dangerous thing on his land, nor is it any failure on his part or on the part of his agents in
- H keeping the dangerous thing on the land, nor is it due to any latent or patent defect in his protective measures. The real cause is none of these things, but the act of the stranger, for whose acts the occupier of the land is in no sense responsible, because he cannot control them. It is interesting in this connection to observe that in *Rickards v. Lothian* (3), LORD MOULTON, after referring to the judgment of the Exchequer Chamber in *Nichols v. Marsland* (5) (1876) (2 Ex.D. 1), continued ([1913] A.C. at p. 278):

"To follow the language of the judgment just recited—a defendant cannot in their Lordships' opinion be properly said to have caused or allowed the water to escape if the malicious act of a third person was the real cause of its escaping without any fault on the part of the defendant. It is remarkable that the very point involved in the present case was expressly dealt with by BRAMWELL, B., in delivering the judgment of the Court of Exchequer in the

same case. He says: 'What has the defendant done wrong? What right of the plaintiff has she infringed? She has done nothing wrong. She has infringed no right. It is not the defendant who let loose the water and sent it to destroy the bridges. She did indeed store it, and store it in such quantities that if it was let loose it would do as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbour, the occupier of the house would be liable. That cannot be. Then why is the defendant liable if some agent over which she has no control lets the water out? . . . I admit that it is not a question of negligence. A man may use all care to keep the water in . . . but would be liable if through any defect, though latent, the water escaped . . . But here the act is that of an agent he cannot control'."

There BRAMWELL, B., gives, by way of *reductio ad absurdum*, the example of a mischievous boy boring a hole in a cistern. He says that if the defendant in *Nichols v. Marsland* (5) was liable, then the occupier of a house in which there was a cistern, if a mischievous boy bored a hole in it, would be liable, and adds: "That cannot be". If we are to accept counsel's argument in its full form on this point, then if any mischievous boy chose to come on the defendants' land and chose to set fire to the petrol or the petrol vapour in the tank of a vehicle there, the defendants would be liable. I repeat, with BRAMWELL, B., "that cannot be". It seems to me that this argument must be limited to saying that in the circumstances of a particular case, it may be that children doing some mischievous act whereby the dangerous thing escapes are not strangers. I cannot, however, regard that as aiding a plaintiff in an action such as this, unless it can be shown that in the circumstances of the case the dangerous thing was left by the defendants in such a condition that it was a reasonable and probable consequence of their action, which they ought to have foreseen, that children might meddle with the dangerous thing and cause it to escape. If facts such as those were made out in any particular case, then in my view, the defendants could not claim to rely on the act of the mischievous child as constituting the act of a stranger. It would be an act brought about by the defendants' own negligence in dealing with the dangerous thing, and the foreseeable consequence of a negligent act. If that were made out, however, one reaches the point where the claim based on *Rylands v. Fletcher* (1) merges into the claim in negligence: for if such a state of affairs could be made out, then it would no longer be necessary for the plaintiff to rely on *Rylands v. Fletcher* (1) at all. He could rely simply on the defendants' negligence. Counsel for the plaintiff is precluded from taking that course here by the circumstance that the learned judge, in my view perfectly rightly, held that there was no negligence on the part of the defendants.

Accordingly, while I feel great sympathy for this unfortunate infant plaintiff, who has sustained very serious injuries through no fault of his own, I have come to the conclusion that no ground has been shown on which this court could properly hold the defendants liable to compensate him for his hurts. I agree that this appeal must be dismissed.

PARKER, L.J.: I agree and I would only add a word in deference to the argument of counsel for the plaintiff in regard to the rule in *Rylands v. Fletcher* (1). Although the decision in *Musgrove v. Pandelis* (6) ([1919] 2 K.B. 43) has been the subject of some criticism (see the speech of LORD PORTER in *Read v. Lyons & Co., Ltd.* (7), [1946] 2 All E.R. at p. 479), it is still binding on this court. Accordingly, I feel bound to approach the matter on the basis that the facts here bring the case within the rule in *Rylands v. Fletcher* (1): nor do I think it is open to this court to hold that the rule applies only to damage to adjoining land or to a proprietary interest in land and not to personal injury. It is true that in *Read v. Lyons & Co., Ltd.* (7), LORD MACMILLAN, LORD PORTER and LORD SIMONDS

A all doubted whether the rule extended to cover personal injuries, but the final decision in the matter was expressly left over and, as the matter stands at present, I think we are bound to hold that the defendants are liable in this case, quite apart from negligence, unless they can bring themselves within one of the well-known exceptions to the rule.

B For a long time there has been an exception to the rule where the defendants can show that the act which brought about the escape was the act of a stranger, meaning thereby someone over whom they had no control. The acts in question here, first, of removing the petrol cap, and, secondly, of inserting a lighted match, are, as it seems to me, prima facie undoubtedly the acts of strangers in that sense. Counsel, however, contends that nevertheless, since at any rate the last of those acts, the insertion of the lighted match, was almost certainly the act of a young child, the exception does not apply, and for this reason, so he says, that in law the act of a young child is not a novus actus interveniens. Speaking for myself, I do not think the matter can be approached in quite that way. In a *Rylands v. Fletcher* (1) case the plaintiff need only prove the escape. The onus is then on the defendants to bring themselves within one of the exceptions. Once they prove that the escape was caused by the act of a stranger, D whether an adult or a child, they avoid liability, unless the plaintiff can go on to show that the act which caused the escape was an act of the kind which the occupier could reasonably have anticipated and guarded against. In that connection it seems to me that it is not sufficient for the plaintiff to show that the defendants knew that children played in the vehicle park, played on the roof of a motor car or inside a coach. They must show that the defendants reasonably E should have anticipated an act of a kind which would cause the escape.

Sorry as one is for the infant plaintiff in this case, it seems to me that he has utterly failed to show that the defendants should have anticipated any such thing. I agree that this appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Peacock & Goddard*, agents for *Clulow & Rudge*, Brierley Hill, Staffordshire (for the plaintiff); *Bentleys, Stokes & Lowless*, agents for *Turner, Bayley & Co.*, Dudley (for the defendants).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

Re ELECTRICAL AND INDUSTRIAL DEVELOPMENT
TRUST. ALLIED INVESTORS TRUSTS, LTD. v. BOARD
OF TRADE.

[CHANCERY DIVISION (Danckwerts, J.), December 14, 1955.]

Unit Trust—Scheme—Authorisation by Board of Trade—Matter to be specified in trust deed—Sale price—Initial service charge considered excessive by Board of Trade—Right to refuse authorisation—General discretion of Board—Prevention of Fraud (Investments) Act, 1939 (2 & 3 Geo. 6 c. 16), s. 16 (1) (c), Schedule, as amended by Companies Act, 1947 (10 & 11 Geo. 6 c. 47), s. 117 (1).

The plaintiff, the manager of a unit trust scheme, applied to the Board of Trade for an order under s. 16 (1)* of the Prevention of Fraud (Investments) Act, 1939, declaring a unit trust scheme as modified by a proposed supplemental deed to be an authorised unit trust scheme within the meaning of that Act, and thus to be exempt under s. 2 (1) (c) of the Act from the prohibitions on dealings enacted in s. 1 of the Act. The proposed supplemental trust deed contained provisions for matters specified in the Schedule to the Act, among which was a provision, pursuant to para. 1 of the Schedule, for determining the manner in which the manager's prices for units on a sale were to be calculated. The proposed deed provided for an initial service charge, which was to be included in the sale price, of 5½ per cent. of the sale price, subsequently amended to five per cent. The Board of Trade, considering that the initial service charge was too high, declined to make the order on the ground that the proposed deed did not provide to their satisfaction, as was required by s. 16 (1) (c) of the Act, for a matter specified in the Schedule to the Act. They further contended that they had a general discretion not to make an order at all and were not bound to make the order merely because a proposed trust deed contained provisions for the matters specified in the Schedule to the Act.

Held: it was open to the Board of Trade to decline to declare the scheme to be an authorised unit trust scheme on the ground that the initial service charge was excessive because on the true construction of s. 16 (1) (c) of the Act of 1939 the Board not only were entitled to be satisfied that the deed contained the provisions specified in the Schedule to the Act (of which a provision for determining the manner in which the prices for units on sale were to be calculated was one) but also were entitled to be satisfied as to the terms of those provisions (see p. 167, letters F, G, post).

Per CURIAM: I should be inclined to come to the conclusion that the Board of Trade have a general discretion which entitles them, in the proper exercise of a semi-judicial function, to consider whether they should refuse to authorise unit trust schemes even though the trust deed contains the particulars required by the Schedule to the Act of 1939 to be stated in the deed (cf. p. 169, letter E, post).

[For the Prevention of Fraud (Investments) Act, 1939, s. 16 and Schedule (as amended by the Companies Act, 1947, s. 117 (1)), see 16 HALSBURY'S STATUTES (2nd Edn.) 534, 541.]

Cases referred to:

- (1) *Inland Revenue Comrs. v. Ross & Coulter (Bladnoch Distillery Co., Ltd.), etc.*, [1948] 1 All E.R. 616; 1948 S.C. (H.L.) 1; 2nd Digest Supp.
- (2) *Julius v. Oxford (Bp.)*, (1880), 5 App. Cas. 214; 49 L.J.Q.B. 577; 42 L.T. 546; 44 J.P. 600; 42 Digest 716, 1351.

* The relevant provisions of this sub-section are printed at pp. 163, 164, post.

A Adjourned Summons.

The plaintiff, Allied Investors Trusts, Ltd. (the managers of the unit trust scheme called Electrical and Industrial Development Trust) applied to the court by originating summons, pursuant to R.S.C., Ord. 54A, for the determination of the following questions: (a) whether on the true construction of the Prevention of Fraud (Investments) Act, 1939, as amended by the Companies Act, 1947, s. 117, if the Board of Trade were satisfied that the conditions set forth in s. 16 of the Act of 1939 were fulfilled in relation to a unit trust scheme, the Board of Trade were entitled to refuse to declare the scheme to be an authorised unit trust scheme for the purposes of the Act of 1939; and (b) whether the Board of Trade, in satisfying themselves that a unit trust scheme was such as to secure that any trust created in pursuance of the scheme was expressed in a deed providing to the satisfaction of the Board of Trade for the matters specified in the Schedule to the Act of 1939 as amended by s. 117 of the Act of 1947 (and in particular as to the matters specified in para. 1 of the Schedule), were entitled to take into account the size of any initial service charges for which the deed provided.

S. Pascoe Hayward, Q.C., and M. M. Wheeler for the plaintiff, managers of the unit trust scheme.
Denys B. Buckley for the Board of Trade.

DANCKWERTS, J.: This is an application by a company in regard to a unit trust scheme in which the court is asked to construe the provisions of the Prevention of Fraud (Investments) Act, 1939, as amended by the Companies Act, 1947, s. 117. The general purpose of the Act of 1939 appears to be to prevent the public being induced to part with their money by the blandishments of fraudulent persons in regard to investment in shares or other securities. There are provisions contained in the Act prohibiting dealings in securities, and so on, and the immediate provisions with which I am concerned are those which contain certain exemptions from the prohibitions contained in the Act.

Among the exemptions are some concerned with authorised unit trust schemes. An "authorised unit trust scheme" is defined by s. 26 (1) of the Act to mean

"any unit trust scheme declared by an order of the Board of Trade for the time being in force to be an authorised unit trust scheme for the purposes of this Act."

"Unit trust scheme" means

"any arrangements made for the purpose, or having the effect, of providing facilities for the participation by persons, as beneficiaries under a trust, in profits or income arising from the acquisition, holding, management or disposal of securities or any other property whatsoever."

Section 16 deals with authorised unit trust schemes. Section 16 (1) provides:

"The Board of Trade may by order declare to be an authorised unit trust scheme for the purposes of this Act any unit trust scheme in relation to which the Board are satisfied that the following conditions are fulfilled, that is to say . . ."

I note in passing that, as regards the question what the Board of Trade are to do, the word is not "shall" but "may". The conditions which follow are:

"(a) that each of the persons who are respectively the manager and the trustee under the scheme is a corporation incorporated under the law of some part of the United Kingdom, and having a place of business in Great Britain at which notices and other documents are received on behalf of the corporation, and (b) that the scheme is such that the effective control over the affairs of the corporation which is the manager under the scheme is and

will be exercised independently of the corporation which is the trustee under the scheme." A

Paragraph (c), which is the one with which I am more immediately concerned, is in these terms:

"that the scheme is such as to secure that any trust created in pursuance of the scheme is expressed in a deed providing, to the satisfaction of the Board, for the matters specified in the Schedule to this Act." B

Paragraph (d) contains provisions as regards the capital and control of the corporation which is the trustee under it. Section 16 (2) provides:

"If, with respect to any authorised unit trust scheme, the Board of Trade consider that the order declaring the scheme to be an authorised unit trust scheme ought to be revoked on either of the following grounds, that is to say— (a) that the conditions specified in paras. (a) to (d) of the preceding subsection are no longer fulfilled in the case of that scheme, or (b) that the circumstances relevant to the making of an order have materially changed since the making thereof, the Board may serve on the manager under the scheme and on the trustee under the scheme a written notice that they are considering the revocation of the order on that ground, specifying the respect in which the said conditions are no longer fulfilled or the said circumstances have changed . . .", C D

and the manager and the trustee are invited to make any representations which they wish to make with respect to the proposed revocation within a certain period. E

In the Schedule are set out what are called "Matters for which trust deeds pursuant to unit trust schemes must provide". Paragraph 1, as amended by the Companies Act, 1947, s. 117 (1), which is the important provision, is as follows:

"For determining the manner in which the manager's prices for units on a sale and purchase respectively and the yield therefrom are to be respectively calculated and for entitling the holder of any units to require the manager to purchase them at a price calculated accordingly." F

Other matters, into which I need not go, are referred to; these include the issue of unit certificates, requiring the terms of advertisements or circulars to be placed before the trustee, and the prohibition of the issue of such if the trustee disapproves. G

The history of this case is as follows. The company which is the plaintiff constituted a unit trust scheme on Mar. 23, 1936, called the "Electrical Industries Trust", which trust was to be determined on Mar. 23, 1956. The plaintiff was the manager of that scheme. In 1953 proposals were made for the continuance of the Electrical Industries Trust Scheme by means of a trust deed which was eventually submitted, for approval pursuant to s. 16 (1) (c), to the Board of Trade under the name of "Electrical Industries Trust, Second Series". That deed contained a provision under which the manager was given power to make an initial service charge. The initial service charge is defined as follows: H

"The initial service charge' means a charge which may be included in the sale price (as defined below) of a unit and which shall not exceed 5½ per cent. of the sale price of such unit (without taking into account the adjustment mentioned in the definition of sale price)." I

"Sale price" is defined in this way:

"The sale price' of a unit means a price at which the managers offer units for sale and which shall not exceed a price arrived at by taking:— (a) the value of the investments comprising the trust fund computed at the lowest stock exchange dealing offered price at the time as near as may be at

A which the unit is quoted or sold by the managers and (b) all cash held by or on behalf of the trustees for account of the trust and any other property belonging to the trust and (c) any duties and charges in respect of the purchase of the investments and the issue of certificates in respect thereof and any duties and charges which would have been payable if the units quoted or sold had to be constituted at the said time and by dividing the aggregate of these items by the number of units constituted at the said time and adding to the amount so ascertained the initial service charge (if any) calculated as described in the definition of the initial service charge and adding to the price so ascertained an adjustment not exceeding 3d. per unit or one per centum of the said sale price so ascertained whichever is the lesser."

B That is the provision to which objection was taken by the Board of Trade in a letter dated Sept. 4, 1953. They objected because (in the terms of their letter)

"the size of this charge is regarded as an integral part of the manner in which the sale price of the units is determined and therefore as a matter which must be provided for to the satisfaction of the Board of Trade under s. 16 of the above Act. I should add that the Board have so far insisted that the preliminary service charge should not exceed two per cent. and that the semi-annual service charge should not exceed one-quarter per cent. (per half year). Such figures are now incorporated in the deeds of a number of trusts and the Board have no reason to regard them as inadequate. It is not therefore possible to agree to the maximum initial service charge of 5½ per cent. referred to in your letter of July 31, 1953."

E The result of that objection by the Board of Trade appears to have been that the trust deed prepared on behalf of the plaintiff was withdrawn and a fresh trust deed, which was eventually dated Oct. 20, 1954 and received on that day the approval of the Board of Trade, was put forward instead. This trust deed, in effect, for the moment avoided the difficulty which had been experienced with the Board of Trade, for the provision as regards the initial service charge is as follows:

"'The initial service charge' means a charge which may after the execution of the supplemental deed mentioned in cl. 3 hereof be included in the sale price (as defined below) of a unit."

G The provision as to sale price follows in effect the similar provisions which were contained in the earlier deed. That received the approval of the Board of Trade. Then there was an amending deed, with which I need not trouble; but when eventually the further deed was put forward on behalf of the plaintiff which did fix the amount of the initial service charge, objection was again taken by the Board of Trade. The provision to which they objected was as follows:

H "'The initial service charge' means a charge which may be included in the sale price (as defined below) of a unit and which shall not exceed five per cent. of the sale price of such unit without taking into account the adjustment mentioned in the definition of 'sale price'."

I The figure of five per cent. was, of course, only one-half per cent. below the figure named in the original deed put forward, and the Board of Trade again took objection but this time they added an additional reason for their refusal to approve the deed. It was the view of the Board of Trade, as expressed in their letter of Apr. 21, 1955,

"that they have a discretion in the exercise of their power under s. 16 of the Prevention of Fraud (Investments) Act, 1939. They do not consider that their power is coupled with a duty so that they are bound to make an order if the conditions (a) to (d), specified in sub-s. (1) of that section,

are fulfilled. In this connection, I would point out, for example, that to fulfil condition (c) it is necessary for the terms of the deed to provide, to the satisfaction of the Board, for the matters specified in the Schedule to the Act."

Counsel for the plaintiff says that although he admits that the Board of Trade have a discretion of some kind, it is a discretion which can only be exercised by them on a true construction of the Act. His contention was that if the deed put forward on behalf of the plaintiff contained the provisions which are required to be in the deed pursuant to the terms of the Schedule to the Act, it was not open to the Board of Trade to take objection on some further ground. He referred me to the statement in *MAXWELL ON INTERPRETATION OF STATUTES* (10th Edn.), p. 123, where the following statements are found:

"Where, as in a multitude of Acts, something is left to be done according to the discretion of the authority on whom the power of doing it is conferred, the discretion must be exercised honestly and in the spirit of the statute, otherwise the act done would not fall within the statute. 'According to his discretion' means, it has been said, according to the rules of reason and justice, not private opinion; according to law and not humour; it is to be, not arbitrary, vague and fanciful, but legal and regular; to be exercised, not capriciously, but on judicial grounds and for substantial reasons . . . Moreover, if a public authority bases its exercise of discretion on a mis-interpretation of the statute which it purports to administer, the court has jurisdiction to interfere."

I was also referred to the speech of LORD THANKERTON in *Inland Revenue Comrs. v. Ross & Coulter (Bladnoch Distillery Co., Ltd.), etc.* (1) ([1948] 1 All E.R. 616) where he said (*ibid.*, at p. 629):

". . . I apprehend, generally speaking, the courts are not entitled to interfere [with a discretionary power given by a statute] unless either (a) the exercise of the discretion has not complied with the conditions provided by the statute for the exercise of the discretionary power . . . or (b) the power has not been exercised judicially."

Those statements are no doubt completely unexceptionable, but the difficulty that I experience is how to apply them to the facts of the present case. Counsel for the plaintiff has pointed out, quite reasonably, that the provisions of the deed cannot really be attacked on the ground that they do not show the necessary matters (in the words of para. 1 of the Schedule to the Act of 1939)

"For determining the manner in which the manager's prices for units on a sale and purchase respectively and the yield therefrom are to be respectively calculated and for entitling the holder of any units to require the manager to purchase them at a price calculated accordingly."

He is, I think, perfectly correct in saying that it can be seen from the terms of the deed what are the matters which are taken into consideration in fixing the manager's prices for units on a sale and purchase respectively, including the initial service charge, and that it is merely a mathematical calculation to ascertain the various portions of the price which are made up from those respective matters. Therefore, counsel submits, on the face of it the provisions in para. 1 of the Schedule to the Act of 1939 are satisfied and the Board of Trade have no power to require compliance by the plaintiff with other things which they may think are advisable in the interests of the public, or for some other good reason, but which are not required by the terms of the Schedule to the Act.

So far, it seems to me that what counsel says would be perfectly satisfactory; but on turning to s. 16 (1) it is found that that is not the whole of the question, because first of all the Board of Trade are empowered to

A "declare to be an authorised unit trust scheme for the purposes of this Act any unit trust scheme in relation to which the Board are satisfied that the following conditions are fulfilled",

and then the conditions to which I have already referred are given. Paragraph (c) of those conditions is

B "that the scheme is such as to secure that any trust created in pursuance of the scheme is expressed in a deed providing, to the satisfaction of the Board, for the matters specified in the Schedule to this Act."

The important words in para. (c) are "to the satisfaction of the Board". Granted that there is provision in the deed for the matters specified under paras. 1 to 6 in the Schedule to the Act, the question still arises: Are those matters provided for to the satisfaction of the Board of Trade, and may the Board of Trade fail to be satisfied with the provisions contained in the deed because they think that the provisions contained in the deed are inimical to the interests of the public and possibly unfair on the investors who will be induced to invest their money pursuant to the scheme?

D There is no suggestion, and there could not be any suggestion, against the good faith of the Board of Trade in the present case; but they have expressed their reason for taking objection to the plaintiff's scheme, and the question which still arises is: Is that objection one which the Board of Trade were entitled to take under the provisions of s. 16. I am not for the moment dealing with the other and larger point which was taken on behalf of the Board of Trade, viz., that they have a general discretion under this section conferred by the Act which enables them, if they think proper to do so, to refuse to make any order at all, whether or not the provisions required by the Schedule are contained in the deed. I am dealing with the shorter matter which depends simply on the proper construction of para. (c) of s. 16 (1) of the Act. That matter is not disposed of in any way by the argument of counsel for the plaintiff that the Board of Trade have only a discretion according to the true construction of the Act, because the question is

E what is the true construction of the Act?

I have come to the conclusion that on the true construction of the Act the plaintiff is bound to set forth in its deed the matters which are referred to in paras. 1 to 6 of the Schedule, and that that must be done to the satisfaction of the Board of Trade. If, therefore, the Board of Trade are not satisfied with the terms of those provisions which are contained in the deed relating to the matters

G contained in the Schedule, it is open to the Board of Trade to take the objection. It seems to me that in the present case, when the Board of Trade considered that the initial service charge was fixed at an unfairly high rate (which I take to be the view that they hold), they were entitled to take an objection and they were entitled to refuse to make an order pursuant to s. 16 (1) of the Act.

H That is, in itself, sufficient to dispose of the case, but I will mention the alternative argument which was put forward by counsel on behalf of the Board of Trade. Counsel says that the Board of Trade have a general discretion under the provisions of s. 16 of the Act of 1939, quite apart from the point which I have decided under sub-s. (1) (c) of s. 16, to exercise their judgment whether a unit trust scheme is one which should be authorised, having regard to the interests of the

I public and the fairness of the scheme. He has pointed to what is plainly a permissive word, viz., "may", in the first few words of s. 16 (1), and he says that that has to be contrasted with certain provisions in the Act which are of an imperative character. I turn, therefore, to the other provisions of the Act and will consider them as briefly as I can. Section 1 (1) contains provisions prohibiting any person from (a) carrying on, or purporting to carry on,

"the business of dealing in securities except under the authority of a principal's licence, that is to say, a licence under this Act authorising him to

carry on the business of dealing in securities, or (b) in the capacity of a servant or agent of any person carrying on or purporting to carry on that business . . .”

that is, a representative capacity. Section 1 provides for licences, and s. 2 (1) contains provisions which exempt certain transactions:

“The restrictions imposed by s. 1 of this Act in relation to dealing in securities shall not apply to the doing of anything by, or on behalf of,—
(a) a member of any recognised stock exchange or recognised association of dealers in securities, or (b) the Bank of England, any statutory corporation or municipal corporation, any exempted dealer or any industrial and provident society or building society, or (c) any person acting in the capacity of manager or trustee under an authorised unit trust scheme.”

Section 3 deals with applications for, and the grant and extent of, licences, and sub-s. (1) is as follows:

“Subject to the following provisions of this Act, the Board of Trade—
(a) upon an application in that behalf made by any person in the prescribed manner, and on payment of the prescribed fee, shall grant to that person a principal’s licence, and (b) upon an application made by any person in the prescribed manner, and on payment of the prescribed fee, shall grant to that person a representative’s licence.”

Then there are provisions for how long the licence shall continue, and other provisions. Section 5 contains provisions for refusal and revocation of licences, and provides:

“Subject to the provisions of this section, the Board of Trade may refuse to grant an application for a licence or, where a licence has been granted, may revoke the licence . . .”

Section 7 gives power to the Board of Trade to make rules with regard to the conduct of business of licensed dealers; s. 8 deals with information, and s. 9 provides for publication of names of holders of principals’ licences, and there are certain provisions relating to particular societies. Section 12 contains penalties for fraudulently inducing persons to invest money. Section 13 contains restrictions on the distribution of circulars relating to investments, and sub-s. (3) (a) contains exemptions from the previous prohibition, which includes, amongst others, any invitations or information

“(i) made or given with respect to any securities by or on behalf of a member of any recognised stock exchange or recognised association of dealers in securities, or by or on behalf of the holder of a principal’s licence . . . (iv) made or given by or on behalf of the manager under an authorised unit trust scheme with respect to any securities created in pursuance of that scheme . . .”

Section 14, which deals with stock exchanges and associations of dealers in securities, provides, by sub-s. (1):

“The Board of Trade may by order declare any body of persons carrying on in Great Britain the business of dealing in securities to be a recognised stock exchange or recognised association of dealers in securities for the purposes of this Act.”

Then follows power to vary or revoke by subsequent order of the Board of Trade. That again, counsel says, is a case like the present, where there is a discretion and not an absolute imperative requirement that the Board of Trade shall make an order or declaration. Section 15 contains the exemptions of certain dealers.

The review of the sections which I have made shows that there is, in regard to

A licences, an imperative provision requiring the Board of Trade to issue a licence if the conditions are satisfied. But, contrasted with that, in other sections of the Act, and in particular in s. 16, is a provision which is merely an empowering provision.

B Counsel for the Board has called my attention to what he terms a leading case on the subject, *Julius v. Bishop of Oxford* (2) (1880) (5 App. Cas. 214), where there was a power conferred on the Bishop of Oxford to institute an inquiry in certain circumstances, and it was held by the House of Lords that he might have a duty to consider the matter but that that was the extent of his duty, and that he was not bound to issue the inquiry which was provided for by the terms of the Act, viz., the Church Discipline Act, 1840, which was merely an empowering provision.

C The House of Lords contrasted with that cases in regard to bankruptcy law, and other matters—"aids to execution", perhaps one might term them—where private rights were intended to be conferred by the Act, or matters of that sort, and where therefore though the word "may" might be used, the Act intended that a duty should be placed on the authority concerned to act in the matter and to make an order if the applicant came within the terms provided for in the statute. In those circumstances, is it right that the Board of Trade have a general

D discretion which entitles them, in the proper exercise of a semi-judicial function, to consider whether they should refuse to authorise unit trust schemes, even though the deed does contain the particulars which are required to be stated by the provisions of the Schedule to the Act? It seems to me that there is much to be said for the argument that the Board of Trade have this general discretion, and under the terms of the Act are not bound to make an order merely because the

E matters stated in the Schedule are duly contained in some form or other in the deed submitted to them. If it were necessary for me to do so, I should be inclined to come to the conclusion that the Board of Trade had such a discretion, but in view of the conclusion which I have reached on the provisions of s. 16 (1) (c) of the Act it is not strictly necessary for me to give any final view on this matter, and I will not, therefore, express myself more positively than I have.

F In the result it seems to me that the application made on behalf of the plaintiff must be refused.

Summons dismissed.

Solicitors: *Coward, Chance & Co.* (for the plaintiff); *Solicitor, Board of Trade.*

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

JACKSON AND ANOTHER v. CROUCHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.),
December 9, 12, 16, 1955.]

Rent Restriction—Repairs increase—Landlord's election not to be liable for internal repairs—Effect on rent increase in case of old control dwelling-house—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5 c. 17), s. 2 (1) (d)—Housing Repairs and Rents Act, 1954 (2 & 3 Eliz. 2 c. 53), s. 23 (1), s. 30 (1) (3).

B

Rent Restriction—Repairs increase—Notice of increase—Calculation not completed in the prescribed form of notice—Validity of notice—Amendment—Housing Repairs and Rents Act, 1954 (2 & 3 Eliz. 2 c. 53), s. 25 (3) (4)—Housing Repairs (Increase of Rent) Regulations, 1954 (S.I. 1954 No. 1036), Sch. 1.

C

The defendant was statutory tenant of a dwelling-house subject to "old control" under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The existing recoverable rent included a twenty-five per centum increase under s. 2 (1) (d) of the Act of 1920 on the basis that the landlords were responsible for the whole of the repairs. The landlords served on the tenant a notice of election that s. 30 (3) of the Housing Repairs and Rents Act, 1954, should apply to the dwelling-house and served on him a notice of repairs increase under s. 23 (1) of the Act. Under s. 30 (3) any repairs increase would be reducible by one-third and the state of internal decorative repair of the premises would be disregarded, subject to certain qualifications, in determining for the purposes of Part 2 of the Act of 1954 whether the dwelling-house was in good repair. The one-third reduction was made by the landlords in computing the repairs increase. The prescribed form of notice of repairs increase included a page where particulars of the calculation of the repairs increase were to be set out. The landlords left blank that part of the calculation which would show any deduction necessary to ensure that the recoverable rent, excluding the amount of rates for which the landlords were liable but including the repairs increase, did not exceed twice the gross annual value of the premises (£64). In fact no such deduction was necessary, as the recoverable rent less the landlords' rates which was the only deduction to be made did not exceed £64. The tenant was or should have been perfectly well aware in the circumstances of the present case what the figures were. The tenant refused to pay the repairs increase on the grounds (i) that the notice of repairs increase was bad because the relevant part of the prescribed form had not been completed, and (ii) that as the landlords had elected that s. 30 (3) of the Act of 1954 should apply they could not demand the full increase under s. 2 (1) (d) of the Act of 1920 on the footing that they were wholly responsible for repairs.

D

E

F

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Held: (i) the landlords would be granted leave under s. 25 (4) of the Act of 1954 to amend the notice of repairs increase by setting out the figures of the calculation which had been left blank, and the amendment would be made effective as from the date of the notice of repairs increase.

(ii) the landlords' election that s. 30 (3) of the Act of 1954 should apply did not affect the position as between the landlords and the tenant for the purposes of s. 2 (1) (d) of the Act of 1920 but had effect only for the purposes of the Act of 1954; accordingly the landlords continued to be entitled to the full permitted increase under s. 2 (1) (d) of the Act of 1920 when they became entitled to the repairs increase under the Act of 1954 reduced in accordance with s. 30 (3) of that Act.

I

Appeal dismissed.

- A** [**Editorial Note.** There was no decision whether the failure to complete the notice of repairs increase by setting out the omitted calculation invalidated the notice. SIR RAYMOND EVERSHERD, M.R., said that although on a strict reading of the demands of the prescribed form of a notice of repairs increase, the circumstances of the present case might justify the view that it was not necessary to complete the calculation, nevertheless he would regret it if he had so to hold, because a tenant might thereby be deprived of the information which the form was intended to give (see p. 174, letter I, post).

B For the Housing Repairs and Rents Act, 1954, s. 23, s. 25, s. 30 (1) (3), see 34 HALSBURY'S STATUTES (2nd Edn.) 346, 350, 355, 356.

For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (1) (d), see 13 HALSBURY'S STATUTES (2nd Edn.) 984.]

C **Appeal.**

This was an appeal by the defendant, the statutory tenant of No. 32 Ingrave Street, Battersea, in the County of London, against an order of His Honour JUDGE HODGSON dated July 4, 1955, and made at Wandsworth County Court, that the plaintiffs, the landlords, should recover against the defendant the sum of £4 2s. 8d. in respect of an increase of rent of 5s. 2d. weekly under the Housing Repairs and Rents Act, 1954. The landlords served a notice dated Dec. 30, 1954, which read as follows:

Housing Repairs and Rents Act, 1954.
Notice of Repairs Increase.

- E** To the tenant of 32 Ingrave Street, Battersea, S.W.11.
Take notice that

The existing recoverable rent of the above-mentioned premises inserted at (1) below will be increased as from Feb. 14, 1955, by the repairs increase permitted by the above-mentioned Act, the amount of which is inserted at (2) below.

			£	s.	d.	
F	(1) Existing recoverable rent of the premises	-	-	1	3	7 per week
	(2) Repairs increase as calculated overleaf	-	-	5	2	per week
	Total rent	-	1	8	9	

Overleaf the notice was as follows:

- G** *Calculation of repairs increase.*

per week
£ s. d.

Maximum repairs increase of twice the statutory repairs deduction for the premises, the gross value of which is £32 per annum - - - - -

7 8

per.....
£ s. d.

Less:

(i) . . .

(ii) A further amount (if any) calculated in the manner set out below to ensure that the recoverable rent, excluding the amounts set out below but including the repairs increase, does not exceed twice the gross value of the premises

Total of (i) and (ii) - - - - -

Net repairs increase - - - - -

	£	s.	d.	A
<i>Less:</i>				
One-third of net repairs increase where landlord has made an election as to internal decorative repair	—	—	2 6	
Repairs increase recoverable	—	—	5 2	

Calculation referred to in (ii) above

per..... B
£ s. d.

Existing recoverable rent

per.....
£ s. d.

Less:

(a) Amount payable by the landlord for rates for current rating period — — — —

(b) Part of rent which represents payment for furniture or services provided by the landlord

(c) Part of rent which represents payment in respect of improvements, alterations or additional or improved fixtures or fittings — —

Total of (a) (b) and (c) —

Add:

Maximum repairs increase less any amount entered at (i) above

Less:

Twice the gross value £..... per annum, equals — —

Amount of further deduction (if any) under (ii) above — £

The landlords also served a notice of the same date which read as follows:

Housing Repairs and Rents Act, 1954.

Notice of election as to internal decorative repair.

To the tenant of 32 Ingrave Street . . . Take notice that we [the landlords] of the above-mentioned premises, hereby elect that s. 30 (3) of the Housing Repairs and Rents Act, 1954, shall apply to the above-mentioned premises.

Note. -

. . . The effect of an election is . . . that the landlord will be entitled to a smaller repairs increase, but he will not be responsible for keeping the interior of the premises in good decorative repair.

The tenant refused to pay the increase and the landlords claimed in the county court the sum of £4 2s. 8d., being the amount of the increase of 5s. 2d. for sixteen weeks. The tenant contended, inter alia, (1) that the "notice of repairs increase" was bad because no actual calculation had been made under (ii) and (2) that the premises were subject to "old control", i.e., were dwelling-houses to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2) applied, and as the landlords were no longer assuming liability for the whole of the repairs of the premises their election under s. 30 (3) of the Act of 1954 must operate so as to reduce the twenty-five per cent. rent increase under s. 2 (1) (d) of the Act of 1920.

The tenant agreed that the result of any calculation under (ii) in the notice would be nil, and the landlords contended accordingly that the tenant knew, or could have known, that no calculation was required, but, alternatively, they

A applied for leave under s. 25 (4) of the Act to amend the notice by adding the following figures under the heading "Calculation referred to in (ii) above, viz.:

	£	s.	d.
Existing recoverable rent	61	6	4 per annum

B per
£ s. d.

Less:

(a) Amount payable by the landlord for rates for current rating period - - 25 5 0

25 5 0

Add: maximum repairs - - - -

36 1 4

20 0 0

56 1 4

D Less: Twice the gross value £32 per annum equals

64 0 0

Amount of further deduction (if any) under (ii) above

His Honour JUDGE HODGSON held that he would, if necessary, have granted leave to amend, but that in any event the notice of repairs increase was good; he also rejected the tenant's other contention and accordingly gave judgment for the landlords.

G. L. S. Dobry for the landlords.
D. J. Turner-Samuels for the tenant.

SIR RAYMOND EVERSHERD, M.R.: This appeal has raised two questions emerging from the impact of the Housing Repairs and Rents Act, 1954, on the pre-existing rent restriction legislation. The Act of 1954 was designed, inter alia, to give to a landlord added rights of increasing the rent in cases in which repair obligations by him ought fairly to be covered. The provisions of the Act of 1954 are highly elaborate, and the elaboration is enhanced by the fact that, pursuant to the terms of the Act, regulations were made by which various forms were prescribed, their purpose undoubtedly being to make as clear as could be to a tenant who received a notice of increase how the increase was justified arithmetically. The desirability of that course is made manifest by the fact that in many cases the calculations would be of a most complex character.

H As His Honour JUDGE HODGSON dealt with what I will call the calculation point first in his judgment, and as I have just made a reference to the question of forms, I will follow him, and deal first with that matter, which arises particularly under the terms of s. 25 of the Act of 1954.

I By s. 23 (2) the phrase "repairs increase" is defined to mean the amount of any increase payable by virtue of s. 23 (1) of the Act of 1954. By s. 25 it is provided, so far as is relevant:

"(1) No sum shall be recoverable by way of repairs increase unless the landlord has served on the tenant or a former tenant of the dwelling-house a notice in the prescribed form of his intention to increase the rent (hereinafter referred to as a 'notice of increase'), accompanied by—

(a) a declaration in the prescribed form that at the date of service of the notice the conditions justifying an increase of rent were fulfilled; and

(b) a declaration . . .

and no such sum shall be recoverable before or in respect of any period before, such date as may be specified in the notice.

"(2) . . .

"(3) The forms prescribed for the purposes of this section shall be such as, taken together, to contain such information as appears to the Minister expedient for informing the tenant of the effect of this Act and in particular of the circumstances in which the repairs increase is recoverable from or may be withheld by the tenant, and of the way in which the amount of the increase is calculated.

"(4) The county court, if satisfied that any error or omission in a notice of increase or a declaration accompanying such a notice is due to a bona fide mistake on the part of the landlord, shall have power to amend the notice or declaration by correcting any errors or supplying any omissions therein . . ."

Sub-section (4) goes on to provide that if there is such an amendment, the court may provide that the notice shall notwithstanding take effect as from its original date. The form which was prescribed under the regulations,* and which, therefore, I assume appeared to the Minister expedient for the somewhat ambitious purposes stated in sub-s. (3), is the form R.R.3, of which the landlords availed themselves in the present case. [HIS LORDSHIP read the form which is set out at p. 171 ante and continued:] The form provides for deductions which have to be made from the maximum repairs increase. One is as follows:

"Less . . . (ii) A further amount (if any) calculated in the manner set out below to ensure that the recoverable rent, excluding the amounts set out below but including the repairs increase, does not exceed twice the gross value of the premises."

In the present case, no further deduction had to be made, because it appears that when the rates for which the landlords are liable are deducted, the new increased rent remains appreciably below twice the gross value. So that the right thing to insert under (ii) is either the word "Nil" or "None", or to leave it blank; and if that is so, the question then arises whether you fill in at all the part of this form which is headed "Calculation referred to in (ii) above".

The landlords say, as a matter of strict obligation, if against the phrase "A further amount (if any) calculated in the manner set out below . . .", it is right to put "Nil", that negatives the requirement that you should have to make any calculation. For the only calculation foretold is a calculation of a further amount, and, ex concessis, there is none. Nevertheless it appears to me that that strict view may well not give effect to the obvious intention of the Act that the tenant should be fully informed. I have read s. 25 (3) which emphasises, among other things, the need to inform the tenant (at any rate, in the way the Minister thinks expedient) of the process by which the amount of increase is calculated. In the present case, bearing in mind that the increased rent, if justified, is £1 8s. 9d., it follows, of course, to the merest tyro in arithmetic that that is more than £64 per annum, which is twice the gross value. It is plain that the explanation of the apparent discrepancy lies in the fact that the rates, amounting to £25 5s. per annum are payable by the landlords and that that sum must be deducted from the existing recoverable rent under the heading "Calculation referred to in (ii) above" in the notice. Although on a strict reading of the demands of this form the circumstances in the present case may justify the view that the item (ii) does not have to be completed, nevertheless, I should rather regret it if I had so to hold, because a tenant—not in the present case but in some cases—might thereby be deprived of the information which the

* Housing Repairs (Increase of Rent) Regulations, 1954 (S.I. 1954 No. 1036).

- A form was intended to give. Fortunately, however, we are not bound to pursue that matter. The landlords made it plain to the county court judge that if their view was not strictly right, they were most willing to have the form amended; they asked to have it amended. The learned judge was in turn satisfied that there was no real point here; the tenant was, or should have been, well aware of what the figures were. There is no deprivation in his case of essential knowledge. The judge therefore said that, if it were necessary, he would have given, in pursuance of his discretionary powers under s. 25 (4), leave to amend by filling in the figures which counsel for the landlords explained to us this morning. Counsel said that he had always been willing to make that amendment, and we have thought that the best course would be to accept that suggestion, that is to say, to amend the notice as the county court judge said that he was prepared to do, if necessary, and to say, in the exercise of the discretion, as the judge again was plainly prepared to say, that the notice should still take effect from its original date, i.e., Dec. 30, 1954.

There remains the second point, which is also short, and which arises under s. 30 of the Act of 1954 when taken with s. 2 (1) (d) of the Act of 1920. By the Act of 1920 a limited power of increasing rents was conferred, and s. 2 (1) provided:

- “The amount by which the increased rent of a dwelling-house to which this Act applies may exceed the standard rent shall . . . be as follows, that is to say:— . . . (d) In further addition to any such amounts as aforesaid—(i) where the landlord is responsible for the whole of the repairs, an amount not exceeding twenty-five per cent. of the net rent.”

Originally that Act contained in s. 2 (5) a provision which included this:

“and the landlord shall be deemed to be responsible for any repairs for which the tenant is under no express liability.”

That provision was repealed by s. 30 (1) of the Act of 1954, which provides as follows:

- “For the purposes of this Part of this Act and Sch. 2 thereto and of s. 2 (1) (d) of the Act of 1920 the landlord shall be deemed, as between himself and the tenant, to be wholly responsible for the repair of a dwelling-house in any case where the tenant is under no express liability to carry out any repairs.”

The words “wholly” and “in any case” are new. In the present case there is no doubt that the tenant is not under any express liability to carry out repairs. If, therefore, the matter stood alone thus, it would follow that by s. 2 (1) (d) the landlord had the power to increase the rent by twenty-five per cent. therein mentioned; but s. 30 (3) must also be regarded, and I accept that these two sub-sections must be read in conjunction:

- “Where neither the landlord nor the tenant is under an express liability to carry out internal decorative repairs, then if not later than the service as respects the dwelling-house of a notice of increase under s. 25 of this Act the landlord serves on the tenant a notice in the prescribed form electing that this sub-section shall apply to the dwelling-house—(a) the amount of any repairs increase recoverable by the landlord in respect of the dwelling-house shall be reduced by one-third . . . (c) in determining for the purposes of this Part of this Act whether the dwelling-house is or was at any time in good repair, the state of internal decorative repair of the dwelling-house and any other premises shall be disregarded unless it is or was at the time in question such as to make the dwelling-house not reasonably suitable for occupation.”

I have said that the phrase “repairs increase” relates exclusively to the right to increase rent conferred by s. 23 (1) of the Act of 1954. Therefore para. (a)

of s. 30 (3) does not in terms have any effect on, or bear any relation to, the right to increase conferred by s. 2 (1) (d) of the Act of 1920. Recourse must, however, again be had to the statutory prescribed forms, and it is obligatory on the landlord who exercises this option, as the present landlords did, to fill in another form, R.R.6. That form must include a note, the last sentence of which reads:

“ The effect of an election is therefore that the landlord will be entitled to a smaller repairs increase, but he will not be responsible for keeping the interior of the premises in good decorative repair.”

It is said by the tenant that the effect of s. 30 (3), when it is brought into operation, and of the prescribed machinery for doing so, is either to confer in some way on the tenant a liability for repair, or, at least, to negative necessarily the proposition that the landlord is exclusively so responsible himself, because it is said he cannot in one and the same breath, so to speak, say “ I must be deemed to be solely responsible for all repairs ”, and tell the tenant in the prescribed form that he is not responsible for internal decoration. I agree with the learned judge that there is perhaps some inelegance in the wording. The wording, he said, might have been happier, and indeed there are few Acts of Parliament to which that observation might not at some time be applied. In my judgment, however, it is tolerably clear that though the effect is expressly to limit the landlords’ right to recover the increase under the Act of 1954 and though for that purpose it is right to make plain that the landlords repudiate responsibility for internal decorative repairs as a matter of obligation, it still seems to me to remain inevitably true that by the express terms of s. 30 (1), since the tenant is under no express liability, the landlords, for the purposes of s. 2 (1) (d) of the Act of 1920, remain as between themselves and the tenant wholly responsible. Agreeing, therefore, as I do, with the judge on that matter, on which really there is no more to be said, it seems to me that on this part of the case also the tenant fails.

BIRKETT, L.J.: I agree.

ROMER, L.J.: I also agree.

Appeal dismissed.

Solicitors: *Frank Taylor, Nightingale & Baker* (for the landlords); *Garber, Vowles & Co.* (for the tenant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

NOTE.

MILLER (formerly KOZUBOWSKI) v. KOZUBOWSKI, HEKNER
(cited as HEPNER), DENESTER (cited as DENNISTER)
and NIEKRASZ cited.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Mr. Commissioner Latey, Q.C.),
November 24, December 21, 1955.]

*Divorce—Decree nisi—Form—Specific finding of adultery—Name of co-respondent
or second respondent to appear in decree.*

[As to rectification of decree nisi, see 12 HALSBURY'S LAWS (3rd Edn.) 391,
para. 866, note (u); and for cases on the subject, see 27 DIGEST (Repl.) 553,
5034-5036.]

Application.

The wife presented a petition, dated Sept. 19, 1953, for divorce on the ground of the husband's adultery and cruelty. By his answer the husband denied the alleged cruelty and adultery and cross-prayed for a divorce on the ground of the wife's adultery with the three parties cited. The wife filed a reply denying the alleged adultery but by an order of Mr. Registrar WILKINSON the prayer of her petition was stayed and her reply was struck out. The first party cited, a Mr. Hekner, was abroad but the second and third parties cited, a Mr. Denester and a Mr. Niekrasz, entered appearance, and Mr. Denester filed an answer. The hearing of the husband's cross-prayer took place before Mr. Commissioner LATEY, Q.C., on Nov. 7, 8, 9, 1955. The commissioner found that the wife had committed adultery with the three parties cited and that Denester and Niekrasz had committed adultery with her. Accordingly, he granted a decree nisi in the husband's favour, and ordered Denester to pay the husband's costs. The decree, when drawn up, recited that the commissioner had decreed that the marriage between the husband and the wife

“ . . . be dissolved by reason that since the celebration thereof the [wife] had been guilty of adultery with Denester (cited as Dennister), the second party cited [and] condemned the second party in the costs incurred on behalf of the [husband].”

The husband now applied for inclusion in the decree of the names of the other persons with whom the wife was found to have committed adultery.

N. Lermom for the husband.

MR. COMMISSIONER LATEY, Q.C.: On Nov. 9, 1955, I found that the wife, who did not proceed with her petition but against whom the husband charged adultery, to have been guilty of adultery with three men, a Mr. Hekner, a Mr. Denester and a Mr. Niekrasz. I dismissed Hekner from the suit as there was no evidence against him. The wife's confession was evidence only against herself. I found Denester and Niekrasz guilty of adultery with the wife. I made an order for the husband's costs only against Denester, not against Niekrasz. According to the accustomed practice over many years the order for the decree nisi was drawn up so as to name only Denester as the party cited guilty of adultery, as he was the only party cited who was ordered to pay costs.

Counsel for the husband applied for a correction of the order so that it should be recorded therein that the wife had committed adultery with each of the three men cited in accordance with my finding. On consideration of this somewhat technical matter I have decided that properly the order should be drawn up so

as to record therein the fact that the wife was guilty of adultery with Denester and Niekrasz. A departmental direction*, dated Dec. 6, 1955, was issued by the senior registrar which reads as follows:

"Where there is a specific finding of adultery against a co-respondent or second respondent, [and, of course, the same thing applies to parties cited] the name should appear in the statement of the ground for divorce in the decree ('So and so had been guilty of adultery with A.B. the co-respondent'), whether or no there is any order for costs."

So that by drawing attention to this matter, counsel for the husband has probably instituted a new practice. The order now reads thus:

"... be dissolved by reason that since the celebration thereof the [wife] had been guilty of adultery with Denester, the second party cited, and with Niekrasz, the third party cited, and they with the [wife]."

Order accordingly.

Solicitors: *Martin & Nicholson* (for the husband).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

NOTE.

THE CHUSAN.

OWNERS OF THE STEAMSHIP PROSPECTOR *v.* OWNERS OF THE STEAMSHIP CHUSAN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J., assisted by Commadore Owen and Captain Galpin, Trinity Masters), December 6, 7, 8, 9, 1955.]

Shipping—Collision—Apportionment of blame—Radar equipment—Excessive speed in fog.

Action.

The plaintiffs were the owners of the *Prospector*, a steamship of 6,165 tons gross, and fitted with reciprocating engines of 3,350 h.p.i. The defendants were the owners of the *Chusan*, a twin-screw passenger steamship of 24,215 tons gross, fitted with steam turbine engines of 42,300 h.p.i., and with radar. On June 12, 1953, at about 9.26 p.m. G.M.T., a collision occurred in the Straits of Dover, near the South Goodwin lightship, between the *Prospector*, which was on a voyage from the West Indies to London laden with general cargo, and the *Chusan*, which was on a cruise with passengers from Tilbury to the Mediterranean. At the time of the collision each of the ships was in charge of a duly licensed Trinity House pilot. The weather was foggy, visibility being about three cables at water level, and about two cables for those in charge of the bridge of the respective ships. Just before the collision occurred, the *Prospector* was proceeding at her half speed, which was about eight knots, and the *Chusan* was proceeding at "slow ahead", which gave her a speed of some seven knots.

* This, being a departmental direction, was not published as a Practice Direction.

- A Each of the ships was sounding on her whistle the regulation blasts for fogs.* The presence of the Prospector was not detected on the radar screen of the Chusan, because at the material time there was no one on continuous watch at the radar set. When the first whistle signal from the Prospector was heard the Chusan's engines were stopped, and when further signals were heard the engines were put, first, half-speed astern and then full speed astern. Her course was not altered at any material time. The Prospector came into sight at about the time when the Chusan's engines were put full speed astern. The first whistle signal from the Chusan which was heard on the Prospector was heard by the third officer who reported it to the master and the pilot, but they had not heard it and took no action on receiving the third officer's report. When another signal from the Chusan was heard the Prospector's speed was reduced from half to slow.
- C Just after the Chusan's signal was heard for the third time on the Prospector, the persons on the bridge of the Prospector saw the form of the Chusan on the surface of the water as a dark unidentifiable object on the starboard bow at an estimated distance of about five cables. The Prospector's engines were then stopped and the wheel was put hard-a-port. Shortly afterwards the shape of the Chusan came into view and the Prospector's engines were put full speed astern.
- D Each of the ships still had some residual forward way, and the stem of the Chusan struck the starboard bow of the Prospector causing serious damage. The plaintiffs claimed damages against the defendants on the ground that the Chusan was to blame for the collision. The defendants denied that any blame attached to the Chusan and alleged that the whole of the blame should be put on the Prospector.
- E

The case is reported for the observations of the court on the effect to be given, in assessing any blame to be attributed to the Chusan, to the fact that she was fitted with a radar set.

R. F. Hayward, Q.C., and G. N. W. Boyes for the plaintiffs, the owners of the Prospector.

- F *J. V. Naisby, Q.C., and J. B. Hewson* for the defendants, the owners of the Chusan.

WILLMER, J., stated the facts and found that the Prospector was at fault and contributed to the collision in that (i) her initial speed of eight knots was excessive for a loaded vessel of her character in the weather conditions which then prevailed; (ii) in breach of art. 16 of the Sea Regulations, 1910,† she failed to stop her engines until the whistle signal of the Chusan had been heard for the third time; and (iii) the Prospector altered her course before the position and course of the Chusan were known. Dealing with the Chusan's liability, His LORDSHIP referred to the fact that she was a high-powered vessel with good pulling-up power, and continued: There is also another fact which, I think, is material to be taken into consideration. The Chusan was fitted, as one would

* See art. 15 of the Sea Regulations, i.e., of Sch. 1 to the Order in Council as to Collisions at Sea and Distress Signals (S.R. & O. 1910 No. 1113); 20 HALSBURY'S STATUTORY INSTRUMENTS 93. These regulations have been replaced by the Collision Regulations (Ships and Seaplanes on the Water) and Signals of Distress (Ships) Order, 1953 (S.I. 1953 No. 1557), which came into force on Jan. 1, 1954. For the text of art. 15 of the new regulations, see SUPPLEMENT to 30 HALSBURY'S LAWS (2nd Edn.), para. 919.

† Article 16 of the Sea Regulations, 1910, reads: "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over." See 30 HALSBURY'S LAWS (2nd Edn.) 722, para. 929; 20 HALSBURY'S STATUTORY INSTRUMENTS 94. Article 16 of the Regulations of 1910 has been replaced by r. 16 of Sch. 1 to the Collision Regulations, 1953 (see note, supra).

expect a large passenger ship to be fitted, with a radar set. It is the fact that A
no warning of the presence of the Prospector had been detected on the radar
screen of the Chusan, but it is also the fact that at the material time there was no
officer on continuous watch at the radar set. The radar screen is mounted
inside the chart room, and the evidence showed that both the master and the
chief officer, who had been specially called to the bridge because the weather was
foggy, were going in and out spasmodically and having a look at the radar screen; B
but it so happened that on none of the occasions when either of those officers
looked at the radar screen was any trace of the Prospector found. The result
was that the first which the Chusan knew of the presence of the Prospector was
when she heard a whistle signal from the Prospector. This is a matter which I
have considered very carefully with the Elder Brethren.

I think that all those circumstances must be taken into consideration in C
deciding whether, in a particular case, a vessel is proceeding at a proper speed or
not. I have come to the conclusion that for a vessel of this character, navigating
in this area, in these conditions of visibility, and in circumstances in which a
continuous watch was not being kept on the radar, a speed of seven knots was
excessive. I find no other fault with the Chusan, but I do not see that I can
avoid concluding that the excessive speed of the Chusan was a factor contributing D
to the collision.

Before I leave that point and consider the apportionment of blame as between
the two vessels, I should like to add a footnote to what I have already said about
the radar. I wish to make it abundantly clear that what I have said is not to be
interpreted as meaning that a vessel which maintains a continuous watch on her
radar is thereby entitled to proceed at an excessive speed in fog. I hope that E
nothing which I have said in this case can be twisted round and used in future
cases in such a way that it may seem to justify a speed which would otherwise
be excessive, merely on the basis of a continuous watch being maintained on the
radar set. I approach the matter in this way. It seems to me to be part of any
seaman's duty, in the exercise of reasonable care, to take full advantage of any F
equipment with which his vessel is equipped. After all, a radar set is not the only
kind of equipment with which one expects a modern steamship to be supplied.
This equipment is supplied to be used, and to be used intelligently; but I am
far from saying that the use of this equipment can be prayed in aid so as to
justify navigation that would otherwise be reckless.*

[His LORDSHIP apportioned the blame as to three-quarters to the Prospector G
and as to one-quarter to the Chusan, and ordered that the costs should be borne
in the same proportion as the damages.]

Judgment accordingly.

Solicitors: *Simpson, North, Harley & Co.* (for the plaintiffs); *Thomas Cooper & Co.* (for the defendants).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

* In *The Prins Alexander*, where an appeal from the Court of Appeal was dismissed by the House of Lords on June 23, 1955, there had been a collision between two vessels, the N.O. Røgenaes and the Prins Alexander, both of which were fitted with radar. It was contended by the appellants, the owners of the Røgenaes, that the position of the respondents' vessel had been "ascertained" within the meaning of art. 16 of the Sea Regulations, 1910 (art. 16 is printed in the second footnote at p. 179, ante; see also the first footnote there) by means of the radar observations of the Røgenaes. On

A this point LORD SOMERVELL OF HARROW, with whom VISCOUNT SIMONDS, LORD MORTON OF HENRYTON and LORD TUCKER concurred, said:

“ On the assumption that there was a prima facie breach of the article [i.e., art. 16] your Lordships were invited by the appellants to hold that, having regard to their radar observations, the position of the vessel had been ‘ ascertained ’ within the meaning of the article and, therefore, even if the signal had been heard on the bridge it would not have been necessary to stop the engines. On the view which I have taken of the radar observations of the Røgenaes, that answer wholly fails on the facts. There were some observations by the learned judge and by the Court of Appeal on the effect, if any, of radar equipment on art. 16. The question, as I see it, is whether the position of a ship can be ‘ ascertained ’ within the article by radar observations. The meaning of these words in the article were the subject of some observations by LORD MACMILLAN in *Nippon Yusen Kaisha v. China Navigation Co., Ltd.* ([1935] A.C. at p. 182): ‘ The position of the Toyooka Maru was not, in their Lordships’ opinion, ascertained within the meaning of the regulation. It was inferred, not ascertained, and as it turned out the inference was wrong. The data on which an inference is founded may be so conclusive as to raise the inference to the level of a certainty, but in the present case the only data were that the fog-signals were heard on the Kiangsu’s port bow, that outward bound vessels keep to the south side of the channel and that it was improbable that a vessel would be crossing the fairway in a fog. An inference based on these data was not in their Lordships’ opinion an ascertainment on which it was justifiable to disregard the precaution enjoined by reg. 16. In order that the position of a vessel may be ascertained by another vessel within the meaning of the regulation she must be known by that other vessel to be in such a position that both vessels can safely proceed without risk of collision: see, e.g., per SIR GORELL BARNES, P., in *The Aras* ([1907] P. 28 at p. 34). The Kiangsu did not know the position of the Toyooka Maru in this sense; she inferred it and took the chance of her inference being right.’ There are obvious possibilities of error in the use of PPI [i.e., planned position indicator in a radar apparatus]. There should be, we are advised, in circumstances such as the present continuous observation by one man and plotting of bearings if reliable inferences are to be drawn. Article 16 stands and it is to be noted that the new rule which has now replaced it is in substantially the same terms. It may be that proper observations on a PPI can ascertain the position of a vessel in the sense explained by LORD MACMILLAN. They clearly did not do so in this case so far as the Røgenaes is concerned.”

F The extract from the speech of LORD SOMERVELL OF HARROW given above substantially covers the observations in the House of Lords regarding radar equipment. A report of the whole case of *The Prins Alexander* is given in [1955] 2 Lloyd’s Rep. 1.

MOORE v. R. FOX & SONS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.J.J.), November 10, 11, 14, 15, 16, 17, December 20, 1955.]

Negligence—Res ipsa loquitur—Onus on defendant to disprove negligence—Workman employed by defendant fatally injured by explosion of gas apparatus on defendant's premises—Expert evidence that accident could have happened without negligence of defendant—Whether onus discharged.

The plaintiff's husband was employed by the defendants as a phosphater and in the course of his work it was his duty to immerse metal objects in a de-rusting tank which was filled with liquid chemicals maintained at a temperature of 140° F. by a thermostatically-controlled gas burner situated under the tank. The main gas supply of the burner passed through a thermostatically-controlled regulator, the supply being automatically cut off when the desired heat was attained and recommencing when the temperature fell below the required level. While the machine was in continuous operation the gas supply turned on and off once in about every twenty minutes. To ignite or re-ignite the burner when the supply was flowing, a pilot jet flame, which should have been about six inches in length, was provided near to the burner and supplied by a separate pipe. There was also a smaller pipe to burn away the small overflow of gas from the regulator. The machine had been supplied and fitted on the defendants' premises by the manufacturer and had been in constant use since November, 1952. On Feb. 18, 1953, at about 4.30 p.m., while the plaintiff's husband was attending to the tank, an explosion occurred under the tank and he was fatally injured. The machine had worked satisfactorily from the beginning of that day until the time of the explosion. The plaintiff claimed damages against the defendants on the ground that her husband's death was attributable to the negligence of the defendants. (It was proved at the trial that the explosion was caused by an accumulation of unignited gas due to a failure in the proper functioning of the pilot jet; (that the explosion would not have occurred if the machine had been properly maintained) that there was no fault in the gas supply and that the mechanism was such as should not have required overhaul at or before the time of the accident. It was, however, the duty of the defendants' maintenance man to inspect the apparatus weekly and the duty of their foreman to supervise the plaintiff's husband and not to allow him to work the gas apparatus until the foreman was satisfied that he was competent to do so. Neither the foreman nor the maintenance man was called as a witness. It was not contended by the defendants that the plaintiff's husband had been responsible for the accident.

Held: the plaintiff was entitled to recover damages from the defendants because

(a) (per SIR RAYMOND EVERSLED, M.R., and BIRKETT, L.J.) (i) the maxim of *res ipsa loquitur* applied as the plant was under the management of the defendants or their servants and the accident was such as in the ordinary course of things would not have happened if proper care had been taken (principle stated by ERLE, C.J., in *Scott v. London Dock Co.* (1865), 3 H. & C. at p. 601, applied), and (ii) the defendants had failed so to explain the accident as to discharge the onus which was on them to show either that the explosion was due to a specific cause not connoting their negligence or that they used all reasonable care in and about the management of the plant, it being insufficient for the defendants merely to show that the accident could have happened without negligence on their part (principle stated by ASQUITH, L.J., in *Barkway v. South Wales Transport Co., Ltd.*, [1948] 2 All E.R. at p. 471, adopted; observations of LORD RADCLIFFE in

A *Esso Petroleum Co., Ltd. v. Southport Corpn.*, [1955] 3 All E.R. at p. 872, applied; dicta of LANGTON, J., in *The Kite*, [1933] P. at p. 168, and of LORD DUNEDIN in *Ballard v. North British Ry. Co.*, 1923 S.C. (H.L.) at p. 54, not followed) and

(b) the plaintiff, on the alternative footing that the maxim *res ipsa loquitur* did not apply, had established negligence on the part of the defendants.

B Appeal allowed.

[As to the maxim *res ipsa loquitur*, see 23 HALSBURY'S LAWS (2nd Edn.) 671-675, paras. 956-958; and for cases on the subject, see 36 DIGEST (Repl.) 143-149, 753-780.]

C Cases referred to:

(1) *The Kite*, [1933] P. 154; 102 L.J.P. 101; 149 L.T. 498; Digest Supp.

(2) *Ballard v. North British Ry. Co.*, 1923 S.C. (H.L.) 43; 36 Digest (Repl.) 142, 1237.

(3) *Esso Petroleum Co., Ltd. v. Southport Corpn.*, [1955] 3 All E.R. 864.

D (4) *Woods v. Duncan*, *Duncan v. Hambrook*, *Duncan v. Cammell Laird & Co., Ltd.*, [1946] 1 All E.R. 420, n.; [1946] A.C. 401; [1947] L.J.R. 120; 174 L.T. 286; 36 Digest (Repl.) 52, 286.

(5) *Scott v. London Dock Co.*, (1865), 3 H. & C. 596; 34 L.J.Ex. 220; 13 L.T. 148; 159 E.R. 665; 36 Digest (Repl.) 145, 772.

E (6) *Barkway v. South Wales Transport Co., Ltd.*, [1948] 2 All E.R. 460; [1949] 1 K.B. 54; *revsd.* H.L., [1950] 1 All E.R. 392; [1950] A.C. 185; 114 J.P. 172; 36 Digest (Repl.) 144, 764.

(7) *O'Hara v. Central S.M.T. Co., Ltd.*, 1941 S.C. 363; 36 Digest (Repl.) 142, 1238.

Appeal.

The plaintiff, Mrs. Florence Margaret Moore, appealed from an order of
F STREATFEILD, J., dated Apr. 29, 1955. The plaintiff's husband, who was employed by the defendants, R. Fox & Sons, was fatally injured by an explosion at the apparatus at which he was working. The plaintiff, as administratrix of the estate of her husband, sought to recover damages against the defendants under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, on the ground that the explosion occurred by reason of
G the negligence of the defendants, their servants or agents. STREATFEILD, J., held that the doctrine *res ipsa loquitur* applied to the facts of the case, but that the defendants had successfully discharged the onus which was thus on them to disprove negligence, because, although they were unable to give positive evidence how the accident actually occurred, they were able to give an explanation satisfactory to the court which indicated that the accident was just as
H likely to have occurred without their negligence as with it. The learned judge held, accordingly, that the plaintiff had not succeeded in establishing that her husband's death was due to the negligence of the defendants and gave judgment for the defendants.

Stephen Chapman, Q.C., and *R. D. B. Davies* for the plaintiff.

I *R. H. Forrest, Q.C.*, and *R. E. Hopkins* for the defendants.

Cur. adv. vult.

Dec. 20. The following judgments were read.

SIR RAYMOND EVERSHERD, M.R.: On Feb. 18, 1953, at about 4.30 p.m., Mr. G. F. Moore, who was employed by the defendants as a phosphater in their business, was in the ordinary course attending to a tank on the defendants' premises into which it was his duty to immerse metal objects. An explosion then occurred underneath the tank as a result of which Mr. Moore was killed

almost instantaneously. A friend of Mr. Moore, Mr. Higgins, who was a lorry driver also in the defendants' employment, had just been speaking briefly to Mr. Moore and had not, in fact, left the room or shop when the explosion occurred. Mr. Higgins gave evidence for the plaintiff, and as a result of that evidence (which was to the effect that Mr. Moore was attending to his tank in a perfectly normal way) the judge found as a fact, and there has been no serious challenge to his finding, that the explosion was not due to any action on the part of Mr. Moore himself. A B

That which I have referred to as a "tank" was an apparatus designed and manufactured by Messrs. Neil & Spencer, Ltd., by whom it had been supplied and fitted on the defendants' premises. It had been in use continuously since the previous November. Its purpose was the removal of rust from metal objects. It consisted of a substantial metal tank, the function of "de-rusting" being achieved by the immersion of the metal objects to be treated in the tank which was filled for the purpose with certain liquid chemicals maintained at a temperature of 140° F. It appeared that the objects to be treated were immersed for about ten to fifteen minutes each. The heating, and the maintenance of the requisite heat, in the tank was achieved by a thermostatically-controlled gas burner situated underneath the tank and visible from the outside through a slip in the outer casing of the appliance. The burner was of the bar type, having several vents or ports. The main gas supply of the burner passed through a thermostatically-controlled regulator so contrived that, when the desired heat was attained, the supply was automatically cut off; but, when the temperature fell below the required level, the supply recommenced. It appeared that in the course of a day (during which the tank was in continuous operation) the gas supply turned on and off once in about every twenty minutes. In order to ignite or re-ignite the burner when the supply was flowing, a pilot jet flame, which should have been about six inches in length, was provided near to the burner and supplied by a separate pipe. There was also a third and much smaller pipe, called the "bleeder", which served to burn away the small overflow of gas from the regulator. There was, finally, a contrivance known as a "draught interrupter" designed to prevent a down-draught from extinguishing the burner flames. A result of the explosion on Feb. 18, 1953, was to blow the various components which I have briefly described seriously out of position, to sever the main pipe altogether at one point, and also to break, i.e., put wholly out of operation, the draught interrupter. C D E F

It appears to have been Mr. Moore's habit, when working at the tank, to stand on some kind of wooden box. Although the box was not produced, and although it was, at the inquest held after Mr. Moore's death, described by the defendants' first witness, Mr. C. R. Fox, a partner in the defendant firm, as a "stool", it was vaguely suggested to the plaintiff's expert witness, Mr. Whittaker, that the explosion might have been due to the use of this box by Mr. Moore on the ground that it might have prevented a sufficient flow of air to the burner. The suggestion was repudiated by Mr. Whittaker and rejected by the judge, who thought from the evidence of certain marks on the casing of the tank that, in any event, the box or stool had not been immediately in front of the slit in the casing. The suggestion was no more pursued before us than the suggestion that Mr. Moore had unaccountably been a party to his own destruction by turning, or tampering with, the taps on the apparatus. This restraint on the defendants' part was, in my judgment, wise: for, as will later appear, it cannot, in the peculiar circumstances of this case, assist the defendants to suggest that the death of Mr. Moore was attributable to his failure to appreciate the dangerous potentialities of the apparatus at which he had been required to work. G H I

The plaintiff, as the widow and administratrix of Mr. Moore, is suing on her own behalf and on behalf of the two children of her marriage with the deceased, under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous

- A Provisions) Act, 1934, alleging that the death of her husband was attributable to negligence on the part of the defendants. In addition to her own evidence, which was not directed to the question of liability, the plaintiff called as witnesses Mr. Higgins, the effect of whose evidence I have already stated, and Mr. Whittaker, a consulting engineer of thirty years' experience, though not expert in gas apparatus. Mr. Whittaker proved, as has since been conceded on all hands, that the accident must have been caused by an accumulation of a quantity of unburnt gas under the tank: for unburnt gas of the kind here employed, when mixed with air, becomes highly explosive. In the present case this unburnt gas mixed with air must have been exploded either by the pilot jet flame operating tardily, or by the "bleeder" flame, or (as Mr. Whittaker also thought possible) by some incandescent soot. If tampering with the taps or other temerarious conduct on the part of Mr. Moore is eliminated, it appears to follow without possibility of doubt (and this, again, was not disputed) that the explosion must have been due to the fact that gas emanating from the burner was not (as it should have been) immediately ignited by the pilot jet, but was allowed for a time to accumulate unburnt under the tank. According to Mr. Whittaker, the functional failure of the pilot jet should not, and would not, have happened if the apparatus had been properly maintained. I quote the following two questions and answers from Mr. Whittaker's examination-in-chief:

- E "Q.—. . . As long as that was properly inspected and maintained, should the pilot light either go out completely or else get so low that it would not light the burners when the gas came on? A.—No, it should not. A pilot light of the size I saw would not go out very easily. It was of sufficient size for that.

"Q.—Do you think it is likely to be blown out? A.—I think it would be very difficult to blow it out."

- F The plaintiff contended that her case fell within the rule or principle known as *res ipsa loquitur*, i.e., that the fact of the explosion spoke for itself and led to the conclusion of negligence on the defendants' part unless it could be otherwise explained. Thus, as she claims, the onus was put on the defendants which in the event, as she argued below and before us, was never discharged. The learned judge accepted the premise to the plaintiff's argument, i.e., that this was a case to which the formula *res ipsa loquitur* applied; but he concluded, nevertheless, that the defendants had successfully discharged the onus cast on them. Founding himself largely on the judgment of LANGTON, J., in *The Kite* (1) ([1933] P. 154), he thought that it sufficed for the defendants by expert evidence (alone) to show possible, that is, theoretically possible, ways in which this accident or others like it might happen, and then to say that some, at least, of those possibilities were consistent with absence of negligence.

- H I have found the case one of perplexing anxiety. The so-called rule or "principle" of *res ipsa loquitur* has been the subject of many judicial pronouncements both in England and in Scotland. It has, indeed, been somewhat criticised. In the view of LORD SHAW OF DUNFERMLINE in *Ballard v. North British Ry. Co.* (2) (1923 S.C. (H.L.) 43) its title to the designation of "principle" has been largely attributable to the fact of its expression in the Latin tongue.*
- I Nevertheless, there can, in my view, be no doubt of the validity of the rule or presumption, by whatever name it is called. It has been considered by the House of Lords as recently as the present term in *Esso Petroleum Co., Ltd. v. Southport Corpn.* (3) ([1955] 3 All E.R. 864). Although, therefore, it cannot be doubted that, if the plaintiff can rightly assert, as regards this accident, *res ipsa loquitur*, the onus is then thrown on the defendants to show that there was no negligence on their part or, at least, to give an explanation of the accident

* See 1923 S.C. (H.L.) at p. 56.

which is consistent with the absence of negligence, it is far less clear whether the language of LANGTON, J., ought to be taken as justifying the conclusion for which the defendants have here contended, and particularly the proposition that they can discharge that onus on the basis of what are, in effect, purely scientific hypotheses. In the circumstances, I think it right that I should express my own view of the present case both on the assumption, which the learned judge favoured, that the case was one of *res ipsa loquitur*, and also on the alternative view that, although at the end of her case the plaintiff might have established a *prima facie* case of negligence, nevertheless the onus remained throughout on the plaintiff; so that the question for the determination of the court in the latter alternative is whether, on the evidence as a whole, the right inference is one in favour of the plaintiff or of the defendants. In the latter alternative, I do not forget the point forcibly made by counsel for the defendants that the standard of duty, departure from which will alone amount to negligence, is an objective standard, namely, the standard of the reasonably prudent employer at the date of the accident, and not a standard derived from consideration of the particular precautions which were, in fact, taken in the present case plus the added attraction of wisdom after the event.

It will be necessary, therefore, for me to consider in some detail the evidence produced before the judge. I will, however, anticipate at once my conclusions. First, if as the judge thought, this was a case of *res ipsa loquitur*, that is, a case in which this accident, having regard to all the circumstances in which it occurred, spoke for itself and led to the inference of negligence, then, with all respect to him, I do not agree with his conclusion that the defendants thereafter discharged that onus by calling four expert witnesses, the result of whose evidence was, after all, that the accident was inexplicable. In the words of one of them (Mr. F. C. Smith) at the end of his re-examination: "I have had some experience, but I cannot tell you how this happened." Secondly, and on the alternative hypothesis that the onus of proof rested throughout on the plaintiff, then I also conclude in the plaintiff's favour: for, in my judgment, on the whole of the evidence and drawing the legitimate—but I hope not more than the legitimate—inference from the defendants' decision not to call either their maintenance man or the foreman under whom Mr. Moore worked (of whom more hereafter), I think that the plaintiff sustained to the end the case which she had set out to establish and which Mr. Whittaker supported in the answers already quoted, namely, that this accident should not and would not have happened if proper care and attention had been applied to the apparatus.

[HIS LORDSHIP referred to certain aspects of the conduct of the case for the defendants at the trial of the action and reviewed the evidence of Mr. Fox, a partner in the defendants' firm, and continued:] What, then, was the extent of Mr. Moore's responsibility? Mr. Fox, it is true, said that he "thought" that he (Mr. Fox) had taught Mr. Moore when the former ceased himself to work the machine. It appears to me, however, particularly in view of the later answers, that when Mr. Fox ceased himself to work the machine, he could only have given a broad explanation of the nature of the job to Mr. Moore. For it is clear that the foreman, Mr. Morley, was put in charge and that it was the foreman's duty to satisfy himself, before Mr. Moore was allowed even to light the machine, that the latter was fully competent to handle the machine safely. It is further clear, in my judgment, that, even assuming that the foreman had been shown to have discharged his duty, Mr. Moore's responsibilities never extended to anything except looking after the state of the tank itself and, perhaps, lighting the gas first thing in the morning.

I come, finally, in reference to Mr. Fox's evidence, to what was said about the maintenance man, ultimately identified by Mr. Fox as a Mr. Golightly. In his examination-in-chief Mr. Fox referred to the duty of the maintenance man. This

- A was the first reference to the existence of such a man. When giving his evidence at the inquest, Mr. Fox had made no reference whatever to Mr. Golightly or to any other maintenance provision except the obligation, which he conceived that he himself had, to overhaul the machine after an interval of time which, at the relevant date, had not arrived. Mr. Fox was, naturally, much pressed in cross-examination on this matter—why had he forborne to make
- B any reference to Mr. Golightly? “I really have not”, he said, “an answer to that one”. I find it unnecessary to deal at any length with this part of Mr. Fox’s cross-examination. It was, however, in my judgment, made quite clear that, apart altogether from the overhauls which would be called for at infrequent intervals, it was the duty of the maintenance man to inspect the machine regularly once a week, and that he was, or should have been, competent
- C to detect any defect in its proper functioning.
- I In my judgment, so far from tending to any substantial extent to qualify the evidence given on the plaintiff’s side, Mr. Fox may be said to have supported it in no negligible degree. He conceded that to his knowledge the machine was one potentially of dangerous characteristics. He conceded that, if the machine were properly maintained and looked after, no explosion should have
- D occurred. He proved that it was the duty of the maintenance man to inspect the apparatus weekly, and the duty of the foreman to supervise Mr. Moore and not to let him take charge of the working of the machine (i.e., the gas apparatus, which was part of it), including even the lighting of the gas, unless and until satisfied that Mr. Moore understood the machine and so was competent to be left in charge. There was, however, no evidence that either of these
- E duties had been performed. There was, therefore, no evidence of conduct which, whatever the actual cause of the accident, was in accordance with a proper performance of the duty of care—no evidence, in other words, comparable to that of Lieutenant Woods in *Woods v. Duncan*, *Duncan v. Hambrook*, *Duncan v. Cammell Laird & Co., Ltd.* (4) ([1946] A.C. 401). In all the circumstances it is, in my judgment, the right inference to draw from the absence
- F of the maintenance man and the foreman as witnesses that there had, in fact, been no proper care or maintenance of the machine, and that the foreman had never been satisfied of Mr. Moore’s competence and understanding of the machine—or, at least, that the defendants were unwilling to take the risk that these men, if called as witnesses, would have so admitted in cross-examination. It seems to me to follow from my last statement that, even if (contrary to the
- G judge’s view) Mr. Moore brought his own destruction on himself in some way, then he did so because he had never been properly informed as to the potential dangers of the machine and of the necessity, in the interests of his own safety, to avoid doing whatever he did do.

I come to the expert witnesses called for the defendants. [His LORDSHIP reviewed the evidence of the four expert witnesses for the defendants, concluding

H in regard to the first two (a servant of long experience of the North Thames Gas Board, the gas suppliers, and one of H.M. Inspectors of Factories) that they were unable to account for the accident; in regard to the third (a representative of the manufacturers of the machine) that the machine was such that no attention should have been required to the pipe work for a period longer than that for which the machine had been installed, and that he had discovered nothing from

I inspection after the accident which could have caused it, and in regard to the fourth (a consultant on industrial safety) that he confirmed the evidence of the inspector of factories.* His LORDSHIP continued:] Having given my account of the evidence produced to the judge, I proceed to state, on the basis of that evidence, my reasons for the conclusions which I have earlier given. I take first the alternative favoured by the judge, that the plaintiff had rightly said

* A summary of the evidence is given by SIR RAYMOND EVERSHERD, M.R., at p. 191, letter D, to p. 192, letter A, post.

that this was a case of *res ipsa loquitur* and had, therefore, thrown on the defendants the onus of explaining the accident so as to absolve themselves from the implication of negligence. As I understand the law on this subject which has been expounded in the cases, the so-called rule applies where the res, that is the "thing" itself, without more, leads to the inference of negligence. If, then, this is a case of *res ipsa loquitur*, it must be because the happening of the explosion, of itself, but in the light of the circumstances in which it occurred, leads to that result. For my part, I am disposed to agree in this respect with STRETFIELD, J. I do not, that is to say, accept the argument of counsel for the defendants that the application of the rule is excluded because the defendants were not themselves, at the relevant time, in sole control of the machine and of the gas which heated it. This was, after all, a case in which Mr. Moore was employed by the defendants to use this machine (which the defendants had installed and provided for him) for the purpose of his inserting in the tank the pieces of metal to be treated. The foundation of all subsequent authority is found in *Scott v. London Dock Co.* (5) (1865) (3 H. & C. 596). The language of ERLE, C.J., which is the basis of all that has since followed, was (*ibid.*, at p. 601):

"But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

In my judgment this passage is directly applicable to the facts of the present case; for the thing, that is the machine, was

"under the management of the defendant or his servants, and the accident was such as in the ordinary course of things does not happen if those who have the management use proper care."

This is a fact which is corroborated by the evidence of Mr. Whittaker. Furthermore, the sum of the defendants' evidence was not to explain the accident, but to show that it was inexplicable. Agreeing, therefore, with the learned judge that this was a case of *res ipsa loquitur*, I am unable to agree that the defendants so explained the accident as to discharge the onus thrown on them. In *Barkway v. South Wales Transport Co., Ltd.* (6) ([1948] 2 All E.R. 460), ASQUITH, L.J., stated, by reference to the facts before him, the position as to onus of proof in such cases as follows (*ibid.*, at p. 471):

"(i) If the defendants' omnibus leaves the road and falls down an embankment, and this without more is proved, then *res ipsa loquitur*, there is a presumption that the event is caused by negligence on the part of the defendants, and the plaintiff succeeds unless the defendants can rebut this presumption. (ii) It is no rebuttal for the defendants to show, again without more, that the immediate cause of the omnibus leaving the road is a tyre-burst, since a tyre-burst *per se* is a neutral event consistent, and equally consistent, with negligence or due diligence on the part of the defendants. When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale. The depressed scale will remain down . . . (iii) To displace the presumption, the defendants must go further and prove (or it must emerge from the evidence as a whole) either (a) that the burst itself was due to a specific cause which does not connote negligence on their part but points to its absence as more probable, or (b), if they can point to no such specific cause, that they used all reasonable care in and about the management of their tyres: *Woods v. Duncan* (4)."

In my judgment the formulation of ASQUITH, L.J., which I have cited is correct and is applicable to the present case. It is, moreover, supported by

A the language of LORD RADCLIFFE in *Esso Petroleum Co., Ltd. v. Southport Corpn.* (3), where he said ([1955] 3 All E.R. at p. 872):

B “Running a ship on to the training wall of a channel in the conditions of weather which prevailed at the time of the accident is, at any rate, not the same thing as running into a stationary vessel in the Mersey. But, assuming that the event was itself prima facie evidence of negligence, and that the respondents had so framed their case, I do not doubt that the majority of the Court of Appeal were right in saying that the appellants would not have displaced that evidence by merely showing that their failure in navigation was due to a failure in the steering apparatus of the ship. They would have had to go further and show that they had not omitted any reasonable precaution to ensure that failures did not occur in their steering apparatus or in their control of the steering.”

C STREATFIELD, J., however, was of opinion that the language of LANGTON, J., in *The Kite* (1) led to a different result. LANGTON, J., in turn, founded himself on the speech of LORD DUNEDIN in the House of Lords in *Ballard v. North British Ry. Co.* (2) and particularly on the following passage in that speech

D (1923 S.C. (H.L.) at p. 54):

E “I think this is a case where the circumstances warrant the view that the fact of the accident is relevant to infer negligence. But what is the next step? I think that, if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears, and the pursuer is left as he began, namely, that he has to show negligence. I need scarcely add that the suggestion of how the accident may have occurred must be a reasonable suggestion.”

Then, after referring to *Scott v. London Dock Co.* (5), and citing the language of ERLE, C.J. (3 H. & C. at p. 601), LORD DUNEDIN concluded (1923 S.C. (H.L.) at p. 55), in reference to the passage which I have already quoted* from the

F judgment of ERLE, C.J.:

“I take notice of the word ‘explanation’; it is not in absence of ‘proof’.”

So, in *The Kite* (1) LANGTON, J., said ([1933] P. at p. 168):

G “When they [the defendants] have given that explanation one has still to see whether negligence has been proved. The explanation may be disbelieved; the explanation may not at all exclude negligence, but the explanation may leave the matter still in some doubt as to exactly how the occurrence did happen, but leave an equal possibility that it happened without negligence as with negligence.”

H If, by the passage which I have last quoted, LANGTON, J., meant to lay it down that in a case of *res ipsa loquitur*, that is to say, a case in which the onus has been cast on the defendants, it is sufficient to discharge that onus for them to show that the accident might have occurred for more than one reason some of which reasons are consistent with the absence of negligence, then it seems to me that the conclusion is not justified and is in conflict with the formulation of ASQUITH, L.J., in *Barkway v. South Wales Transport Co., Ltd.* (6) and the language of LORD RADCLIFFE in *Esso Petroleum Co., Ltd. v. Southport Corpn.* (3). I must not be taken to be suggesting that *The Kite* (1) was therefore wrongly decided. That was a case in which the plaintiffs, owners of cargo loaded in a barge, sued the owners of the tug which was towing the barge for negligent navigation on the part of the tug master since the barge containing the plaintiffs’ goods had, in the course of the tow, come into collision with an arch of a railway bridge, and the goods were thereby damaged. The tug master gave evidence

* See p. 188. letter D, ante.

which the judge believed. The effect of that evidence was that, at the critical time, the barge containing the plaintiffs' goods swung outwards from the barge to which it should have been made fast, and that the collision was, in the tug master's view, due to that fact. It was accepted by the judge that the navigation by the tug master was in no sense careless and, if so, the swinging out of the barge containing the plaintiffs' goods was attributable to the fact that it had not been properly made fast to the adjacent barge, a circumstance which was wholly outside the tug master's control and for which, therefore, his company was in no sense responsible. In other words, as I follow the facts and findings in *The Kite* (1), the defendants there proved by the tug master's evidence, as was proved in *Woods v. Duncan* (4) by the evidence of Lieutenant Woods, that, whatever in fact was the cause of the accident, there had been no fault or want of care on the part of the party sued.

It remains for me to say a word on LORD DUNEDIN's language in *Ballard v. North British Ry. Co.* (2), which I have already quoted.* Any speech of that very learned Lord requires and receives the highest consideration. It is not, however, to be forgotten that in *Ballard v. North British Ry. Co.* (2) LORD DUNEDIN was expressing a dissenting opinion. So much was pointed out by the Court of Session in Scotland in *O'Hara v. Central S.M.T. Co., Ltd.* (7) (1941 S.C. 363). Thus, LORD NORMAND (Lord President) said (*ibid.*, at p. 377) that LORD DUNEDIN's observations which I have quoted

"... cannot ... be treated as if they stood alone, and I desire to say, with respect, that I prefer the clearer discussion of *res ipsa loquitur* which is to be found in LORD SHAW's speech."

See also the language of LORD CARMONT (*ibid.*, at p. 392):

"It seems to me to be idle to suggest, as has been sometimes done, that LORD DUNEDIN was not out of harmony with the majority in his ideas as to *res ipsa loquitur* ..."

In my judgment LORD DUNEDIN, in the passage cited, had rather in mind the circumstances which in any given case do, in truth, give rise to the proposition *res ipsa loquitur* than to the consequences which properly follow when a case of *res ipsa loquitur* has once been established by a plaintiff. It must, as I venture to think, always be a question whether, on proof of the happening of a particular event, it can with truth be said that the thing speaks for itself. The event or "thing" may, or may not, produce that result. Not every accident has, without more, that effect. If, on a closer analysis of the happening and its circumstances, it does not in truth appear fairly to follow that the proper inference is one of negligence, then the case is not one of *res ipsa loquitur* at all. In my judgment, it was to such considerations that LORD DUNEDIN was addressing his mind. In light of the other and numerous authorities, I cannot think that he intended to lay it down that, where the event is shown to be such, on a true analysis, that the thing speaks for itself, the defendants can none the less discharge the onus on them by proffering explanations of which the most that can be said is that some, at least, are consistent with the absence of want of care. Such a view would, in my judgment, negative the proposition that the onus (of showing that the accident was not attributable to negligence) had been cast on the defendant. As ASQUITH, L.J., observed in *Barkway v. South Wales Transport Co., Ltd.* (6) ([1948] 2 All E.R. at p. 471): "When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale." I note, moreover, that earlier in his speech in *Ballard v. North British Ry. Co.* (2) LORD DUNEDIN had said (1923 S.C. (H.L.) at p. 53):

"The foundation of all actions of the kind we are considering must be

* See p. 189, letter D, ante.

- A negligence on the part of the defender, and whether the expression *res ipsa loquitur* is applicable or not depends upon whether, in the circumstances of the particular case, the mere fact of the occurrence which caused hurt or damage is a piece of evidence relevant to infer negligence. Thus, there is a class of cases dealing with injury occurring to a servant owing to defective plant, which he was obliged to use and which it was the duty of the employer
- B to supply. In such cases the fact of an accident may easily be a fact from which you may infer that the plant was defective, and it will then be upon the employer to show that the defect was one against which he could not have guarded."

- C In my judgment the final words of the passage which I have just quoted clearly support the view which I take, and are entirely consistent with the formulation of ASQUITH, L.J. In my judgment, the present is one of the class of cases to which, in the last cited passage, LORD DUNEDIN was intending to refer. I think, accordingly, that on the basis that this was a case of *res ipsa loquitur* the defendants failed to discharge the onus of explanation cast on them.

- D I turn finally to the alternative question—if this was never a case of *res ipsa loquitur*, did the plaintiff, on the whole of the evidence, prove negligence? At the risk of repetition let me summarise the effect of the evidence. (i) It is common ground that the explosion was caused by an accumulation of unignited gas and that this accumulation must have been due to a failure in the proper functioning of the pilot jet by reason (a) of Mr. Moore having himself tampered with the mechanism, or (b) of some kind of obstruction in the pilot pipe, or (c)
- E of the pilot pipe being out of position, or (d) of some down-draught due to failure in operation of the draught interrupter, or (e) of a combination of two or more of the foregoing. (ii) It was conceded by Mr. Fox that the possibility of an explosion from one or other of the above causes rendered the machine potentially dangerous, if not properly operated or properly looked after. (iii) The plaintiff proved: (a) to the judge's satisfaction (and the defendants' witnesses did not suggest the contrary) that (i) (a) above did not occur, i.e., that Mr. Moore
- F was not himself responsible for the explosion, and, accordingly, (b) that the explosion would not have occurred if the machine had been properly maintained, Mr. Whittaker's evidence in this important respect being in fact (for what it is worth) supported in terms by that of the defendants' partner and manager, Mr. Fox. (iv) The plaintiff is entitled to ask the court to infer from the absence
- G as witnesses of Mr. Golightly (the defendants' maintenance man) and Mr. Morley (the defendants' general foreman), (a) that, though there was a duty imposed on the former to inspect the mechanism weekly to see that it was functioning properly, that duty had not, at any relevant time, been performed, and (b) that, though it had been the duty of Mr. Morley to see that Mr. Moore properly understood the machine and its dangerous potentialities and not otherwise to
- H allow Mr. Moore to be left in charge of it, that duty had not been performed, or, at least, (c) that the defendants forbore to call those witnesses out of fear lest they should so admit in the course of their evidence. (v) The defendants proved (a) that there had been no failure or fault in the gas supply; (b) subject to the pipes, the "bits and pieces", being assumed to be in the same condition on Feb. 20, 1953, as they were immediately after the accident, they were (except
- I for the draught interrupter) in fact in good order and condition, i.e., they showed no evidence of want of maintenance, and also showed no evidence of there having been in them any physical obstruction, particularly any obstruction through the presence of tarry or gummy deposit or corrosion. For reasons which I have already stated, the obstruction by way of air-lock ought, in my judgment, to be disregarded. (c) that the mechanism was such as should not have required any overhaul of, or tampering with, the pipes or jets four months after its installation. (vi) In addition to the matters of fact in the preceding paragraph, it is a further significant fact—although the defendants' witnesses did not appear

to lay stress on it, nor was much, if anything, made of it in argument—that the machine had, apparently, worked satisfactorily from the beginning of the day on which the accident occurred until 4.30 p.m., from which it might be inferred that the explosion was due to some sudden and temporary obstruction which happened shortly before the explosion. A

The summary which I have given of the defendants' evidence is short, but in my judgment they proved no more. Assuming the absence of any causing or contributing conduct on the part of Mr. Moore, their evidence is at once open to the objection that it proved too much. For the accident undoubtedly occurred by reason of a functional failure of the apparatus, a failure not due to fault in the supply or (as I think) to an air-lock. Proof of absence of any signs of gummy deposit or corrosion serves to eliminate only those possibilities as causes of the obstruction or ignition failure; and I observe that, according to Mr. Stevens' evidence, neither of those two causes should in any event have occurred by February, 1953, and no precaution against them would, in the ordinary course, have been taken by then. B C

In the end, then, it is in my judgment a case of weighing (against the background that we are here concerned with a potentially dangerous machine), on the one hand, the evidence given on the plaintiff's side (and conceded by Mr. Fox) that the accident would not have occurred if the apparatus had been properly looked after, *plus* the inferences which I have stated in (iv) above; against, on the other hand, the defendants' evidence that on Feb. 20 the mechanism (except the draught interrupter) appeared to be in good order and condition, and the fact that the explosion occurred at 4.30 in the afternoon of Feb. 18. In my judgment, weighing these matters as best I can, the plaintiff discharged the onus placed on her. Though the defendants' highly qualified experts could give no explanation of the calamity, the persuasive inference seems inevitably to me to be that from lack of attention some progressive defect in the size or position of the pilot jet flame or, perhaps, some defect in the draught interrupter had, by the afternoon of the fatal Feb. 18, reached the danger point. D E

I add that, even if the assumption be not made (as I think it should in accordance with the judge's finding and in the absence of any serious suggestion to the contrary) that Mr. Moore himself neither caused nor contributed to the explosion, the conclusion is no more favourable to the defendants; for the failure of the defendants to call Mr. Morley leads, to my mind, to the inference that the action which (on this view) Mr. Moore took should be attributed to the absence of proper instruction on the dangerous potentialities of the machine. F G

It only remains for me to deal with the point taken by counsel for the defendants (which is, of course, only relevant if the accident was not due to conduct on the part of Mr. Moore himself) that the proper and objective standard of care did not, according to Mr. Stevens' evidence, require that any maintenance should have been given to the machine so soon after its installation. In my judgment, the answer to the argument is threefold. First, Mr. Stevens' evidence of the efficiency of his machine—that its components should require no overhaul or adjustment for many months—could not, as a matter of ordinary common sense and ordinary common prudence, dispense with the obvious duty of an employer engaging men to work at a potentially dangerous machine, to have the machine regularly watched and to see that it continued in fact to function properly. Second, the duty which I have called "obvious" was recognised as such by Mr. Fox, who appointed a maintenance man to inspect the machine weekly. I see no reason why the court should not accept the conduct of Mr. Fox as being that of an ordinary prudent employer. Third, this is all the more so since Mr. Fox in his evidence did not rely on or at all refer to, the manufacturers' assurance as fixing or influencing for him the limits of his duty of care; nor was there, as is often the case in actions of this kind, any evidence of the precautions or absence of precautions taken by other employers using this H I

A particular machine or other machines like it. For the reasons which I have given, I think, accordingly, that on any view the plaintiff was entitled to succeed and ought to have judgment for the sum of damages which is agreed.

BIRKETT, L.J.: I have had the opportunity of reading in advance and of considering the comprehensive judgment by SIR RAYMOND EVERSLED, M.R., which he has just delivered. There is nothing that I myself would desire to add to the judgment. I agree with the conclusions and I agree with the reasoning on which those conclusions are based, and I, therefore, would allow the appeal.

ROMER, L.J.: I am in agreement with SIR RAYMOND EVERSLED, M.R., that this appeal should be allowed. For myself, however, I am doubtful whether the principle *res ipsa loquitur* applied to the accident in which Mr. Moore was killed, and I would prefer to rest my conclusion on the view that at the close of the whole evidence which the plaintiff called she had established a *prima facie* case of negligence against the defendants which they failed by their own evidence to displace. In considering whether *res ipsa loquitur* applies on the happening of any particular accident, one has to inquire what the "thing" is which, by its very nature, suggests negligence on the part of the person sued. The "thing" in the present case is, I suppose, the explosion of gas in the combustion chamber of the apparatus at which the deceased was working at the time. I greatly doubt whether the proof or admission at the trial that this explosion occurred would, in itself, have sufficed to place on the defendants the onus of showing that there had been no negligence on their part; for the explosion might, if nothing were known about it beyond its mere occurrence, quite reasonably be attributed to some cause or causes other than negligence by the defendants, including carelessness on the part of Mr. Moore himself. Mr. Higgins was the only person, apart from the deceased man himself, who was present on the scene when the accident occurred, and, even after the account of the disaster which he gave in evidence, I do not think that it could fairly be said that an inference arose of negligence on the defendants' part. Accordingly, as I say, I prefer to found my concurrence in allowing this appeal on the view that the evidence for the plaintiff, when taken as a whole, established against the defendants a case for them to answer; and for the reasons which SIR RAYMOND EVERSLED, M.R., stated, and with which I fully agree, the defendants failed, in my judgment, satisfactorily to answer it.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Trott & Gentry* (for the plaintiff); *Carpenters* (for the defendants).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

SHERRIN v. BRAND (orse. PHELPS).

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.),
December 7, 8, 9, 12, 1955.]

Rent Restriction—Death of tenant—Order for possession during tenant's lifetime—Conditional suspension—Conditions not fulfilled by tenant—No enforcement of order by landlord—Effect on rights of member of tenant's family—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5 c. 17), s. 5 (2) (as substituted by the Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 Geo. 5 c. 32), s. 4 (2)), s. 12 (1) (g), s. 15 (1)—C.C.R., 1936, Form 138.

On Dec. 2, 1953, a landlord of a dwelling-house obtained an order by consent in a county court under s. 4 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, in a form following C.C.R., 1936, Form 138. The order provided (so far as relevant): "It is adjudged that the [landlord] do recover against the [tenant] possession of the land mentioned in the particulars of claim . . . And it is adjudged that the [landlord] do recover against the [tenant] the sum of £36 4s. 8d. for arrears of rent and mesne profits and £11 8s. for costs . . . It is ordered that judgment for possession shall not be enforced for twenty-eight days and for so long thereafter as the [tenant] punctually pays to the [landlord] . . . the arrears of rent, mesne profits and costs by instalments of £10 forthwith and 13s. 7d. per week . . . And it is further ordered that the judgment shall cease to be enforceable when the arrears of rent, mesne profits and costs referred to above are satisfied." The tenant defaulted in the payment of the prescribed instalments but the landlord took no step to enforce the judgment during the tenant's lifetime. On Jan. 26, 1955, the tenant died, having at that date discharged about half of the arrears of rent. The landlord claimed possession against the defendant, who was admittedly within the term "tenant" as defined by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g). On the question whether the defendant was entitled to the protection of the Rent Restrictions Acts, and of the nature of the defendant's rights under s. 15 (1) of the Act of 1920,

Held: the order of Dec. 2, 1953, did not put an end to the statutory tenancy, and the subsequent death of the statutory tenant made no difference in that respect; the defendant had become entitled to the statutory tenancy as it existed immediately before the death of the statutory tenant (principle stated by JENKINS, L.J., in *American Economic Laundry, Ltd. v. Little* [1950] 2 All E.R. at p. 1190, applied) subject to the conditions of the order of Dec. 2, 1953, and therefore the landlord was not entitled to possession.

American Economic Laundry, Ltd. v. Little ([1950] 2 All E.R. 1186) and *Bolsover Colliery Co., Ltd. v. Abbott* ([1946] K.B. 8) distinguished on the facts.

Appeal allowed.

[**Editorial Note.** The form of order in the present case followed that prescribed as Form 138 by the County Court Rules (see COUNTY COURT PRACTICE, 1955, p. 574). The consequence of the construction of the order adopted by the Court of Appeal, viz., that it did not put an end to the statutory tenancy, was that the succeeding "tenant" on the death of the statutory tenant became entitled to what he had had as statutory tenant (see p. 202, letter B, post). SIR RAYMOND EVERSLED, M.R., emphasises that the effect of s. 12 (1) (g) of the Act of 1920 is not to create a new tenancy nor, strictly speaking, to provide for a

A transmission, but the new tenant on the death of the statutory tenant steps into his shoes (see p. 202, letter I, post).

As to death of statutory tenant, see 20 HALSBURY'S LAWS (2nd Edn.) 334, para. 401; and for cases on the subject, see 31 DIGEST (Repl.) 663-666, 7635-7649.

B

For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5 (2), s. 12 (1) (g), s. 15 (1), see 13 HALSBURY'S STATUTES (2nd Edn.) 990, 999, 1017.]

Cases referred to:

- (1) *American Economic Laundry, Ltd. v. Little*, [1950] 2 All E.R. 1186; [1951] 1 K.B. 400; 31 Digest (Repl.) 665, 7645.
- C (2) *Bolsover Colliery Co., Ltd. v. Abbott*, [1946] K.B. 8; 115 L.J.K.B. 5; 173 L.T. 172; 31 Digest (Repl.) 664, 7640.
- (3) *Mills v. Allen*, [1953] 2 All E.R. 534; [1953] 2 Q.B. 341; 3rd Digest Supp.
- (4) *Clifton Securities, Ltd. v. Huntley*, [1948] 2 All E.R. 283; 2nd Digest Supp.
- (5) *Tickner v. Clifton*, [1929] 1 K.B. 207; 98 L.J.K.B. 69; 140 L.T. 136; 93 J.P. 57; 31 Digest (Repl.) 663, 7636.

D

Appeal.

Appeal by the defendant from an order of His Honour JUDGE ARMSTRONG, dated Aug. 24, 1955, made at Poole County Court, whereby he ordered the defendant to give up possession of premises known as 124, Surrey Road, Bourne-mouth. The learned judge rejected the defendant's contention that she was entitled to the protection of the Rent Restrictions Acts.

E

C. H. Duveen, Q.C., and *J. R. B. Fox-Andrews* for the defendant.
Scott Henderson, Q.C., and *M. G. King* for the landlord.

SIR RAYMOND EVERSHED, M.R.: This case has raised problems of no little difficulty both as regards the substance of the enacted law under the Rent Restrictions Acts, and also as regards the procedure of the county court under those Acts. The question is whether the defendant, a Miss Joyce Brand, is entitled to any (and if so what) protection under those Acts, she being admittedly within the class by definition of "tenant" in s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, having regard to the fact that the previous statutory tenant, through whom she claims, as it were, to succeed by virtue of the definition was a person against whom an order for possession had been made in respect of the premises in question, No. 124, Surrey Road, Poole.

G

H

I

I do not want at this stage to give to the order to which I have alluded any of the epithets which have been used—"absolute", "conditional", or "suspended". The facts are that at the date of the death of the previous statutory tenant, he had not, on the one hand, duly complied with the terms imposed by the order on him, and that, on the other hand, the judgment which had been obtained by the plaintiff had not been executed, and no steps had been taken by her to execute it. The person I have called the previous statutory tenant was one Gilbert Christopher Phelps, and he died on Jan. 26, 1955. I have said that the defendant, Miss Brand, is admittedly a member of his family within the scope of the definition in s. 12 (1) (g) of the Act of 1920. Mr. Phelps was a man well advanced in years. We were informed that he was an old age pensioner, and his resources appear to have been insufficient to enable him to pay the rent of £1 6s. 5d. in respect of the house. At any rate, he did not do so. At the date of the order of Dec. 2, 1953—on the interpretation and effect of which the whole of this case turns—there was about six months' rent unpaid and in arrear. Proceedings were accordingly started by the landlord, Miss Sherrin, and the order

to which I have referred is expressed to have been made by consent. It reads as follows: A

"It is adjudged that the plaintiff do recover against the defendant possession of the land mentioned in the particulars of claim attached to the summons in this action, that is to say [and the premises are described.] And it is adjudged that the plaintiff do recover against the defendant the sum of £36 4s. 8d. for arrears of rent and mesne profits and £11 8s. for costs making together the sum of £47 12s. 8d., [and then in brackets appears a note when the costs were taxed.] It is ordered that judgment for possession shall not be enforced for twenty-eight days and for so long thereafter as the defendant punctually pays to the plaintiff or her agent the arrears of rent, mesne profits and costs by instalments of £10 forthwith and 13s. 7d. per week in addition to the current rent. And it is ordered that the judgment for £36 4s. 8d. and costs shall not be enforced for so long as the defendant pays the said instalments of 13s. 7d. per week. And it is further ordered that the judgment shall cease to be enforceable when the arrears of rent, mesne profits and costs referred to above are satisfied." B C

Then underneath appears the following: "Current rent £1 6s. 5d. per week. Arrears to date of judgment £36 4s. 8d." D

It was the view of the learned judge that the effect of this order was of a peremptory character. The appropriate passage in his judgment is as follows:

"These orders have, as far as my experience goes, always in the past been treated in the following way. If the conditions are complied with and the arrears paid off, the order is automatically discharged, and on any further default in payment of current rent fresh proceedings have to be started. On default, and on proof to the court of default, leave is normally given for the warrant to issue . . . I should myself have regarded the order as a final order for possession, defeasible on satisfaction of the arrears with execution stayed on terms. This I regarded as a reasonable order to make in the circumstances, and the plaintiff was in my view entitled to ask for a final order, and it would not have been reasonable to adjourn the case on terms." E F

With all respect to the learned judge, I somewhat doubt his interpretation of the order. It is no doubt true that Mr. Phelps may have had no defence or answer to the claim for arrears of rent, and that the landlord, Miss Sherrin, was acting not without some feelings of benevolence in the matter. Still, the order was a consent order. Furthermore, the substance and intent of it, as I read it, was as follows: that Mr. Phelps was to remain on as tenant subject, however, to the added obligation, as a condition of his so doing, that he had to pay off the arrears (for which judgment against him was given) by instalments, together with costs; and subject also to this, that if default was made, the plaintiff could then take the appropriate steps mentioned by getting a warrant to execute the order without further or separate proceedings. That such was the intended effect of the order, and particularly that Mr. Phelps should continue as tenant—which is for present purposes of the highest importance—seems to me to be corroborated on the face of the order whereby, as it will be recalled, the 13s. 7d. was to be paid in addition to the current "rent" stated as being £1 6s. 5d. a week, and also by the subsequent payment in fact of sums for rent by Mr. Phelps, and the receipts given therefor and in terms for rent by the plaintiff, Miss Sherrin. G H I

The order follows the Form 138, which is found as an Appendix to the County Court Rules in the COUNTY COURT PRACTICE, a circumstance to which I shall briefly return later. It is also on the face of it stated to be suspended. At the top left-hand corner I read: "Order for recovery of land suspended under Rent and Mortgage Interest Restrictions Acts, 1920 to 1939". That description

A is certainly accurate in that, on the face of it, the execution of the judgment or order was suspended; and since also the right to enforce was conditional on default—or, put the other way, the right on Mr. Phelps's part to remain on in possession and not to have the order enforced against him was conditional on punctual payment of the instalments of arrears. The order clearly, therefore, earns also the adjective "conditional". Until the happening of the condition, or the failure to fulfil it (according to the way one looks at it) the judgment was unenforceable; and if in fact all the arrears had been paid off, the judgment would have been a brutum fulmen, since it would have been for ever unenforceable. What then would have been its effect (if any) may be uncertain; but I am not sure that the logical conclusion of the landlord's argument is not that even so, and even if the judgment had been discharged—though perhaps otherwise if it had been rescinded—Mr. Phelps would at that point of time have become a trespasser liable to eviction at once and altogether without the protection of the Rent Restrictions Acts.

To complete the facts: on the death of Mr. Phelps on Jan. 26, 1955, approximately only half of the amount of arrears had been discharged. The right to enforce the judgment according to its terms had arisen some time before, but it had not been enforced by the plaintiff in fact up to the date of the death for, no doubt, laudable motives, and she had continued up to that time to accept and gives receipts for rent. The question then is: Can the defendant now claim to be the tenant under the Acts of the premises No. 124, Surrey Road, Poole? This is not the first time that a problem of this character has come before the Court of Appeal; but before I refer to the two earlier cases to which our attention was directed I must make some reference to the general scheme of the Rent Restrictions Acts, and to certain specific provisions of those Acts, though let me acknowledge that much of what I am about to say has been said before. Thus, it has been said many times that the expression "statutory tenant" is one not found in the Acts. The phrase is a useful way of describing compendiously an individual who, as regards a dwelling-house as defined in the Acts, has what F LUSH, J.,* called a status of irremovability by virtue (but subject to the provisions) of those Acts.

The nature of these rights and obligations finds expression in s. 15 (1) of the Act of 1920:

G "A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, and shall be entitled to give up possession . . ."

H One of the provisions of the Act referred to in this section is, as I think, what is now s. 4 (2)† of the Rent and Mortgage Interest Restrictions Act, 1923:

I "At the time of the application for or the making or giving of any order or judgment for the recovery of possession of any such dwelling-house, or for the ejectment of a tenant therefrom, or in the case of any such order or judgment which has been made or given, whether before or after the passing of this Act, and not executed at any subsequent time, the court may adjourn the application, or stay or suspend execution on any such order or judgment, or postpone the date of possession for such period or periods as it thinks fit, and subject to such conditions (if any) in regard to payment by the tenant of arrears of rent, rent, or mesne profits and otherwise as the court thinks

* In *Keeves v. Dean*, [1924] 1 K.B. 685 at p. 686.

† Section 4 (2) of the Act of 1923 substituted a new s. 5 (2) in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

fit, and, if such conditions are complied with, the court may, if it thinks fit, discharge or rescind any such order or judgment.” A

It is always within the jurisdiction of the court, in my judgment (assuming that the conditions for the exercise of the jurisdiction have arisen) to make an order for possession, but to postpone the effectiveness of the order by making the continued occupation of the tenant conditional, for example, on his paying arrears of rent and costs in such manner as is provided by the order—such a provision being within the language which I have read from s. 4 (2)—or to postpone the date of possession for such period or periods as it thinks fit, and subject to such conditions in regard to payment by the tenant of arrears of rent and otherwise as the court thinks fit. That indeed is, as I think, plainly the effect of the order of Dec. 2, 1953; and if that is the effect of the order, it certainly does not necessarily involve the result (as I read s. 15 (1)) that, during the period of the postponement of possession, the so-called statutory tenancy ceases altogether, and the tenant wholly ceases to have the protection of the Act. B C

I need not read s. 12 (1) (g) for its terms are well known. It takes the form of a definition *inter alia* of the word “tenant”. It is common to speak of a succession to or transmission of the statutory tenancy; but this expression, though again a convenient formula, is in truth not strictly accurate; the statutory tenancy so-called, having no proprietary quality, is incapable of transmission in law. The more correct and strict view is that when a tenant is said to have the right and obligation indicated in s. 15 (1), as affected by the exercise of the powers conferred by s. 4 (2) of the Act of 1923, the tenant is not confined to the individual in occupation when the original contractual tenancy came to an end, or the individual against whom an order is made under s. 4 (2) of the Act of 1923, but includes such member of that person’s family who, after his death, may satisfy the qualification of the definition s. 12 (1) (g). D E

With this introduction, I turn to the first case, *American Economic Laundry, Ltd. v. Little* (1) ([1950] 2 All E.R. 1186). In that case, as in the present case, an order for possession was made against the occupying tenant, but the tenant died before the date fixed by the order made had occurred. The question was whether the defendant (who was admittedly a member of the deceased’s family) could continue in occupation by virtue of s. 12 (1) (g). We have not seen the actual form of order made in *American Economic Laundry, Ltd. v. Little* (1), nor is it precisely set forth in the report of the case in this court in the law reports. It is quite clear, however, from that report (and I think also from the report of the county court judge’s judgment which we were shown by counsel for the defendant) that in vital respects it differed from the order made in this case on Dec. 2, 1953. In *American Economic Laundry, Ltd. v. Little* (1) there was no question of its enforceability being conditional on the tenant’s failure to pay the arrears, still less was there any question of the order becoming in any event altogether unenforceable if the tenant performed all the obligations put on him by the order. The order, though the date was twice extended, was always a simple unqualified order to take effect on a future date mentioned, viz., Apr. 3, 1950. The tenant died on Mar. 8, 1950, before the date had arrived. Counsel for the landlord may be right in saying that the distinctions to which I have referred (and which are referred to in the judgment) between “absolute” and “conditional” orders may in part have been the invention of Mr. MacDermot, the learned counsel in the case. None the less, it is clear to my mind that the order in *American Economic Laundry, Ltd. v. Little* (1) could fairly be described (in contrast to the order in the present case) as “absolute” in the sense that the plaintiff’s right to possession is not qualified by reference to conditions or contingencies. Hence, SOMERVELL, L.J., who delivered the leading judgment of the court, though he thought that the order operated to put an end to the tenant’s right to remain in occupation under the Act, reserved the question what F G H I

A would be the effect of an order such as we have here, a so-called "conditional" order. Certain passages of his judgment were read. After saying that the tenant, after the making of the final order, might be regarded as being in possession by licence of the court, the learned lord justice went on ([1950] 2 All E.R. at p. 1188):

B "I agree with what was said by JENKINS, L.J., in the course of the argument, that the position of someone against whom an order for possession has been made and suspended at common law or under s. 5 (2) of the Act of 1920 [that is the same as s. 4 (2) of the Act of 1923] is sui generis. The problem which we have to solve is not assisted by considering in what respect his position is the same quoad the landlords as it was before the order was made. Obviously it is fundamentally different in the respect, that, whereas before he was entitled to the protection of the Acts until successful proceedings were taken, he is now in the position of proceedings having been taken and an order for possession having been made. All that he has is a right to apply for a postponement under s. 5 (2). In my opinion, a tenant in that position, with an absolute order made against him, notwithstanding that it may be suspended, is not a tenant within the meaning of s. 12 (1) (g) of the Act of 1920."

SOMERVELL, L.J., then referred to *Bolsover Colliery Co., Ltd. v. Abbott* (2) ([1946] K.B. 8), and in reference to that case, he proceeded ([1950] 2 All E.R. at p. 1189):

E "The headnote illustrates the similarity between that case and the present one. 'Held, that the father's tenancy was subject to defeasance by the plaintiffs on his ceasing to be in their employment by virtue of the provisions of para. (g) (i) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, that when the defendant succeeded to that tenancy, it remained subject to the same defeasance and therefore the plaintiffs having established that they required the house for occupation by a person in their whole-time employment, were entitled to an order for possession'."

F SOMERVELL, L.J., goes on:

G "... at the conclusion of his judgment SCOTT, L.J., used these words ([1946] K.B. at p. 12): 'The right of the landlord and the liability of the tenant are co-extensive in that respect, and a tenancy carried on by the provisions of the Act as to the succession of a widow or other relation is the same tenancy with its advantages and disadvantages unaltered. I, therefore, think that the appeal should be allowed.'"

Later the learned lord justice said this ([1950] 2 All E.R. at p. 1189):

H "Counsel for the landlords referred to the fact that under s. 5 (2) of the Act of 1920 [i.e., s. 4 (2) of the Act of 1923] orders for possession may take either of two forms. There may be, as here, an absolute order the execution of which is suspended, or there may be a conditional order, that is to say, the order for possession does not become operative so long as certain conditions are fulfilled—it may be payment of rent or abatement of a nuisance. I The difference between those two kinds of orders is illustrated by the concluding words of s. 5 (2), where it is said in reference to an order made subject to conditions: '... if such conditions are complied with, the court may, if it thinks fit, discharge ... any such order' ... That cannot be done when an absolute order has been made. I am not deciding what the position would be in a case of this kind where a conditional order had been made against the deceased. It may be that the result would be the same; it may be that it would be different."

JENKINS, L.J., expressed his agreement with SOMERVELL, L.J., but he also added, after stating what was the character of the statutory tenant's interest ([1950] 2 All E.R. at p. 1190):

"That being the character of the statutory tenant's interest after the order for possession has been made, what effect, if any, can be given to the provisions of s. 12 (1) (g), under which, on the death of a statutory tenant, a member of the tenant's family residing on the premises becomes the statutory tenant? It was held by the learned judge that that provision still remained of full force and effect, that on the death of her father the defendant became the statutory tenant under a new statutory tenancy which was hers and nobody else's and would continue to be enjoyed by her in her own right until such time as some new ground for claiming possession arose and the landlords successfully applied for and obtained an order for possession. That would be a most surprising result, and, notwithstanding the reasons to the contrary stated by the learned judge, I agree with my Lord that on a consideration of the relevant provisions of the Act there is really no warrant for his conclusion. I agree that the right principle to be followed is the one stated in *Bolsover Colliery Co., Ltd. v. Abbott* (2), which shows that the member of the family who becomes a statutory tenant on the death of the original tenant—although in a sense claiming in his or her own right, i.e., not claiming under the statutory tenant in the same way as an assignee or legatee of a contractual tenancy may be said to claim under the grantor or testator—nevertheless becomes a statutory tenant under the same tenancy by virtue of which the original statutory tenant was in possession. Thus, in the present case, assuming in the defendant's favour that, notwithstanding the existence of the final order for possession, she could still become statutory tenant of the premises by virtue of s. 12 (1) (g) of the Act of 1920, it seems to me clear that the tenancy to which she would succeed could be no more than the limited interest remaining to run between the date of her father's death and the expiration of the date fixed for possession by the order."

BIRKETT, L.J., expressed concurrence with both SOMERVELL, L.J., and JENKINS, L.J.

This court, therefore, held that the order in the form which I understand it to have taken in *American Economic Laundry, Ltd. v. Little* (1) necessarily had the effect, either immediately on its being made, or when by its terms it took effect, that it put an end to any right under the statute or otherwise of the tenant to remain in occupation.

In the later case of *Mills v. Allen* (3) ([1953] 2 All E.R. 534) a similar question had arisen where the order had been in a form corresponding to the order in this case. In the event it was unnecessary for the court to decide the question left open by SOMERVELL, L.J.; but in the course of my judgment I drew attention to the difficulties which (it seemed to me) would be likely to arise in reference to s. 12 (1) (g) from orders of the kind here in question, and from the distinction said to exist between absolute and conditional orders. Amongst other things, I asked what the position would be in the case of a so-called absolute order if, before it took effect, the court exercised the power which it appears to have under the Act of 1923, in effect, to convert it into a conditional order. I suggested (and nothing in this case has altered my view) that if what the court really desires to do is to put the tenant on terms as to continuing in occupation, then it is a more convenient form of order to adjourn the application on terms that the tenant either pays, or undertakes to pay, the arrears punctually, with liberty to the plaintiff to apply for an order for possession if default is made in carrying out the terms of the order. It is true, as counsel for the landlord pointed out,

A that a certain sanctity is given to the present form of order, whether wisely or unwisely, by the County Court Rules; but it cannot, I think, be suggested that it is outside the jurisdiction of the county court judge to adjourn an application on terms such as I have suggested, and certainly in that event the main difficulty presented by the present case would be avoided altogether.

B As I have touched on these general questions of jurisdiction, it is perhaps right that I should deal (though I shall do so very briefly) with two matters put by counsel for the landlord. He first drew attention to the undoubted law as it was expressed, for example, by DENNING, J., in *Clifton Securities, Ltd. v. Huntley* (4) ([1948] 2 All E.R. 283) that where in forfeiture proceedings, in cases unaffected by the Rent Restrictions Acts, an order is made for possession at a future date the rights of the tenant as such end as and from the date of the order itself. So, it was said by counsel, is it by analogy in Rent Restrictions Acts cases: the rights of the tenant under the statute are at an end from the making of the order, and the determination of those rights does not wait until its later execution. C In my judgment, the analogy is not a true one, and ignores the peculiar circumstances of Rent Restrictions Acts cases. The rights of the tenant do not depend on any proprietary interest or even on a contract, but on the special terms and D provisions of the statutes, including, as I have said more than once, the provisions of s. 4 (2) and any order made in pursuance of the jurisdiction of that section.

Second, counsel drew our attention also to the procedure contemplated by the County Courts Act, 1934, and the County Court Rules for executing orders for possession, including the terms of Form 200 (warrant for possession of land) in E the COUNTY COURT PRACTICE, 1955, p. 613. I agree that the provisions of the rules and the form appear to contemplate the issue of a warrant by the registrar without further order by the judge. It was said that in practice, the further order for possession, or for the issue of the warrant, is normally made by the judge himself, and that may or may not be so. It is, however, in my judgment, not necessary to pursue this aspect of the matter, for it does not appear to be F relevant to the question that we have to decide.

I return accordingly to that question. The decision in *American Economic Laundry, Ltd. v. Little* (1) is binding on us; but for the reasons which I have given, the order in the present case made on Dec. 2, 1953, is different in essential respects from the order made in that case. In my judgment, the reasoning which led to the result in *American Economic Laundry, Ltd. v. Little* (1) is, therefore, not G applicable in the present case; and I conclude, accordingly, that the order of Dec. 2, 1953, did not then and there put an end to the rights of occupation, i.e., the so-called statutory tenancy of Mr. Phelps, and that since that order had not been executed in fact, and no steps had been taken to that end by the date of his death, Mr. Phelps, when he died, was still a statutory tenant of No. 124, H Surrey Road, Poole. I would add that if this is not so, then in cases of this kind two very strange results would appear to follow which can be put in the form of questions. (i) What happens under such an order as this if all the arrears are paid off? Counsel for the defendant, in opening the case, suggested that a new contract, a new contractual tenancy, then came into existence once one instalment of rent had been paid and accepted. Counsel for the landlord said that the I statutory tenancy revived. I find difficulty in accepting either suggestion; but fortunately, having regard to the view I take, the question need not be answered in either sense. Further (ii) What is the position of a lawful sub-tenant under s. 15 (3) of the Act of 1920 of part of the premises? If counsel for the landlord is right, then from the date of the making of the order, the sub-tenant becomes the direct tenant of the landlord. Again, what happens if the order is complied with and becomes wholly unenforceable? Does the statutory tenant spring back to his original position of sub-tenancy? And what happens,

during the time that the order operates, as regards that part of the rent for the whole of the premises payable by the tenant attributable to the part occupied by the sub-tenant? Must there be some apportionment? The example was pressed in argument by counsel for the defendant to further stages of elaboration which illustrate the increasing difficulty which would arise if the landlord's view of this matter is correct; but I do not pursue it further. A

Therefore on the first and main point I hold that the order, being in the form with which we are here concerned, did not put an end to the so-called statutory tenancy of Mr. Phelps; and whether the tenant against whom such an order is made dies before or after any default in compliance with the order makes in this respect no difference. If so, then to use the convenient, but inaccurate, phrase, the statutory tenancy will be transmitted by virtue of s. 12 (1) (g) to the person qualifying by virtue of that definition. B

That is not an end of the matter, for if in the present case the defendant is entitled to succeed to the statutory tenancy, on what terms does she do so? It is no doubt true that she is clearly not bound by the order; she was not a party to the proceedings, and the debt for which judgment was given was not her debt. So much is well established and illustrated by *Tickner v. Clifton* (5) ([1929] 1 K.B. 207); but it does not follow, in my judgment, that the defendant becomes a statutory tenant without any regard to the order of Dec. 2, 1953, able to make, as it were, a fresh start from Jan. 26, 1955, as though that order had never been made. Counsel in opening the case first indeed so contended, but later he resiled from that view, and now concedes (and in my judgment rightly concedes) that the so-called tenancy to which the defendant became entitled is the tenancy as it existed immediately before the death of Mr. Phelps, with and subject to all the incidents then attached to it, including those imposed by the court in the exercise of its powers under s. 4 (2) of the Act of 1923. At the relevant date the so-called tenancy had, as the result of the order, an infirmity, viz., that if default were made (as in fact it had been) in paying off the arrears, then the landlord was entitled, by virtue of the order, to apply at once for a warrant for possession. It is true, of course, that the landlord cannot apply now in that action for a warrant of possession against the defendant. She must start fresh proceedings against the defendant asking for possession; but that is merely a matter of procedure occasioned by the fact that Mr. Phelps is dead. Immediately before his death, she had the right under the order to apply for immediate possession, which *prima facie* she would have been entitled to obtain. In proceedings against the defendant, she can so assert, and she can allege any other facts which have occurred since. I do not think that the landlord's right, which I have tried to formulate, has been altogether lost by the death of Mr. Phelps. C D E F G

On the other hand, I think that my conclusion results from a true view of the Acts, and especially s. 15 (1) and s. 12 (1) (g) of the Act of 1920. The former section defines the statutory rights of occupation which the tenant has, and, as I have said, those rights seem to me to comprehend any orders which may have been made under s. 4 (2) of the Act of 1923. Clearly during the latter part of Mr. Phelps's life, and after the order of Dec. 2, 1953, had been made, a description of his rights under the statute to the occupation of No. 124, Surrey Road, Poole, would have been incomplete and inaccurate without any reference to the order which had been made in December, 1953, under s. 4 (2) of the Act of 1923. The effect of s. 12 (1) (g) is not, in my judgment, to create some new tenancy—so much was pointed out by SCOTT, L.J., in *Bolsover Colliery Co., Ltd. v. Abbott* (2)—nor even to provide strictly for transmission, as I have said, from the previous occupant. The effect is that by definition the "tenant", having the rights I have described under s. 15 (1), includes in this case the defendant. She, as it were, steps into the shoes of Mr. Phelps and takes his place for all the purposes of the Acts. H I

A I add, first, that the result does not, as I think, constitute any increase of the standard rent, either during Mr. Phelps's life after the order was made, or after his death. The sums, payment of which the tenant was required to make as a condition of continued occupation, are what they were stated in the order to be, arrears of rent and costs. Nor, second, is my conclusion inconsistent, as counsel for the landlord argued, with the decision in *Bolsover Colliery Co., Ltd. v. Abbott* (2) which has been referred to in the passages that I have read from SOMERVELL, L.J.'s judgment in *American Economic Laundry, Ltd. v. Little* (1). In *Bolsover Colliery Co., Ltd. v. Abbott* (2), the rights of the statutory tenant depended on his being in the employment of the plaintiffs, who let the dwelling-house to him as their employee. The death of the tenant necessarily put an end to that essential condition of the tenancy; the member of the family who claimed to succeed, though ready and willing to be employed, was not employed in fact, and the condition of the tenancy was not readiness to be employed, but employment in fact. And third, as I have said before, my conclusion does not at all involve the proposition that the defendant is made personally liable under the order. The landlord may no doubt have two remedies—as a landlord would where, for example, the tenant's rent has been guaranteed by a third party. The existence and availability of the landlord's remedy against Mr. Phelps which, I gather, is in fact of no value at all, is a matter which the county court judge would consider on any application for possession against the defendant. I cannot, therefore, see that this point creates any difficulty; nor, I think, does any difficulty arise from the fact that if the defendant pays the rent and arrears, she may have a claim for indemnity against the estate of Mr. Phelps.

E The view that I have expressed follows the reasoning of JENKINS, L.J., in *American Economic Laundry, Ltd. v. Little* (1) set out in the passage which I have already quoted, with which I agree and which I respectfully adopt. The result also seems to me in accordance with good sense, principle and the justice of the case. If the landlord had, shortly before Mr. Phelps's death, obtained under the order of Dec. 2, 1953, the right to have the order enforced, but refrained from exercising it out of proper feelings for Mr. Phelps, who was then on his death bed, it seems to me a hard thing (and contrary to good sense) that she should now have altogether lost the right to the benefit of the order. Moreover, where one person succeeds in any sense to rights vested in another, then *prima facie* the former cannot and should not get a higher or better right than that enjoyed by the so-called predecessor.

G I therefore conclude, with all respect to the learned county court judge, that he was wrong in holding that the defendant was a mere trespasser outside the scope of the Acts, and in ordering possession accordingly. Her right to become statutory tenant on Mr. Phelps's death was, however, qualified in the way that I have stated by virtue of the order. That, however, is an aspect of the matter which has not been considered by the learned county court judge, and it would not be right for me to attempt to fetter his statutory discretion in regard to it. I think, therefore, the appeal should be allowed.

H **BIRKETT, L.J.:** I agree with the judgment delivered by SIR RAYMOND EVERSHED, M.R., which has covered the matter so fully that there is very little that need be added. As this is an important case, however, which has been very fully argued by the learned counsel on both sides, and since we are differing from the learned county court judge, it is perhaps fitting for me to add a word or two of my own in this matter.

There are really two questions to determine: (1) Is the defendant, Miss Brand (otherwise known as Phelps), a tenant of these premises at No. 124, Surrey Road, in Poole; and (2) If she is a tenant of those premises in special circumstances, on what terms does she hold? What are the terms of the tenancy?

The facts of the case are not in dispute. These premises had been let to a Mr. Phelps, and he was protected by the Rent Restriction Acts. He fell into arrears with his rent, and on Dec. 2, 1953, an order was made in the Poole County Court, in the form which had been customary in the county courts for very many years, i.e., an order for possession in twenty-eight days, suspended on payment of the arrears of rent by instalments of £10 forthwith and 13s. 7d. per week in addition to the current rent, the arrears to date of judgment being £36 4s. 8d., and costs ultimately taxed at £11 8s. This order was made on Mr. Phelps's own offer. Within a very few weeks he was in default under the order, and continued in default until his death on Jan. 26, 1955. The landlord did not apply to the court to enforce the order for possession, as she could have done at almost any time in 1954. It would appear that she refrained out of kindness to Mr. Phelps, who was an old age pensioner of slender means. Certain correspondence was put in before the learned county court judge that we have seen, and it would appear to be plain that what the learned judge was saying was accurate—that when the pensioner had written to say what his financial state was, the solicitors for the landlord wrote back showing every possible consideration. But those letters also indicated the doubt which existed about the proper answer to the question that we have to determine, for I observe in that correspondence that the solicitors for the landlord advised the defendant that if she was the lawful widow, there was a question whether or not she would not be the tenant of the premises, and matters of that kind; and the learned judge himself, when he came to deal with the question, said:

"The position is obviously one of great difficulty. In one sense, no order for possession is final in the case of protected premises in that application may be made for a stay at any time until the warrant for possession is actually executed; but in my view this order was, and was intended to be, as final as possible, and I think that as long as the arrears and costs remained undischarged, Mr. Phelps was a statutory tenant against whom an order for possession has been made, and there was no tenancy in existence which could be transmitted to the defendant."

That was the position taken up by counsel for the landlord in this court, because he submitted that once this order with which we are dealing was made, the tenancy was forthwith ended, and that thereafter Mr. Phelps remained in the premises only by virtue of a kind of licence from the court. The first question, therefore, to be determined is what was the nature of the order which was in fact made.

It is, I think, quite clear from s. 4 (2) of the Act of 1923 that the order which may be made by the county court judge could take various forms; and a very considerable doubt has existed (and I suppose will continue to exist; I do not know) as to what are the precise effects of any particular order being made. [His LORDSHIP read s. 4 (2)*, and continued:] What Parliament was clearly intending to do was to invest the county court judge with the widest possible powers because of the infinite variety of circumstances in which people are placed in regard to their housing, and in which they are compelled to go to the county court either as landlords or as tenants. The statute says: "You can adjourn it if you wish when the facts are such that, if you do adjourn it, that may be an end of the whole matter. If the facts indicate that it is the proper thing to do, you may make an order for possession. You may suspend the order." As the learned county court judge pointed out, during that period of suspension there may be any number of applications to the court for suspensions of the order. Discretion is vested in the court for postponing the date of possession for such period and on such terms as it thinks fit; and if

* The text of the sub-section is set out at p. 197, letter H, ante.

A those conditions are fulfilled, the court may also, if it thinks fit, discharge the order altogether. [His LORDSHIP discussed the terms of the order of Dec. 2, 1953, and continued:] Counsel for the landlord contended in this court that there was what he called an absolute order or final order for possession, and the learned county court judge said that it was intended to be as final an order as possible. In view of the form of the order in *American Economic Laundry, Ltd. v. Little* (1),
B it is quite clear that it was not, because in that case the order made was plainly a quite different order; and the passage which was read by SIR RAYMOND EVERSHED, M.R., from SOMERVELL, L.J.'s judgment indicates the distinction which was in the mind of the learned lord justice in regard to an absolute order and a conditional order. I think for my part that the order which was made in the present case was as described here* by SIR RAYMOND EVERSHED, M.R., and
C that it certainly was not of the nature of the order with which the court was dealing in *American Economic Laundry, Ltd. v. Little* (1). The conditions laid down by the order were broken quite early after it was made on Dec. 2, 1953. It would have been possible for the landlord to go to the court and to have said: "The conditions which you laid down in the order have been broken, and we now ask for a final order for possession". Again it is common ground that no
D application was made to the court for a very long time. On Jan. 26, 1955, when the old age pensioner, Mr. Phelps, died, the order of Dec. 2, 1953, was still in being, and no application had been made to the court.

In those circumstances, what is the position now? I would like to quote from *American Economic Laundry, Ltd. v. Little* (1) the words of JENKINS, L.J., which preceded the passage cited by SIR RAYMOND EVERSHED, M.R., where he
E said this ([1950] 2 All E.R. at p. 1190):

" . . . Mr. Little died after the date of the order for recovery of possession against him, but before the expiration of the last of a series of extensions which had been made by way of postponement of the date on which the order was to be complied with. What was his position? It is said that,
F notwithstanding the order for possession, he was still a statutory tenant. To say that seems to me really to beg the question. It may well be that he could be described as a statutory tenant, but that description would not itself accurately define his precise position because he was a statutory
G tenant against whom had been made a final order, under which possession was to be delivered up on a fixed date. During the period intervening between the date of such an order and the date fixed for delivery of possession the statutory tenant has obviously certain rights and certain obligations. For instance, during that period he would have to pay the equivalent of the rent. That is not to say, however, that he is still a statutory tenant for all purposes, so as to be in the same position as if the order had never been made. He has nothing left but the limited interest granted to him by what may be
H described as the indulgence of the court pursuant to s. 5 (2) [of the Act of 1920]. In effect, he has a period of grace."

I for my own part would desire to adapt these words of JENKINS, L.J., to this case: "The defendant who becomes statutory tenant on the death of the original tenant, although in a sense claiming in her own right, that is to say, although not claiming under the statutory tenant in the same way as an assignee or legatee of a contractual tenancy may be said to claim under the grantor or testator, nevertheless becomes statutory tenant under the same tenancy by virtue of which the original statutory tenant was in possession. Thus in the present case, assuming in the defendant's favour that notwithstanding the existence of the final order for possession, she could still become statutory tenant of the premises by virtue of s. 12 (1) (g) of the Act of 1920, it seems to me at all events clear that the tenancy to which she in effect succeeded could be no more

* See pp. 196, 197, and p. 201, letter F, ante.

than the limited interest remaining to run between the date of the death and the expiration of the date fixed for possession by the order.” A

Happily in this case, no question arises about the position of the defendant; and, as the learned judge said, it was conceded that she was a tenant within the necessary meaning of “tenant” in s. 12 (1) (g) of the Act of 1920. It is plain, as SIR RAYMOND EVERSLED, M.R., said, that while she is not liable for these arrears of rent, her tenancy is subject to the same infirmities (to use the word my Lord has used) as the tenancy of Mr. Phelps at the date of his death. Her tenancy cannot, I think, be better than the tenancy that Mr. Phelps enjoyed. To use the familiar phrase, the defendant really stepped into his shoes on the death of Mr. Phelps. What the future may hold, I know not. It may be that an application will be made to the county court judge in respect of this tenancy, and those matters will be matters for him to decide after hearing the various contentions of the parties. B C

On this appeal, I for my own part am quite satisfied that, using the phraseology which has been used, this is a conditional order as distinct from the absolute order which was the order described in *American Economic Laundry, Ltd. v. Little* (1). I believe that it was the intention of the parties that it should be so—that it should not be a final order. In my view, counsel for the landlord’s submission on that matter is ill-founded, and I believe the conclusion of the learned county court judge on that question to be wrong. In these circumstances, I agree that this appeal should be allowed. D

ROMER, L.J.: I also agree, and can express my conclusions quite briefly. The first thing, it seems to me, that has to be done is to ascertain the meaning of the order of Dec. 2, 1953, having regard to the terms in which it was framed. The learned judge who made the order said what he meant by it, and has indicated that he intended it to be “as final as possible”. It has, however, to be borne in mind that the order was a consent order, and that its intention can legitimately be discovered only from its language. The order is that of Form 138 in the Appendix to the County Court Rules, and is apparently the only form contained in the rules which is apt for making a future or conditional or suspended order for possession. In fact at the top left-hand corner it is described as: “Order for recovery of land suspended under Rent and Mortgage Interest Restrictions Acts, 1920 to 1939”. The first two paragraphs of adjudication are, if taken alone, unequivocal in their terms, and establish the landlord’s right to recover against the defendant possession of the premises in question, and specified amounts for arrears of rent and costs. These paragraphs, however, are followed by three more, each of which takes the form of an order. The first two are as follows: E F G

“It is ordered that judgment for possession shall not be enforced for twenty-eight days and for so long thereafter as the defendant punctually pays to the plaintiff or her agent the arrears of rent, mesne profits and costs by instalments of £10 forthwith and 13s. 7d. per week in addition to the current rent. And it is ordered that the judgment for £36 4s. 8d. and costs shall not be enforced for so long as the defendant pays the said instalments of 13s. 7d. per week.” H

In my opinion, the result of these two orders is to qualify the immediate operation which the preceding adjudications would otherwise have had by suspending their enforcement in the manner and on the terms therein prescribed. An absolute stay was imposed on the judgment for possession for twenty-eight days. Thereafter the judgment should not be enforced (which means that it should be unenforceable) so long as the defendant punctually paid 13s. 7d. weekly to the plaintiff or her agent in addition to the current rent; and this provision was, by the second order, extended also to the sum due for arrears of rent and I

A costs. By the third and concluding order it was provided that on payment of the arrears of rent and costs, the judgment should cease to be enforceable altogether. In my opinion, the meaning and effect of this judgment, when taken as a whole, and especially in view of the concluding paragraph, is that the defendant might remain on as tenant of the premises so long as he performed the conditions as to payment of the prescribed instalments in addition to the current rent; and that, on payment of the final instalment, the operation of the judgment would automatically cease. In other words, the judgment for possession was not intended to have an immediate effect, and would never indeed take effect at all provided that the conditions as to payment were fulfilled. If this be the true meaning and construction of the order, it is clear that it cannot have resulted in determining Mr. Phelps's statutory tenancy on the date on which it was made, for the object of the order was to preserve Mr. Phelps's position (albeit conditionally) and preservation is the antithesis of destruction.

That being, as I think, the object and effect of the order, the next question is whether the judge had power to make it. A sufficient affirmative answer to this question is perhaps afforded by the fact that the form of order is that which is contained in the Appendix to the rules. Apart altogether from that, it is clear that the order is within the authority of s. 4 (2) of the Act of 1923. The embargo on the enforcement of the judgment for possession for twenty-eight days was a "stay of execution", and the rest of the order was, I think, either a "suspension of execution", or a "postponement of the date of possession"—it matters not which—subject to conditions which are authorised by the subsection. Counsel for the landlord contended that if an order for possession is made in any form, the tenant ceases to be a tenant, and that there is nothing in s. 4 (2) to show that Parliament envisaged the contrary. I do not think that this is right. If, after a conditional order for possession is made, the tenant ceases to be a tenant, he would not be liable thereafter for rent, and could not be sued for rent, but only for mesne profits. But s. 4 (2) authorises the court to make conditions "in regard to payment by the tenant of arrears of rent, rent or mesne profits"; and "rent" in that context, following on "arrears of rent", and immediately preceding "mesne profits"—which is mentioned as an alternative—obviously means rent payable by the tenant in his capacity as such. Therefore the legislature contemplated, in my opinion, the survival of the status of tenant notwithstanding an order for possession which is suspended conditionally. It follows from what I have said that if Mr. Phelps had duly performed the conditions as to payment contained in the order of Dec. 2, 1953, his position as statutory tenant would have continued down to his death. In fact, however, he defaulted on frequent occasions in payment of the instalments, and he was in default when he died. It appears to me, on the language of the judgment, that directly Mr. Phelps made default, the judgment for possession became enforceable; and it would appear from Form 200 in the Appendix to the rules (though the practice of the county court may be otherwise) that the landlord need only have established this default to the satisfaction of the registrar to have obtained a warrant for possession. In fact, however, the landlord (from very meritorious motives) never applied for such a warrant, and never obtained one; and, therefore, this order being, as I have said, a conditional order, there never was a time when Mr. Phelps could not have asked the judge for further relief by way of again suspending execution or otherwise under s. 4 (2). In these circumstances, I do not think that the order *ipso facto* lost its conditional character by reason of Mr. Phelps's default, and in my opinion the suspension of the order for possession was still operative at the time of his death.

The next question is whether the defendant became entitled to some (and if so what) tenancy of the premises when Mr. Phelps died, it being conceded that she was a member of the family for the purposes of s. 12 (1) (g) of the Act of 1920. If the judgment for possession given on Dec. 2, 1953, had been merely qualified

by a stay of execution for twenty-eight days, without more, and Mr. Phelps had died during this period, it is clear from *American Economic Laundry, Ltd. v. Little* (1) that the defendant could either have claimed no tenancy at all, or at best succeeded to a tenancy for the rest of the period. The reason, however, is that if the judgment had taken that form, the tenancy would have been determined by the order. That reason has no application to the present case where the object of the order was not to end the tenancy, but (subject to the specified conditions) to preserve it. At Mr. Phelps's death there was a tenancy which was subsisting, and not defunct; and I can see no valid reason why the defendant should not be entitled to it by succession. I am quite satisfied, however, that she takes it subject to the order of Dec. 2, 1953, in so far as the provisions of that order are applicable to her as a tenant. The defendant is not, of course, personally subject to the judgment for possession or for payment of the arrears of rent or costs, for they were made against Mr. Phelps alone, and she was not a party to the proceedings. But if she claims a tenancy, she can claim only by succession; the tenancy to which Mr. Phelps was entitled and to which the defendant claimed, on his death, to succeed, had certain incidents attached to it by the order of the court; and the defendant cannot, in my judgment, claim the benefit of the tenancy and at the same time disclaim the incidents. These incidents are that in addition to and as distinct from the standard rent, the specified weekly sums have to be paid until they have been fully discharged; and on the defendant defaulting in these payments, it may be (I say no more) that the landlord could obtain an order for possession in proceedings brought against her for that purpose.

It may be said (and has in fact been said) that from and after the making of the order the tenancy was not a statutory tenancy because the tenant did not thenceforward retain possession of the premises by virtue of the provisions of the Act—see s. 15 of the Act of 1920—but partly by virtue of these provisions, and partly under the provisions of the order of the court. It is, of course, true, as I have just said, that certain though temporary incidents have been incorporated into the tenancy, but Mr. Phelps continued, in my opinion, to be a statutory tenant after the order was made. Section 15 is not exhaustive, and Mr. Phelps did not cease to be a tenant by virtue of the provisions of the Act merely because he had to comply for the time being with certain further requirements.

I agree that the appeal should be allowed.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Denton, Hall & Burgin*, agents for *Chas. G. Lester & Russell*, Bournemouth (for the defendant); *Peacock & Goddard*, agents for *Buchanan & Llewellyn*, Bournemouth (for the landlord).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A
G. H. RENTON & CO., LTD. v. PALMYRA TRADING
CORPORATION OF PANAMA.

[COURT OF APPEAL (Singleton, Jenkins and Hodson, L.J.J.), December 14, 15, 16, 19, 20, 1955.]

B
Shipping—Carriage by sea—Bill of lading incorporating Hague Rules—Clause for discharge of cargo in the event of strike—Strike at port of delivery—Delivery at port other than that named in bill of lading—Carriage of Goods by Sea Act, 1924 (14 & 15 Geo. 5 c. 22), Schedule, art. III, r. 2, r. 8, art. IV, r. 4—Water Carriage of Goods Act, 1936 (1 Edw. 8 c. 49) (R.S.C. c. 207), Schedule, art. III, r. 2, r. 8, art. IV, r. 4.

C
The plaintiffs were the indorsees of four bills of lading relating to a shipment of timber to be carried by the defendants' ship from two ports in British Columbia to London and, in one case, Hull. Condition 2 of the bills of lading applied the Hague Rules* to the contracts of carriage, but the rules were inapplicable in relation to the timber subject to one of the contracts of carriage as it was stated to be carried on deck. Clause 14 of condition 3 of the bills of lading provided " (c) Should it appear that . . . labour troubles . . . strikes . . . would prevent the vessel from . . . reaching or entering the port of discharge or there discharging . . . and leaving again . . . the master may discharge the cargo at port of loading or any other safe and convenient port " and " (f) The discharge of any cargo under the provisions of this clause shall be deemed due fulfilment of the contract ". Before the ship reached London where she was due to arrive on Oct. 14, 1954, the dock workers in the Port of London went on strike and the master was instructed by the defendants to proceed to Hamburg and there discharge that part of the cargo destined for London. The master carried out those instructions and whilst the ship was discharging cargo at Hamburg the dock strike spread to Hull. In accordance with further instructions from the defendants the master also discharged at Hamburg that part of the cargo destined for Hull. In an action for damages in respect of the defendants' failure to deliver the cargo at London and Hull, the plaintiffs contended (i) that the provisions of cl. 14 (c) and (f) of the bills of lading were repugnant to the main object of the contract, namely, to carry timber from British Columbia to London and Hull and should, therefore, be rejected and (ii) that under the Hague Rules, which applied to three of the four bills of lading, the defendants in failing to discharge the cargo at London or Hull were in breach of art. III, r. 2, and that cl. 14 (c) purported to allow a deviation which was not a reasonable deviation within art. IV, r. 4.

H
I
Held: (i) it was open to the parties validly to agree special provisions to meet special emergencies and cl. 14 (c) under which the parties had agreed in the case of a strike to substitute for the port of discharge named in the bills of lading some other safe and convenient port, including the port of loading, was not repugnant to or inconsistent with the main object of the contract and the court would not reject it; accordingly the ship's proceeding to Hamburg and discharging cargo there was, under cl. 14 (f), performance of the contract.

* The Hague Rules thus incorporated in the bills of lading were those enacted in the country of shipment, i.e., those enacted in the Water Carriage of Goods Act, 1936 (1 Edw. 8 c. 49), enacted by the Senate and House of Commons of Canada. They are similar in terms to the Hague Rules set out in the Schedule to the Carriage of Goods by Sea Act, 1924 (14 & 15 Geo. 5 c. 22). The terms of art. III, r. 2, and art. IV, r. 4, are printed at p. 220, letter A, and p. 225, letter E, post.

Tillmanns & Co. v. S.S. Knutsford, Ltd., [1908] 1 K.B. 185, considered; dictum of GREER, J., in *Mongaldai Tea Co., Ltd. v. Ellerman Lines, Ltd.* (1920), 2 Lloyd's Rep. at p. 642, applied.

(ii) article III, r. 2, of the Hague Rules did not imply a duty on the carrier to discharge the cargo at the destination agreed on, and there was nothing in the rules which avoided the right of the parties to agree on a substituted method of performance of the contract in the event of a strike.

(iii) the power given by cl. 14 (c) to discharge cargo at any safe and convenient port in the event of a strike at the port of discharge should not be regarded as a liberty to deviate and, therefore, no question of a breach of art. IV, r. 4, of the Hague Rules arose.

Decision of McNAIR, J. ([1955] 3 All E.R. 251) reversed.

[**Editorial Note.** The bills of lading were on printed forms with type-written insertions. There is a general principle that if any printed condition is found to be inconsistent with or repugnant to the main object disclosed by the terms specially agreed and typed or written into a printed form the court will limit or modify the conflicting printed conditions to the extent necessary to give effect to the main object, or will reject the printed conditions if they are clearly repugnant to the main object (see per JENKINS, L.J., at pp. 222, letter G, et seq., post, citing *Leduc v. Ward* (1888), 20 Q.B.D. 475, and *Glynn v. Margetson*, [1893] A.C. 351). The principle was not applicable to the determination of the present case, as the court found no repugnancy or inconsistency, but the extent of the principle is considered by JENKINS, L.J., at the passage cited. SINGLETON, L.J., intimates that the principle when applied in relation to bills of lading may be particularly applicable where the goods are perishable (see p. 217, letter H, post). The cases are collected and the principle is considered in 11 HALSBURY'S LAWS (3rd Edn.) 415, para. 671.

As to the effect of the Carriage of Goods by Sea Act, 1924, on the common law rights and liabilities of shipowners, see 30 HALSBURY'S LAWS (2nd Edn.) 607, para. 767; and for the obligation of a carrier under art. III, r. 2, of the Schedule to the Act in relation to properly discharging the goods, see 30 HALSBURY'S LAWS (2nd Edn.) 612, para. 771, note (b).

For the Carriage of Goods by Sea Act, 1924, Schedule, art. III and art. IV, see 23 HALSBURY'S STATUTES (2nd Edn.) 887-892.]

Cases referred to:

- (1) *Leduc v. Ward*, (1888), 20 Q.B.D. 475; 57 L.J.Q.B. 379; 58 L.T. 908; 41 Digest 485, 3172.
- (2) *Margetson v. Glynn*, [1892] 1 Q.B. 337; 61 L.J.Q.B. 186; 66 L.T. 142; *affd.* H.L. sub nom. *Glynn v. Margetson*, [1893] A.C. 351; 62 L.J.Q.B. 466; 69 L.T. 1; 41 Digest 311, 1715.
- (3) *Robertson v. French*, (1803), 4 East 130; 102 E.R. 779; 29 Digest 129, 806.
- (4) *Connolly Shaw, Ltd. v. Nordenfjeldske S.S. Co.*, (1934), 49 Lloyd's Rep. 183.
- (5) *Tillmanns & Co. v. S.S. Knutsford, Ltd.*, [1908] 1 K.B. 185; *affd.* C.A., [1908] 2 K.B. 385; 77 L.J.K.B. 778; *affd.* H.L. sub nom. *S.S. Knutsford, Ltd. v. Tillmans & Co.*, [1908] A.C. 406; 77 L.J.K.B. 977; 99 L.T. 399; 41 Digest 522, 3504.
- (6) *Mongaldai Tea Co., Ltd. v. Ellerman Lines, Ltd.*, (1920), 2 Lloyd's Rep. 639; 149 L.T.Jo. 302; 41 Digest 519, 3485.
- (7) *Gosse Millerd, Ltd. v. Canadian Government Merchant Marine, Ltd.*, [1927] 2 K.B. 432; *revsd.* C.A., [1928] 1 K.B. 717; 97 L.J.K.B. 193; 138 L.T. 421; *revsd.* H.L., [1929] A.C. 223; 98 L.J.K.B. 181; 140 L.T. 202; Digest Supp.
- (8) *Pyrene Co., Ltd. v. Scindia Steam Navigation Co., Ltd.*, [1954] 2 All E.R. 158; [1954] 2 Q.B. 402; 3rd Digest Supp.

- A (9) *Kroll & Co. v. Silver Line, Ltd.*, 1954 Amer. Mar. Cas. 177.
- (10) *Printing & Numerical Registering Co. v. Sampson*, (1875), L.R. 19 Eq. 462; 44 L.J.Ch. 705; 32 L.T. 354; 42 Digest 531, 941.
- (11) *Hadji Ali Akbar & Sons, Ltd. v. Anglo-Arabian & Persian S.S. Co., Ltd.*, (1906), 95 L.T. 610; 11 Com. Cas. 219; 41 Digest 500, 3286.
- B (12) *Istros, S.S. Owner v. Dahlstroem (F. W.) & Co.*, [1931] 1 K.B. 247; 100 L.J.K.B. 141; 144 L.T. 124; Digest Supp.
- (13) *Frenkel v. MacAndrews & Co., Ltd.*, [1929] A.C. 545; 98 L.J.K.B. 389; 141 L.T. 33; Digest Supp.
- (14) *Imperial Smelting Corpn. v. Joseph Constantine S.S. Line, Ltd.*, [1940] 2 All E.R. 46; [1940] 1 K.B. 812; 162 L.T. 267; *revsd.* C.A., [1940] 3 All E.R. 211; [1940] 2 K.B. 430; 109 L.J.K.B. 968; 163 L.T. 168; *revsd.* H.L. sub nom. *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corpn., Ltd.*, [1941] 2 All E.R. 165; [1942] A.C. 154; 110 L.J.K.B. 433; 165 L.T. 27; 12 Digest (Repl.) 436, 3333.
- C

Appeal.

- D The defendants appealed from an order of McNAIR, J., made on Oct. 7, 1955, and reported in [1955] 3 All E.R. 251, whereby he held (i) that the contracts between the plaintiffs and defendants for carriage of timber by sea were not contracts for providing for alternative ports of discharge and that discharge of the timber at Hamburg was not a fulfilment of the contracts, cl. 14 (f) being rejected as repugnant to the main object of the contracts which was carriage to London or Hull, and (ii) that if, contrary to his decision at (i) discharge of the timber at Hamburg was a performance of the contracts at common law, cl. 14 (c) was avoided by r. 8 and r. 2 of art. III of the Hague Rules. Accordingly he determined the issue of liability in favour of the plaintiffs.
- E

The plaintiffs as indorsees and holders of four bills of lading covering shipment of cargoes of timber from ports in British Columbia to London or, in one case, Hull, had claimed damages from the defendants, a company carrying on business in Panama* and owning the steamship *Caspiana*, for breach of contracts of carriage by failing to deliver the timber at those ports. The contracts were on terms "c.i.f. London" or "c.i.f. Hull" respectively. The bills of lading provided for carriage of the goods to London, or Hull, "or so near thereto as the vessel may safely get".

F

G The facts were set out in an agreed statement the substance of which was fully set out in the report of the case at first instance; see [1955] 3 All E.R. at pp. 253, 254, 255. The following is a brief summary for the purposes of this report. The vessel sailed from Nanaimo in British Columbia on or about Sept. 3, 1954. Towards the end of her voyage she had arrived on Oct. 13, off Dungeness and was due to dock at London on Oct. 14, 1954. A strike at London docks had begun at a dock at London on Sept. 28, 1954, and had spread. By Oct. 13, 1954, the Port of London was virtually at a standstill. The defendants directed the vessel to Hamburg where she began to unload the London cargo on Oct. 16, 1954. Discharge of the London cargo was completed there on Oct. 26, 1954. On Oct. 20, 1954, the strike spread to the docks at Hull. On Oct. 26, 1954, the strike at Hull continuing, the cargo destined for Hull began to be unloaded at Hamburg on the defendants' instructions and on Nov. 1, 1954, it was completed.

H

I On that date work was resumed at the docks at London and Hull. The defendants did not forward the timber to London or Hull and did not pay the cost of forwarding it or of storage. In the events which had happened a vessel arriving at London on or after Oct. 13, 1954, could not have begun discharge until at least Nov. 1, 1954; a cargo originally destined for London could not have been discharged at Hull during the period of the London dock strike and a cargo destined

* As regards the present case the law of Panama and of England were the same; see p. 213, letter F, post.

for Hull could not have been discharged there between Oct. 20 and Nov. 1, 1954. A
It was not contended that, if delivery could be made in performance of the
contracts of carriage in the circumstances at ports other than London or Hull,
any more convenient port than Hamburg was available. The timber which was
consigned to Hull was stated by the bill of lading to be carried on deck, and
accordingly was outside the ambit of the Hague Rules. The relevant terms of
the bills of lading appear at p. 212, letter I, to p. 214, letter D, post and have B
been summarised in the headnote.

McNAIR, J., gave judgment for the plaintiffs for damages to be assessed in
respect of the expenses to which they had been put by the defendants' failure
to deliver the cargoes at London and Hull.

Eustace Roskill, Q.C., and *A. J. Bateson* for the defendants.

A. A. Mocatta, Q.C., and *R. A. MacCrindle* for the plaintiffs. C

SINGLETON, L.J., after referring to cl. 14 (c) and (f) of condition 3 of the bills
of lading, which is printed at p. 214, letters A and D, post, and after stating the
relevant paragraphs of the agreed statement of fact, the substance of which is
given in [1955] 3 All E.R. at pp. 253-255 and which is summarised for the pur- D
poses of this report at pp. 211, 212, ante, continued: In the court of first instance,
and on appeal, the defendants relied on cl. 14 (c) and (f) of the bills of lading,
and it was submitted on their behalf that they had carried out the terms of their
contract and that they were entitled to judgment in the action. The case put
forward on behalf of the plaintiffs is that cl. 14 (c) and (f), should be disregarded
on one, or both, of two grounds:

(1) Under the common law: The main object of the bills of lading is to provide E
for the carriage of timber to London in consideration of an agreed freight. It is
said that on principle and on authority if the printed words conflict with the main
object and intent of the contract they must be limited and, if necessary, dis-
regarded so as to give effect to, and not to defeat, that object and intent; and,
further, that there is such a conflict in the present case if the printed sub-cl. (c) F
and (f) are taken together.

(2) Under the Water Carriage of Goods Act, 1936, of the Dominion of Canada,
the Hague Rules apply and form part of the contracts. The plaintiffs claim
that in failing to deliver the goods at London (or Hull) the defendants were in
breach of art. III, r. 2, which provides that the carrier shall properly and carefully
load, handle, stow, carry, keep, care for and discharge the goods carried. They G
say that a clause which allows final discharge of the goods at the port of shipment
and gives the shipowner the right to full payment is not carriage within the Act
and is avoided by art. III, r. 8; that the sub-clauses purport to allow a deviation
which is not a reasonable deviation under art. IV, r. 4, and consequently they are
avoided by art. III, r. 8.

The submission made under the Hague Rules applies only to the goods covered H
by three of the bills of lading; in the other case the goods were carried as deck
cargo. Each of the bills of lading is on the form of the Anglo-Canadian Shipping
Co., Ltd., of Vancouver. I was not able to discover how long this form has been
in use. I refer to the first of the bills of lading. They are all in the same form
except for the fact that one is in respect of cargo carried on deck. On the face
of the first of the bills of lading the following words appear (those printed here I
in roman type being in print on the form of bill of lading and those printed here
in italic type being typed on the printed forms):

"Shipped at *Vancouver, B.C.*, in apparent good order and condition,
weight, measure, marks, numbers, quality, contents and value unknown,
by *A. Sereth Lumber Co., Ltd.* on board the good vessel called the '*Caspiana*'
for carriage to *London, England*; or so near thereunto as the vessel may
safely get always afloat, the following goods: . . . 1,333 pcs. *Douglas Fir*

- A *Lumber . . . loaded on board s.s. 'Caspiana', 'Subject to Chamber of Shipping War Risks clauses Nos. 1 and 2' . . . which are to be delivered in the like good order and condition at the aforesaid port unto order of shipper. Notify: Lloyd Duncan & Co., Ltd., . . . 56 Moorgate . . . or his or their assigns, he or they paying freight plus other charges incurred in accordance with the provisions contained in this bill of lading. Freight: collect at destination . . ."*

The amount of the freight is stated, and below, in print, there appears:

"In accepting this bill of lading the merchant expressly accepts and agrees to all its stipulations, whether written, printed, stamped or otherwise incorporated, as fully as if they were all signed by the merchant."

- C On the back of the bill of lading, there are the following clauses:

- "I. Definition. Wherever the term 'merchant' is used in this bill of lading, it shall be deemed to include the shipper, the receiver, the consignee, the holder of the bill of lading and the owner of the cargo. II. Paramount Clause. The Hague Rules contained in the International Convention for the unification of certain rules relating to bills of lading, dated Brussels Aug. 25, 1924, as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said convention shall apply. With respect to goods loaded at a Canadian port, the Water Carriage of Goods Act, 1936, of the Dominion of Canada, shall be effective. With respect to goods loaded at a United States port, the Carriage of Goods by Sea Act, of the United States, approved Apr. 16, 1936, shall be effective. III. Jurisdiction. Any dispute arising under this bill of lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply."

(The carrier, the defendants in this action, have their place of business in Panama. It is agreed for the purposes of this case that there is no difference between the law of this country and the law of the State of Panama.)

- G There follow in the bill of lading sixteen clauses of stipulations or conditions. Clause 3 covers "Forwarding, substitute of vessel, through cargo and trans-shipment". Clause 14 which is headed: "Government directions, war, epidemics, ice, strikes, etc." is the one of importance, although only sub-cl. (c) and (f) are directly relevant to this case. I propose to read the whole clause.

- H "14 (a) The ship shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or otherwise howsoever given by the government of the nation under whose flag the vessel sails or any department thereof, or by any other government or any department thereof, or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risks insurance on the ship, the right to give such orders or directions and if by reason of and in compliance with any such orders or directions anything is done or is not done, the same shall not be deemed a deviation, and delivery in accordance with such orders or directions shall be a fulfilment of the contract voyage and the freight shall be payable accordingly.

I "(b) Should it appear that the performance of the transport would expose the vessel or any goods on board to the risk of seizure or damage or delay, resulting from war, warlike operations, blockade, riots, civil commotions or piracy, or any person on board to the risk of loss of life or freedom,

or that any such risk has increased, the master may discharge the cargo at port of loading or any other safe and convenient port.

"(c) Should it appear that epidemics, quarantine, ice—labour troubles, labour obstructions, strikes, lockouts, any of which on board or on shore—difficulties in loading or discharging would prevent the vessel from leaving the port of loading or reaching or entering the port of discharge or there discharging in the usual manner and leaving again, all of which safely and without delay, the master may discharge the cargo at port of loading or any other safe and convenient port.

"(d) The merchant shall be informed if possible.

"(e) If any situation referred to in this clause may be anticipated, the carrier may cancel the contract or postpone its performance at any time after cargo has been booked and the carrier shall have the same rights of cancellation and postponement as aforesaid if the vessel for any reason given in this clause cannot safely and without delay reach or enter the loading port or ports.

"(f) The discharge of any cargo under the provisions of this clause shall be deemed due fulfilment of the contract. If in connection with the exercise of any liberty under this clause any extra expenses are incurred, they shall be paid by the merchant in addition to the freight, together with return freight if any and a reasonable compensation for any extra services rendered to the goods."

In support of the submission on the common law, counsel for the plaintiffs cited *Leduc v. Ward* (1) (1888) (20 Q.B.D. 475). I do not read the report as it is sufficiently referred to in the next case counsel cited, namely, *Margetson v. Glynn* (2) ([1892] 1 Q.B. 337). The facts of the latter case are sufficiently stated:

"... the action was brought by shippers of oranges against the ship-owners, claiming damages for breach of the contract contained in the bill of lading by reason of which the oranges were damaged. The bill of lading stated that the goods were shipped on board the steamship Zeta, 'now lying in the port of Malaga, bound for Liverpool, with liberty to proceed to and stay at any port or ports, in any rotation, in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever'. The oranges were shipped at Malaga, and the ship then, instead of going to Liverpool direct, went first to the port of Burriana, which is on the north-east coast of Spain, and then back again, and proceeded to Liverpool. A delay of some days was thus caused, and the consequence was that the oranges when they arrived at Liverpool were in a rotten condition. The defendants justified the delay by the terms of the bill of lading. The learned judge held that the general words in the bill of lading did not authorise such a deviation from the direct voyage from Malaga to Liverpool, and gave judgment for the plaintiffs."

On appeal to the Court of Appeal, LORD ESHER, M.R., said (*ibid.*, at p. 338):

"I think we ought to construe this bill of lading according to the principle of construction which was laid down in *Leduc v. Ward* (1), a decision which I not only think we are bound to follow, but which I think was right. We have to construe a well-known description of contract—a contract contained in a bill of lading. A bill of lading is a contract for the carriage of goods on board a ship, and the first thing which the shipper and the shipowner must agree upon is the voyage. As was said in *Leduc v. Ward* (1), the object of the

- A shipper is to have his goods carried from one place to another, in order that when they reach the place of destination they may be either sold or used. The object of the shipowner is to carry the goods from the one place to the other; and upon the voyage on which he is to carry them depends the freight—that is the charge which he can properly make for carrying them. If he is to carry the goods five hundred miles, he will charge one freight; if he is to carry them two thousand miles, it is absurd to suppose that he will not charge a great deal more. Therefore, the first thing which is always settled between a shipowner and a shipper of goods is the voyage. And, after the hundreds of years during which bills of lading have existed, we know the mode in which the voyage is generally described—viz., as from ‘the port in which the ship is now lying’, or at which the goods are to be shipped, to another port which is named. It is generally, but not always, from the port in which the ship is lying, because there may be a charterparty providing that the ship shall go to another port and there ship the goods. In such a case the whole charterparty voyage would include the port at which the goods were not to be shipped; but, when the bill of lading is given only after the goods are shipped, and when it would be improperly given before, the voyage must be from the port in which the ship is then lying to the port of destination, and that is the voyage described. In the present case, the words of the bill of lading are, ‘now lying in the port of Malaga, and bound for Liverpool’. The voyage described is from Malaga to Liverpool, and, if there were nothing else in the bill of lading, the ship would be bound to go from Malaga to Liverpool, according to the ordinary sea course for a steamer from the former port to the latter, and she would not be entitled to stop or to call at any other port, although it was in that course; she would be bound to go straight. But here, after describing the voyage, liberty is given to do something. What is that liberty? It is a liberty with regard to that voyage. It is not liberty to go another voyage, but liberty to do something with regard to that voyage which the ship could not do if the bill of lading had stopped at the words ‘from Malaga to Liverpool’.”

Later in his judgment, the Master of the Rolls said (*ibid.*, at p. 340):

- G “Is there a reasonable and fair construction which will not only give a meaning to those words, but will also give a meaning to the primary words which describe the voyage? When you are describing a voyage, and you add with regard to that voyage liberty to do something, would it be a reasonable construction to say, it means that you may go an absolutely different voyage? I think not. I think we must put a limitation on the words (not exactly the same), but analogous to that which has been put on similar words in other cases, and we must say that the meaning is, with liberty to proceed to and stay at those of the places named, which, as was said in *Leduc v. Ward* (1), are substantially on the course of the voyage named and agreed upon, and hold that the words do not enable the shipowners to go upon that which is in substance another and an absolutely different voyage. The voyage agreed on was from Malaga to Liverpool. The ship went straight away from the direct course to Liverpool; she went in the opposite direction to Burriana, and Mr. Bigham was obliged to admit that his argument, if well-founded, would equally allow the ship to go to Constantinople, then into the Black Sea to Sebastopol, and thence round the coast of Africa to Liverpool.”

The appeal was dismissed. BOWEN, L.J., said (*ibid.*, at p. 343):

“But, so soon as the parties have agreed upon the voyage, and have written that in, the definition of the voyage must, as a matter of business,

cut down the general words to what is fairly applicable to the voyage which has been agreed upon and defined. Any other construction would make business impossible. It would make it impossible to insure the cargo. It would make it impossible for the consignees of the cargo to know what to do as to taking delivery, or what to do with the bills of lading. It is impossible to suppose that the general words are not to receive a light and a limitation from the definition of the voyage which is the very object of the contract."

FRY, L.J., said (*ibid.*, at p. 344):

"When the court in dealing with a contract or document of any kind finds that difficulty, it always, so far as I know, follows this principle, that the general words must be limited so that they shall be consistent with and shall not defeat the main object of the contracting parties."

It is not very clear from the report of that case how much was in print and how much was typed or written into the bill of lading. I think, however, it does become fairly clear when the speeches in the House of Lords are examined. Counsel looked up the House of Lords' record but it does not show which words were written and which were in print. However, SCRUTTON ON CHARTERPARTIES (16th Edn.), p. 302, footnote (m), states that the words "now lying at Malaga and bound for Liverpool" were in writing. The bill of lading (as appears from the record) contained this clause:

"In case of blockade or interdict of the port of discharge, or if without such blockade or interdict, the entering of the port of discharge should be considered unsafe by reason of war or disturbance, the master to have the option of landing the goods at any other port which he may consider safe at shipper's risk and expense, and on the goods being placed in charge of any mercantile agent or of the British Consul, and a letter being put in to the post office addressed to the shipper and consignee if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense, and the master and owners discharged from all responsibility. With liberty in the event of the said steamer putting back to Liverpool, or into any other port or otherwise, being prevented from proceeding in the ordinary course of her voyage, to tranship the goods by any other steamer at receiver's risk and expense."

When *Margetson v. Glynn* (2) reached the House of Lords, the judgments given in the Court of Appeal were expressly approved. LORD HERSCHELL, L.C., said ([1893] A.C. at p. 356):

"I do not put that before your Lordships as by any means the governing consideration, because I am led to the conclusion at which I have arrived upon the same grounds as those which have been so very clearly and fully expressed by the learned judges in the court below. I find myself so completely in agreement with the reasons which they have given that I do not think it necessary to trouble your Lordships with any further observation."

LORD HALSBURY said (*ibid.*, at p. 357):

"My Lords, I am entirely of the same opinion. It seems to me that in construing this document, which is a contract of carriage between the parties, one must in the first instance look at the whole of the instrument and not at one part of it only. Looking at the whole of the instrument, and seeing what one must regard, for a reason which I will give in a moment, as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract. The main purpose of the contract was to take on board at one port and to

A deliver at another port a perishable cargo. I do not think the learned counsel who argued this case on the part of the appellants gave sufficient effect in the argument which he addressed to your Lordships to the difference between the ordinary and formal parts of the document which are to be found in print and the written parts—indeed I gathered from him at one time that he rather contested the legitimacy of considering the difference whether the words were in print or in writing; he appeared to intimate that that doubt was justified by the terms of this particular document, because that in the ordinary construction of a commercial document such a principle as I have mentioned has been adopted certainly for something like a century cannot be a matter of doubt, and the reason for it appears to me to be very cogent and relevant to the case before your Lordships.

C “I have in my hand the report of a case in the Court of King’s Bench in the year 1803, *Robertson v. French* (3) (4 East 130), in which LORD ELLENBOROUGH, as it appears to me, gives with great precision the ground upon which one part of a document may be relied upon as controlling and cutting down the generality of the words in the other. His Lordship says (4 East at p. 135): ‘In the course of the argument it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance which are not equally applicable to the terms of other instruments and in all other cases. It is therefore proper to state upon this head that the same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, viz., that it is to be construed according to its sense and meaning as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary and popular sense unless they have generally in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must, in the particular instance and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The only difference between policies of assurance and other instruments in this respect is that the greater part of the printed language of them being invariable and uniform has acquired from use and practice a known and definite meaning, and that the words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied), are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formality adapted equally to their case and that of all other contracting parties upon similar occasions and subjects’.”

The House of Lords, as I have said, upheld the judgment of the Court of Appeal. The result of these decisions is that one must consider the particular contract into which the parties have entered, and if there be some printed condition which would defeat the object and intention of the parties to the contract it should be limited or disregarded, and this applies especially in the case of perishable goods.

I A somewhat similar question came before BRANSON, J., in *Connolly Shaw, Ltd. v. Nordenfjeldske S.S. Co.* (4) (1934) (49 Lloyd’s Rep. 183). I do not think it necessary that I should read the judgment. There are passages which are especially useful (49 Lloyd’s Rep. at pp. 186, 189). The learned judge emphasised the necessity of looking at the whole of the contract. Apart from this principle, I do not feel that the authorities to which we were referred help towards the solution of the question now before the court. I do not regard cl. 14 (c) and (f) as giving liberty to deviate, using the term “deviate” in its ordinary meaning.

They afford rather a substituted method of performing the contract, if that on which the parties have agreed appears to be virtually impossible of performance in the way intended. If there had been no clause such as cl. 14 (c) a state of uncertainty would have existed and the vessel would have been held up. It was to avoid that position arising that a substituted place of discharge of the goods was inserted and made part of the contract; and it must be remembered that the master was under a duty to act reasonably. It is unlikely that the cargo, or any part of it, would be discharged at the port of loading, although that might be the most convenient place if the trouble occurred at or near that port; and, again, it might be best for the merchant if the goods were perishable. And it is only on the happening of one of the events specified in cl. 14 (c) that any question arises. McNAIR, J., accepted the submission of the plaintiffs on this part of the case. He said ([1955] 3 All E.R. at p. 260):

“With this guidance I now approach the question of the construction of the particular bills of lading with which I am concerned. It is plain that the main object and intent of the contract is the carriage of the timber to London or Hull as the case may be. It is equally plain that this object and intent is frustrated if for any reason the shipowner purports to fulfil his contractual obligations by delivery elsewhere and in particular by delivery at a port in another country and disclaims any intention to complete delivery by forwarding the goods at his own expense to the contract destination. This object is none the less frustrated though the goods’ owners themselves are free at their own expense to bring the goods undamaged to London. I am prepared to hold on the facts agreed that the shipowners were at common law justified under cl. 14, para. (c) in discharging the cargo at Hamburg with a view to forwarding them to London at their own expense. But in my judgment para. (f) of that clause which purports to provide that delivery at Hamburg ‘shall be deemed due fulfilment of the contract’ is so inconsistent with and repugnant to the primary and unqualified promise to deliver at London that it must be rejected. This bill of lading does not in my judgment provide for alternative ports of discharge.”

I am unable to accept this view. It was open to the parties to agree on an alternative place of delivery if it appeared impossible, through strikes, etc., to discharge the goods at the port which was their first choice, and there was no reason why they should not agree that in such an event the master should discharge the goods at a safe and convenient port. The learned judge found (*ibid.*, at p. 257):

“I accordingly hold that, if under the bills of lading the defendants were in law entitled in any event to discharge their contractual obligations by delivery in Hamburg, the existing strike situation was at all material times such that the defendants cannot be said to have acted unreasonably in deciding to deliver both the London and the Hull cargo at Hamburg.”

I do not regard cl. 14 (c), coupled with cl. 14 (f), as repugnant to the object of the contract. It is an agreed method of performance should the position envisaged by cl. 14 (c) arise.

The clause is not a novel one. There has been something of the kind for many years. This is shown in *Tillmanns & Co. v. S.S. Knutsford, Ltd.* (5). The clause reads ([1908] 1 K.B. 186):

“Should a port be inaccessible on account of ice, blockade or interdict, or should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance or any other cause, it shall be competent for the master to discharge goods intended for such port on the ice or at some other safe port or place, at the risk and expense of the shippers, con-

- A signees or owners of the goods; and upon such discharge the ship's responsibility shall cease."

The defendants in that case did not establish facts to bring the clause into play, and there was no argument on it. In the Court of Appeal there were references to the clause in the judgments of VAUGHAN WILLIAMS and KENNEDY, L.JJ.

- B VAUGHAN WILLIAMS, L.J., said ([1908] 2 K.B. at p. 395):

"I now come to the question of the construction of cl. 4 of the charter-party. This clause deals with two possible events, on the happening of either of which it is competent for the master to discharge goods intended for Vladivostock either upon the ice or at some other safe port or place at the risk and expense of the shippers, consignees or owners of the goods, and upon such discharge the shipowners' responsibility is to cease."

C KENNEDY, L.J., having said that the inaccessibility was not proved, and that the learned judge was right as to that, continued (*ibid.*, at p. 408):

- D "I now come to what is to my mind the difficult point in the case. We have to construe cl. 4, which runs: 'Should a port be inaccessible on account of ice, blockade or interdict, or should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance or any other cause, it shall be competent for the master to discharge' . . ."

- E No question was raised as to the validity of the clause. Obviously it did not occur to anyone that the clause was repugnant. One only needs to look at the names of counsel engaged in that case, as well as the firms of solicitors who were instructing counsel, in order to realise that if any such point had been considered worthy of argument it would have been raised then. Further, in *Mongaldai Tea Co., Ltd. v. Ellerman Lines, Ltd.* (6) (1920) (2 Lloyd's Rep. 639) there came before GREER, J., a case concerning a bill of lading which had this clause in it:

- F "In case of the . . . interdict of the port of discharge . . . the master may land the goods and so complete his contract at the nearest safe and convenient port at the expense and risk of the owners of the goods."

GREER, J., speaking of that clause, said (2 Lloyd's Rep. at p. 642):

- G "Now, two clauses were originally relied on by the shipowners, one on the face of the bill of lading and one on the back. The first reads: 'In the case of blockade or interdict of the port of discharge, or, if the entering and discharging in the port shall be considered by the master unsafe by reason of war or disturbance . . . the master may land the goods and complete the contract at the nearest safe and convenient port at the expense and risk of the owners of the goods' . . . That is an exception which specifically provides that in certain events not only will the owner of the ship be excused for any breach of contract in delivering the goods, but it also provides for a substituted method of performing the contract when these events happen. If the events which happened in the present case were within that clause, it would be quite clear the shipowners would be entitled to full freight on delivery of the goods in Glasgow."

- H I do not think it necessary to read more of the judgment, or to go into the facts of that case. There again it was not suggested that the clause which I have read was repugnant to the contract of carriage. The words used by GREER, J., can be applied to this case, although I am not sure that it is right to speak of the clause as an exception. The vessel went to Hamburg, which was found to be a convenient port, if the defendants' contention on the law is correct. In so doing she was going out of her way, and she was acting in accordance with the agreement. Under cl. 14 (f) that which she did is to be regarded as performance of the contract of carriage.

I now come to the point raised under the Hague Rules. This appears to me to depend on the construction of art. III, r. 2, which reads:

"Subject to the provisions of art. IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

In my opinion this cannot be read as covering a duty to discharge at the destination agreed on. The duty imposed by this article is to load, to stow, and to discharge the goods carried properly and carefully. That involves doing each of the tasks in a proper manner and with reasonable care. I refer to the text in French, which is set out in SCRUTTON ON CHARTERPARTIES (16th Edn.), p. 568. The word "properly" in the rule I have read is the translation of the words "de façon appropriée". The port of discharge is written or typed on the bill of lading itself, whereon is recorded the agreement as to the place to which the goods are to be carried, and that is not within the scope of art. III, r. 2. The view of McNAIR, J., on this point reads ([1955] 3 All E.R. at p. 261):

"For the defendants it was argued that the words 'properly and carefully' relate only to the manner and method of carriage, for example the carriage of perishable cargo in a refrigerated hold and at proper temperatures. That they include such matter is not disputed; but do they not go further? In *Gosse Millerd, Ltd. v. Canadian Government Merchant Marine, Ltd.* (7) ([1927] 2 K.B. at p. 434), WRIGHT, J., expressed the view that 'The words "properly discharge" in art. III, r. 2, mean, I think, "deliver from the ship's tackle in the same apparent order and condition as on shipment" unless the carrier can excuse himself under art. IV'. In my judgment it is implicit in this that the discharge should take place at the proper port. The Act and rules nowhere define what is the proper port but I am satisfied that in this case Hamburg was not a proper port for two reasons. First inasmuch as the right to discharge at Hamburg only arises if at all under cl. 14, para. (c), the right so to discharge lapses if the effect of art. III, r. 8 is to avoid that paragraph as a whole. In my judgment it has that effect. Paragraph (c), in terms would permit the shipowner to discharge the goods at the loading port in the circumstances stated in the paragraph and so claim full freight. I cannot believe that such a discharge would be a due compliance with art. III, r. 2."

I cannot accept the sentence

"In my judgment it is implicit in this that the discharge should take place at the proper port."

There is no need to imply any such term; nor do the words of art. III, r. 2, taken in their ordinary meaning, require it. There is nothing in the rules to prevent parties agreeing on a substituted port of discharge. The bills of lading on their face state the place, and a stipulation (cl. 14 (c)) provides for some other place in the event of one of the causes, foreseen as a possibility, arising. In such a case the agreement of the parties avoids the need for any implication.

I draw attention to the words of DEVLIN, J., in *Pyrene Co., Ltd. v. Scindia Steam Navigation Co., Ltd.* (8) ([1954] 2 All E.R. at p. 163):

"There is, however, a third interpretation to art. III, r. 2. The phrase 'shall properly and carefully load' may mean that the carrier shall load and that he shall do it properly and carefully, or that he shall do whatever loading he does properly and carefully. The former interpretation, perhaps, fits the language more closely, but the latter may be more consistent with the object of the rules. Their object as it is put, I think, correctly in CARVER'S CARRIAGE OF GOODS BY SEA (9th Edn.), p. 186, is to define, not the scope of the contract service, but the terms on which that service is to be

- A performed. The extent to which the carrier has to undertake the loading of the vessel may depend not only on different systems of law but on the custom and practice of the port and the nature of the cargo. It is difficult to believe that the rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging, so that
- B both operations are naturally included in those covered by the contract of carriage. But I see no reason why the rules should not leave the parties free to determine by their own contract the part which each has to play. On this view, the whole contract of carriage is subject to the rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide."
- C I cannot see that there is anything in the Act or in the rules which avoids the right of the parties to agree on a substituted method of performance in the event of the position brought about by the strike or strikes which existed when the vessel approached the Port of London. I cannot believe that the states which ratified the Hague Convention of 1924 which led to the rules being made would have
- D agreed that the parties to such a contract should be deprived of the right to determine a substituted place of discharge should there be difficulties of the kind mentioned in cl. 14 (c). In the absence of any such provision, what would have been the position? The vessel would have had to wait; questions as to frustration would have arisen: a state of uncertainty would have existed. It is no answer to say that under art. IV, r. 2, the owners of the vessel would have
- E been relieved from liability. Their ship is of value to them. Moreover, it may be of great advantage to the merchant to have his goods delivered at a convenient port—and sometimes perhaps at the port of loading—especially if they are perishable goods. It could seldom happen that the goods would be discharged at the port of loading; the master must always act reasonably.
- F Counsel for the plaintiffs submitted that cl. 14 (c) and cl. 14 (f), read together, were in conflict with the rules, in that if the discharge took place at the port of loading it was not carriage under the Act. That may be answered by the definition of "carriage of goods" in art. I (e). The reply of counsel for the defendants is that in any event there is nothing in the rules to prevent the parties agreeing on the place or places of discharge. The next point raised by counsel
- G was that under art. IV, r. 4, a reasonable deviation is not to be deemed to be an infringement of the rules, and that that which took place went beyond a reasonable deviation. I am not sure that the submission is right on the facts having regard to the findings; but entirely apart from that I do not consider that the discharge at Hamburg ought to be regarded as something done under a liberty to deviate. The discharge at Hamburg came about because of difficulties of a kind envisaged by cl. 14 (c) under which a substituted place of delivery was
- H agreed on. There was no deviation as that expression is normally understood; nor can it be said that in this respect any question arises under art. III, r. 8. Junior counsel for the plaintiffs submitted that if the words in cl. 14 (c) cannot be disregarded they should be restricted, and that it must be shown by the defendants that there was likely to be a delay of so serious a character as to render delivery thereafter delivery under a different contract. No such question was raised
- I before the trial judge. It appears to me that such a consideration would defeat the purpose for which the clause was inserted.

Our attention was called to the position of bankers and indorsees of bills of lading. It is sufficient to draw attention to the clear words at the foot of the face of the bills. So far as I know it has not been argued in the courts until now that a clause of the nature of cl. 14 (c), coupled with cl. 14 (f), is bad, or that it ought to be treated as null and void. We were referred to a decision in the United States District Court, Northern District of California, Southern Division, *Kroll &*

Co. v. Silver Line, Ltd. (9) (1954 Amer. Mar. Cas. 177) and to the judgment of MICHAEL J. ROCHE, C.J. The clause with which the Chief Justice was dealing is not fully set out, and there is force in the criticism of counsel for the plaintiffs that we ought not to pay attention to it without full information as to what was before the court; so far as it goes, however, it is at least satisfactory for me to know that the judgment of the Chief Justice is in accordance with the view which I have formed on this case. I will cite one passage from the judgment of SIR GEORGE JESSEL, M.R., in *Printing & Numerical Registering Co. v. Sampson* (10) (1875) (L.R. 19 Eq. at p. 465):

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

In my opinion the appeal of the defendants should be allowed and judgment should be entered for them.

JENKINS, L.J.: I agree. The learned judge decided in favour of the plaintiffs on two grounds. He held, first, that, apart from the rules scheduled to the Canadian Water Carriage of Goods Act, 1936 (which may conveniently be referred to as "the Hague Rules") cl. 14 (f) of the printed conditions of the four bills of lading, which purported to provide that delivery at (in the events which happened) Hamburg pursuant to cl. 14 (c) should be deemed due fulfilment of the contract, was so inconsistent with and repugnant to the primary and unqualified promise to deliver at London (or, I may add, Hull) that it must be rejected. He held, secondly, that if (contrary to his view) discharge at Hamburg amounted to due performance of the contract as properly construed at common law, by virtue of cl. 14 (c) and (f) of the printed conditions, these provisions were avoided by the Hague Rules, which admittedly apply to three of the four bills of lading (i.e., those other than the one comprising deck cargo) as a matter of contract, by force of the "Paramount Clause" (cl. II) of the printed conditions.

In support of the first of these two grounds, counsel for the plaintiffs relies on a recognised principle, which is not confined to bills of lading but in its relation to bills of lading may be stated as being that where a bill of lading is concluded by means of a printed form comprising general conditions, into which the parties write, type, or otherwise incorporate the terms agreed on in respect of the particular transaction in view (for example, the termini of the voyage contracted for), and any of the printed conditions is found to be inconsistent with or repugnant to the main object and intention of the bill of lading as disclosed by the terms specially agreed, the court will limit or modify the conflicting printed condition to the extent necessary to enable effect to be given to such main object and intention, or in a case of complete repugnancy wholly reject it. Counsel referred us to several cases in which this principle has been applied to restrict printed deviation clauses expressed in terms so wide that if full and literal effect was given to them they would enable the shipowners at their own will and pleasure to delay indefinitely, and thus for all practical purposes defeat, the main, and indeed essential, object and intention of the particular bargain, namely, the carriage of the shippers' goods from one specified port to another. Inasmuch as the principle, as distinct from its application to the present case, is not in dispute, I need not take up time by referring at length to this considerable line of authority, and will merely mention as typical examples *Leduc v. Ward* (1), and *Glynn v. Margetson* (2). However, before the principle relied on by counsel can be called in aid, the printed general condition of which modification or

- A rejection is sought, must be shown to be repugnant to or inconsistent with the main object and intention of the particular bargain. It is here, as I think, that counsel's argument on this part of the case breaks down. He says that cl. 14 (c) and (f) of the printed conditions now under consideration, in purported pursuance of which the timber was discharged at Hamburg, are just as inconsistent with or repugnant to the main object and intention of the bills of lading, namely, the carriage of the timber from Vancouver or Nanaimo to London or Hull, as the wide liberties to deviate were inconsistent with or repugnant to the voyages contracted for in the cases I have mentioned. I cannot agree. It seems to me that there is a material difference between a deviation clause purporting to enable the shipowners to delay indefinitely the performance of the contract voyage simply because they choose to do so, and provisions such as those contained in cl. 14 (c) and (f) in the present case, which are applicable and operative only in the event of the occurrence of certain specified emergencies. The distinction is between a power given to one of the parties which, if construed literally, would in effect enable that party to nullify the contract at will, and a special provision stating what the rights and obligations of the parties are to be in the event of obstacles beyond the control of either, arising to prevent or impede the performance of the contract in accordance with its primary terms. It is true that the provisions of cl. 14 (c) and (f) qualify in certain specified events the primary obligation of the shipowners to carry the timber to and discharge it at London or Hull. It is not to be supposed, however, that every qualification on the primary obligation of a shipowner introduced by printed general conditions incorporated in a bill of lading involves a repugnancy to or inconsistency with the particular bargain embodied in it, and is, therefore, to be reformed or disregarded. If that were so the greater part of all the printed general conditions incorporated in any bill of lading based on a printed form would be made waste paper, notwithstanding that the parties had deliberately made them part of their contract.
- The principle on which counsel for the plaintiffs relies is not to be invoked for the purpose of creating inconsistencies or repugnancies which would not have existed if the whole bargain, general and special conditions alike, had been written out in full for the purposes of the particular transaction. If cl. 14 in the present case had been struck out of the print and written in identical terms on the face of each of the bills it would, so far as I can see, have involved no inconsistency with or repugnancy to the primary obligation of the shipowners to carry the timber to London or Hull. It would merely have been a provision, accepted by both parties, to meet circumstances beyond the control of either, in which the shipowners could not reasonably be expected to carry out the contract in its primary form. What the rights and obligations of the parties should be on the supervening of one or other of the emergencies dealt with by cl. 14 would have been purely a matter of bargain, and it would have been idle for the plaintiffs to attack the validity of the provisions agreed merely on the ground that such provisions were disadvantageous to them. Why should the result be different because cl. 14 in fact appears as one of the printed general conditions? Prima facie the plaintiffs or their predecessors in title must be taken to have agreed to all the terms and conditions of the bill, both special and general, and I fail to see why, if they would have been bound by the terms of cl. 14 had they been written out afresh on the face of the bill, they should not be equally bound by them appearing as they do amongst the printed general conditions. There is no question here of mistake, or non est factum, or rectification.

In the deviation cases the court had ample ground for concluding that the parties, having agreed to a particular voyage, could not have intended that the wide power of deviation allowed to the shipowners by the general conditions should apply to its full extent, for that would mean in effect that the shipowners need never perform the contract voyage at all. I do not see, however, how the

court could possibly conclude in the present case that the parties to the bills
 now under consideration, having agreed on the voyage from Vancouver or
 Nanaimo to London or Hull, could not have intended cl. 14 (c) and (f) to take
 effect in accordance with their terms so as to entitle the shipowners, in the
 event (for instance) of a strike at London or Hull making discharge of the timber
 at the named port impracticable, to discharge it at the port of loading or any
 other safe and convenient port, and on doing so to charge the full freight. The
 learned judge appears to have been much impressed by the power to discharge
 at the port of loading and to have thought that this at least must be repugnant.
 I cannot accede to that view. As I have said, it seems to me that if it was open
 to the parties validly to agree to special provisions to meet special emergencies
 such as those contemplated by cl. 14, the nature of these special provisions was
 purely a matter of bargain. The principle relied on by counsel is a principle of
 construction which no doubt makes it easier for the court, in construing a bill
 of lading, to correct or resolve a repugnancy or inconsistency between a special
 condition and a printed general condition than it would be to correct or resolve
 a similar repugnancy or inconsistency between two comparable clauses in a bill
 the whole of which had been specially written out for the purposes of the par-
 ticular transaction in view. Where, however, the two clauses are such that
 they could sensibly and without contradiction stand together as clauses in an
 agreement specially written out for the occasion, there can in my view be no
 warrant for remodelling or rejecting one of them merely because (being a
 printed general condition), it introduces some qualification on the other (being
 a special term of the particular bargain). Even in the deviation cases the court
 allowed the general conditions as to deviation to qualify to some extent the
 obligation of the shipowner to perform the particular voyage agreed on. The
 validity of clauses comparable to cl. 14 (c) and (f) in the present case was assumed
 in *Tillmanns & Co. v. S.S. Knutsford, Ltd.* (5), and *Mongaldai Tea Co., Ltd. v.*
Ellerman Lines, Ltd. (6), and in the latter case GREER, J., said (2 Lloyd's Rep.
 at p. 642):

"If the events which happened in the present case were within that
 clause it would be quite clear the shipowners would be entitled to full freight
 on delivery of the goods in Glasgow."

This observation was no doubt made obiter. Nevertheless it is entitled to respect;
 and I think that if such clauses were indeed invalid it would be remarkable that
 during all the years they have been in use their validity has never before been
 attacked in any reported case so far as the researches of counsel have enabled
 them to discover.

Junior counsel for the plaintiffs suggested that cl. 14 (c) should, as a matter of
 construction, be confined to cases of delay so inordinate as in effect to prevent
 discharge at London or Hull except under what would amount virtually to a
 new contract, and that no such degree of delay was here made out. I see no
 justification for this limited construction of cl. 14 (c), and in any case the point
 not having been taken below the facts necessary for its determination were not
 adequately found or agreed. For these reasons I hold that the first of the two
 grounds on which the learned judge based his conclusion cannot be supported.

As to the other ground, namely, that the disputed provisions are void as
 infringing the Hague Rules, I can find nothing in these rules that imposes any
 stipulation as to the termini of any given voyage, and it seems to me necessarily
 to follow that they leave the parties free to make any bargain they please in
 that regard. The parties could thus, at their option, specify one particular port
 as the terminus ad quem, or one or more alternative ports at the shipowners'
 option, or any port selected by the shipowners on a particular stretch of coast-
 line, or (to come nearer to the present case) a particular port with power to the
 shipowners or the captain to substitute another port selected by them or him in

A certain events. Counsel for the plaintiffs relies on art. III, r. 2, which provides:

“Subject to the provisions of art. IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.”

He says that “properly . . . discharge the goods carried” means “conduct the operation of discharging the goods carried in a proper manner and at the proper place”, and that “properly . . . carry . . . the goods carried” means “carry the goods in a proper manner on the proper voyage”. I think the language of this rule is apt to refer, and does refer, to the proper conduct of the operations of discharging, carrying, etc., rather than to the place at which or voyage on which those operations are to be conducted. If I am wrong in this, however, then the propriety in a geographical sense of the operations in question must depend on the terms of the contract, and the carrying or discharging of the goods is properly conducted in a geographical sense if they are carried to and discharged at the port to and at which they ought to be carried and discharged according to the terms of the contract. It follows, in my opinion, that cl. 14 (c) and (f) of the printed conditions in the present case involve no breach of art. III, r. 2, and consequently are not avoided by the invalidating provision of the rules, namely, art. III, r. 8, even though cl. 14 (c) authorises, in the events therein mentioned, discharge at the port of loading; for, on the assumption that the place is material, discharge at the port of loading is in those events proper by the terms of the contract so far as the place of discharge is concerned, and there is nothing in cl. 14 (c) to absolve the shipowners from their obligation to discharge the goods properly in other respects. Counsel also relied on art. IV, r. 4, which provides:

“Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.”

The argument here is that art. IV, r. 4, by expressly permitting certain deviations impliedly prohibits others, and that cl. 14 (c) of the printed conditions in the present bills of lading authorises deviations beyond those permitted by r. 4. I cannot accept this argument. I think that r. 4 should be construed merely as giving additional protection to shipowners and not as imposing by implication an additional restriction in an article expressed to relate to “rights and immunities.” It may have been inserted *ex abundanti cautela* to ensure that shipowners should not be deprived of any of the immunities given by the article by reason of any deviation of the kinds mentioned in r. 4. If I am wrong in this, however, I do not think that what is authorised by cl. 14 (c) is a deviation. It is a power in certain events to substitute as the port of discharge some other port (which may be the port of loading) for the port of discharge named in the bill of lading. That is a change of terminus, not a deviation from the normal route to the terminus originally fixed, and, as appears from what I have already said, I find nothing in the rules that prohibits such a change of terminus.

It is noteworthy that counsel was constrained to admit that if he was right, cl. 14 (a) and (b) as to war risks and the like must share in the same condemnation as cl. 14 (c) and (f), although it so happened in the present case that cl. 14 (a) and (b) were in substance replaced by the special incorporation of the Chamber of Shipping War Risks cll. 1 and 2 on the face of the bill. I find it unnecessary to express any view on the submission on the defendants’ side that “loss or damage to or in connection with goods” in art. III, r. 8, is confined to physical damage, as this seems to me a somewhat doubtful question, and I think the defendants are entitled to succeed on the other arguments to which I have referred. For the reasons I have stated, I think that the second ground for the learned judge’s

decision in favour of the plaintiffs fails with the first, and, accordingly, that this appeal should be allowed. A

HODSON, L.J.: I also agree. The four bills of lading in question provide that in the events which have happened, that is to say strikes at London and Hull, the master might discharge the cargo at port of loading or any other safe and convenient port, and that this discharge should be deemed due fulfilment of the contract. There is no question but that Hamburg, where the discharge took place, was a safe and convenient port. The plaintiffs contend that this provision, while permitting discharge at Hamburg, does not absolve the defendants from performance of their contract, the main object of which was to carry the cargo from Vancouver or Nanaimo to London or Hull, in consideration of freight. It is said that, there being a conflict between the main object of the contract and the liberty or exception clause, this latter clause must, if necessary, be disregarded so as to give effect to and not to defeat the main object of the contract. **BIGHAM, J.**, in *Hadji Ali Akbar & Sons, Ltd. v. Anglo-Arabian & Persian S.S. Co., Ltd.* (11) used this language (1906) (95 L.T. at p. 613): B C

“No doubt the object of the bill of lading contract is that the plaintiffs shall have their goods carried to London, and if the liberties were of such a kind that if put into operation they would defeat the object, it might be possible to disregard them in construing the document.” D

No doubt if the liberty clause were such as to render the promise to carry the cargo wholly illusory, it would be so repugnant to the main object that it must be disregarded. This provision, however, was, on the face of it, a sensible arrangement to cover, inter alia, what is not an uncommon difficulty in the performance of shipping contracts, namely, that caused by strikes at the ports where goods are loaded or unloaded. In the absence of such a clause questions of difficulty would obviously arise as to what decision the master should take on being faced with a strike in one or other of these ports. Apart from authority, I should have no difficulty in reaching the conclusion that the clause in question provides that there should, in the events which have happened, be an alternative port of discharge to London or Hull and that no principle of the common law prevents such a construction being adopted. As **WRIGHT, J.**, said in *Istros, S.S. Owner v. F. W. Dahlstroem & Co.* (12) ([1931] 1 K.B. at p. 252): E F

“In one sense, every exception clause is pro tanto inconsistent with the primary or express obligations which at law or by contract rest upon an owner or a master in respect of the goods entrusted to his charge and the duties arising under a charterparty, but, notwithstanding those obligations, exceptions clauses must receive in due course, if their language and the circumstances require it, their appropriate effect as a shield to a claim for damages.” G

The question is one of construction, and no authority has been cited which directly supports the contention of the plaintiffs. On the contrary, the authorities point the other way. Clauses of the same character as this have been in existence for many years. In the case of *Glynn v. Margetson* (2) (to which I shall return) the bill of lading, which must have been dated at least as early as 1892, contained such a clause as the record of the House of Lords shows. The clause has already been read, and I will not read it again. In *Tillmanns & Co. v. S.S. Knutsford, Ltd.* (5) the voyage was from London to Vladivostock and the clause in that case was of a similar kind, contained under the heading “Conditions and exceptions” in the bill of lading. The material part of that has also already been read, and I will not repeat it; but I quote the observations of **CHANNELL, J.**, who said ([1908] 1 K.B. at p. 193): H I

“In order to justify delivery at another port the circumstances must be within the words ‘should entry and discharge at a port be deemed by the master unsafe’ . . . ”.

A In the Court of Appeal all the members of the court referred to the clause, by way of citation, without expressing any opinion about it, but certainly throwing no doubt on its validity. A most definite expression of opinion on such a clause was expressed by GREER, J., in *Mongaldai Tea Co., Ltd. v. Ellerman Lines, Ltd.* (6). The bill of lading in that case provided for the carriage of goods from Calcutta to London, and the ship had discharged her cargo not at London but

B at Glasgow. GREER, J., said (2 Lloyd's Rep. at p. 642):

"That is an exception which specifically provides that in certain events not only will the owner of the ship be excused for any breach of contract in delivering the goods, but it also provides for a substituted method of performing the contract when these events happen. If the events which

C happened in the present case were within that clause, it would be quite clear the shipowners would be entitled to full freight on delivery of the goods in Glasgow."

That is a very strong expression, although the learned judge dealt with the matter before him on another ground, for the shipowners were found on the facts not to be within the exception. Indeed, in both *Tillmanns & Co. v. S.S. Knutsford, Ltd.* (5) and *Mongaldai Tea Co., Ltd. v. Ellerman Lines, Ltd.* (6), it was held that the shipowners were not covered by the exceptions clauses, but the point that the clauses were bad was never raised by the experienced counsel who were engaged.

It is said, however, on the authority of the House of Lords in *Glynn v. Margetson* (2) that the result contended for by the plaintiffs follows as a matter of law. I, however, find nothing in that case to compel me to that conclusion.

E It was a case which turned on the construction of a deviation clause which had to be read with the main object of the voyage, namely, the carriage of oranges from Malaga to Liverpool. To quote from VISCOUNT SUMNER's speech in *Frenkel v. MacAndrews & Co., Ltd.* (13) ([1929] A.C. at p. 563):

F "It would have been enough for the decision to have said 'Malaga to Liverpool is not Malaga to Burriana and back to Liverpool'."

The principle of construction on which this decision is based is not confined to bills of lading. In *Margetson's* case (2) in the Court of Appeal FRY, L.J. ([1892] 1 Q.B. at p. 344), set out the general principle to which reference has already been made*. I would only say that I do not find that this principle has any application to this case, for here the primary obligation to deliver in London is, in my view, qualified by the liberty to discharge at a safe and convenient port if the shipowner becomes entitled thereto. Commenting on *Glynn v. Margetson* (2), LORD SUMNER in *Frenkel v. MacAndrews & Co., Ltd.* (13) ([1929] A.C. at p. 562) pointed out that the judgments in that case were directed to the case in hand and were not intended to lay down a general rule to fetter all freedom of contract between shippers and shipowners. It is one thing, in my opinion, to construe general words in a deviation clause as subordinate to the main object of the voyage—that is to say, the carriage of oranges from Malaga to Liverpool—and accordingly to prevent the whole purpose of the contract being defeated: it is another thing to say that the parties are not free to contract

G for an alternative port of discharge in certain circumstances, and to provide for this to be deemed fulfilment of their contract. The latter is what I think the parties have agreed to here; and I am not deterred from recognition of that agreement by the argument advanced by counsel for the plaintiffs that the bill of lading being a document of title handled by bankers and commercial people will in future be looked at askance if the construction for which the shipowners here contend is accepted. Due regard must, of course, be paid to that which

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* See p. 216, letter B, ante.

is on the face of the document; but it is to be remembered that on the face of the document (albeit printed) there appear these words: A

“In accepting this bill of lading the merchant expressly accepts and agrees to all its stipulations, whether written, printed, stamped or otherwise incorporated, as fully as if they were all signed by the merchant.”

Junior counsel for the plaintiffs advanced an alternative argument as follows: B
he asked the court, if not prepared to go the whole way with him and his clients, to give what have been described as the peccant words a restrictive construction, noting that the owners had invoked delay, and on the face of the bills of lading their obligation was to carry to London or so near thereto as the vessel might safely get. He argued that the word “delay”, which appears in cl. 14 (c) of the bill of lading, means delay which is not delay of such a serious and extensive character as to render the performance of this contract at London after delay the performance of a substantially different contract. He stated that if the delay was so great as to amount to a frustration of the contract the shipowners need not wait until the end of the crisis, but he insisted that the word “delay” must be construed strictly against the shipowners, on the analogy of the deviation cases, and urged that nothing had been done in this case by the shipowners to discharge the burden of proving the delay. One answer to that, I think, is that the facts of this case as agreed are really not such as to leave the argument open. It has been assumed on the facts as agreed that either the clause came into operation or it did not, and that there was no half-way house. I think it would be necessary, in order to consider this argument fully, that evidence should be called which would enable it to be properly dealt with. Further than that, I am bound to say that I think the words of cl. 14 (c) and (f) are clear, and that this argument would in any case have failed, for the same reasons as have been given in answer to the main argument advanced by the cargo owners. Moreover, a clause open to attack in that way would be quite futile from the shipowners’ point of view and would not be of any use as part of the contract. C D E

As to the Hague Rules which apply to three of the four bills of lading, I accept the submission of the shipowners as to the proper construction of art. III, r. 2; that is to say, that the words “properly and carefully” relate to the manner and method of carriage and do not carry the implication that the discharge must take place at the port which is named in the bill of lading as the primary destination. This is consistent with what appears to be the object of the rules, and I agree also with the statement which appears in *CARVER’S CARRIAGE OF GOODS BY SEA* (9th Edn.), p. 186, that the object of the rules is to define not the scope of the contract of service, but the terms on which that service is to be performed. Article IV, r. 4, is not, I think, inconsistent with this view, if it is read, as I think it should be, as preserving the rights of the shipowners given by art. IV, r. 2, which might otherwise be open to question but for the provisions of r. 4. I do not regard art. IV, r. 4, as otherwise applicable to this case, since I do not think that what has happened here comes under the heading of “Deviation”; the bill of lading in truth provides for a substituted port of discharge and the shipowners have availed themselves of a liberty to discharge at an alternative port and not of a liberty to deviate. Looking at the whole contract, the voyage to Hamburg was not a deviation but a direct fulfilment of the contract voyage; and I think, as counsel for the defendants submitted, that there is a valid distinction between going off the route and going to a different port. It is accordingly unnecessary to express an opinion as to the meaning of the words in art. III, r. 8—“loss or damage to or in connection with goods”. F G H I

Our attention has been drawn to the dictum of ATKINSON, J., in *Imperial Smelting Corpn. v. Joseph Constantine S.S. Line, Ltd.* (14) ([1940] 2 All E. R. 46) where he expressed an opinion that these words refer only to damages for injury to goods; and also to the observations of VISCOUNT MAUGHAM in the House of Lords in the same case ([1941] 2 All E.R. at p. 179) where he appeared to

A accept the observations of ATKINSON, J.; but neither of those expressions of opinion was necessary for the decision in that case, and the matter, therefore, is open to argument.

Appeal allowed.

B Solicitors: *Richards, Butler & Co.* (for the defendants); *William A. Crump & Son* (for the plaintiffs).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

REGAZZONI v. K. C. SETHIA (1944), LTD.

D [QUEEN'S BENCH DIVISION (Sellers, J.), October 24, 25, 26, 27, 28, November 11, December 19, 1955.]

Contract—Illegality—Enforcement of illegal contract—Contract involving shipment from India contrary to the law of India—Recognition of relevant Indian law. Conflict of Laws—Foreign law—Recognition—Penal, revenue, confiscatory and political laws of foreign country.

E On account of a dispute between India and South Africa about the treatment of Indians in South Africa, the Indian government, by a Regulation made in July, 1946, prohibited the taking by sea or by land out of British India of goods destined for the Union of South Africa or which although destined for a port or place outside the Union of South Africa were intended to be taken to the Union of South Africa. Infringement of the Regulation would render the goods liable to confiscation and the shipper (or person held responsible) liable to a penalty of three times the value of the goods. F In September, 1948, the plaintiff and the defendants entered into an agreement under which the defendants undertook to sell and deliver to the plaintiff in September/October, 1948, c.i.f. Genoa, a quantity of jute bags. G To the knowledge of both parties the goods were to come from India and were required for sale to South Africa. At the time of the making of the contract both parties were aware that the shipment would be contrary to the Regulation of 1946. The defendants failed to deliver the jute bags and the plaintiff claimed damages for their non-delivery. It was agreed that English law governed the contract.

H **Held:** the agreement of 1948 was unenforceable and accordingly the plaintiff could not recover damages, because

(a) the court recognised that in 1948 the shipment of the jute bags from India was illegal, since the Regulation prohibiting such export was not such as would be disregarded in this country as being a penal or revenue enactment, or confiscatory or political and

I (b) the agreement to the knowledge of both parties at the time of contracting could not be performed without violating in a foreign and friendly country, namely, India, the law of that country and was, therefore, unenforceable in English law.

Foster v. Driscoll ([1929] 1 K.B. 470) applied.

[As to impossibility of performance by reason of illegality under foreign law, see 8 HALSBURY'S LAWS (3rd Edn.) 185, para. 319; and for cases on the subject, see 11 DIGEST (Repl.) 441-443, 828-840.]

Cases referred to:

- (1) *Sociedade Portuguesa de Navios Tanques Ltda. v. Hvalfangerselskapet Polaris A/S*, [1952] 1 Lloyd's Rep. 71; 3rd Digest Supp.
- (2) *Frankfurth v. Ezner, Ltd.*, [1947] Ch. 629; [1948] L.J.R. 553; 177 L.T. 257; 11 Digest (Repl.) 612, 422.
- (3) *Ralli Brothers v. Compañía Naviera Sota y Aznar*, [1920] 2 K.B. 287; 89 L.J.K.B. 999; 123 L.T. 375; 11 Digest (Repl.) 435, 791.
- (4) *Foster v. Driscoll*, *Lindsay v. Attfield*, *Lindsay v. Driscoll*, [1929] 1 K.B. 470; 98 L.J.K.B. 282; 140 L.T. 479; 11 Digest (Repl.) 441, 832.
- (5) *Pellecat v. Angell*, (1835), 2 Cr. M. & R. 311; 4 L.J.Ex. 326; 150 E.R. 135; 11 Digest (Repl.) 441, 831.
- (6) *Holman v. Johnson*, (1775), 1 Cowp. 341; 98 E.R. 1120; 11 Digest (Repl.) 325, 16.
- (7) *Chugas v. Penaluna*, (1791), 4 Term Rep. 466; 100 E.R. 1122; 11 Digest (Repl.) 441, 829.
- (8) *Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Akt. & Hungarian General Creditbank*, [1939] 3 All E.R. 38; [1939] 2 K.B. 678; 108 L.J.K.B. 861; 160 L.T. 615; 11 Digest (Repl.) 428, 746.
- (9) *Twentsche Overseas Trading Co., Ltd. v. Uganda Sugar Factory, Ltd.*, (1944), 114 L.J.P.C. 25; 172 L.T. 163; 12 Digest (Repl.) 448, 3384.

Action.

Action for breach of contract. In September, 1948, the plaintiff and the defendants entered into an agreement under which the defendants agreed to sell and deliver to the plaintiff five hundred thousand new B. twills September/October, 1948, c.i.f. Genoa. The goods were required for export to South Africa. The defendants refused to deliver any part of the goods. The facts are fully stated in the judgment.

Neil Lawson, Q.C., and *E. J. Cohn* for the plaintiff.

A. A. Mocatta, Q.C., *R. W. Vick* and *B. P. F. Kenworthy-Browne* for the defendants.

Cur. adv. vult.

Dec. 19. **SELLERS, J.**, read the following judgment: The plaintiff claims damages for the non-delivery of jute bags, and the case is perhaps remarkable for the number and variety of the issues raised in such an action, notwithstanding that some of the pleaded defences were not persisted in at the trial. The first issue is whether a binding contract was entered into in relation to a sale and purchase of jute bags and the issue involves consideration of the terms applicable to the agreement set up by the plaintiff.

I find that in September, 1948, the defendants agreed to sell and deliver to the plaintiff five hundred thousand new B. twills at 248 shillings per hundred B. twills September/October shipment c.i.f. Genoa, payment to be made against shipping documents guaranteed by the banking firm of Messrs. Dreyfus of Basle. The agreement was reached through the agency of Mr. Weil of Basle on behalf of the plaintiff and Mr. Raydt of Hamburg on behalf of the defendants.

Having regard to the further issues which have to be determined, a meeting prior to this contract between Mr. B. L. Sethia, a director of the defendant company at the time, Mr. Weil and Mr. Raydt (with a Mr. Wild as an interpreter) is of importance. The precise date is uncertain, but the meeting was probably in 1947, before August of that year when India became independent. These four persons met in a hotel at Zürich and discussed the possibility of business in jute bags from India, which was the largest and cheapest producer of them. South Africa was a large consuming country of such bags for the purpose of bagging the country's grain crops and the South African government had its own buying agency. At the time of the meeting and throughout the material time of this controversy the Indian authorities, by way of political protest and to

A an extent to be considered later, did not allow the export of jute bags from India to South Africa direct and sought to avoid indirect shipments. On account of this embargo, South Africa was greatly restricted in its purchases of such bags and was prepared to pay high prices for, and to buy practically unlimited quantities of, any bags made available. I feel no doubt that the meeting at Zürich was for the purpose of finding a way to take advantage of this situation. Mr. Sethia

B is an Indian and the defendant company were in touch with Indian shippers of the same name, Sethia, who were relations of the defendants' directors but were trading as a separate company. Mr. Sethia offered to supply jute bags c.i.f. a European port, but did not wish to know "officially" that the consignment would be destined to South Africa. Mr. Weil and Mr. Raydt wanted the goods to be shipped from India to some intermediate port so that sales could be made to

C South Africa on the advantageous terms which were ruling. Mr. Sethia has apparently left the defendant company and was not called at the trial, but I am satisfied that he knew the purpose in mind and that the negotiations leading up to the present dispute were in pursuance of it. There can be no doubt that the plaintiff, who lived in Basle and was in almost daily touch with Mr. Weil, also knew the position fully. [HIS LORDSHIP considered the evidence relating to

D the formation of the contract, and continued:] In my view, the documents sufficiently establish the contract sued on. In reaching this conclusion I have had in mind the various extracts from the authorities to which I was referred and which were conveniently reviewed by McNair, J., in *Sociedade Portuguesa de Navios Tanques Ltda. v. Hvalfangerselskapet Polaris A/S* (1) ([1952] 1 Lloyd's Rep. 71). [HIS LORDSHIP considered other defences, and continued:] The

E final defence raised at the trial was that the contract sued on was invalid and unenforceable by the proper law of the contract (which it was agreed was English law) as its performance involved a breach of Indian law.

Before considering the position in law it is desirable to ascertain from the evidence what prohibitions and restrictions were in force in India at the material time, the contract calling for shipment September/October, 1948. The evidence

F of the Indian law was given by Mr. Joseph Nissim, a member of the English Bar who had held judicial and legal appointments in India and had been legal adviser to the Government of Bombay and to the Government of India.

On account of a dispute which had arisen between India and South Africa about the treatment of Indians in South Africa, the Indian government exercised powers under their Sea Customs Act, 1878, which enable the government by

G notice in the Official Gazette to prohibit or restrict the import or export by sea or land of goods of any specified description. In exercise of those powers a Regulation dated July 17, 1946, prohibited

"the taking by sea or by land out of British India of goods from whatever place arriving which are destined for any port or place in the Union of South Africa or in respect of which the Chief Customs Officer is satisfied that the goods, although destined for a port or place outside the Union of South Africa, are intended to be taken to the Union of South Africa."

H

Under the provisions of the Sea Customs Act, 1878, an infringement of the Regulation would make the goods liable to confiscation and the shipper (or the person held responsible) liable to a penalty of three times the value of the goods. If the

I customs officer felt any suspicion that the Regulation might be violated he could require a bond, under s. 138 of the Sea Customs Act, 1878, as security that the goods would be duly shipped, exported or landed at the place for which they were entered outwards or would be otherwise accounted for to the officer's satisfaction. If a bond had been called for, its terms would have been fulfilled by the bond giver producing a landing certificate for the goods, which apparently would have presented no difficulty.

On June 10, 1947, a notice was given from the Customs House, Calcutta, signed by the Deputy Jute Shipments Co-ordinator, that direct shipments only of jute

and jute goods would be allowed to territories which had a seaboard of their own and which enjoyed direct shipping facilities. In cases where direct shipments were impracticable, necessitating shipment via an intermediary port such as Aden or Port Said, shipments would be permitted only on the condition that the shippers entered into a bond undertaking to produce within three months a certificate of landing from the government of the country of final destination to the effect that the consignments in question had reached the ultimate destination. Failure to produce such a certificate within the time stipulated would render the shipper concerned liable to penal action. This notice would appear to have been given in order to draw attention to the existing law and to indicate the manner of its enforcement. As it was obligatory for a shipper to ship direct to the ultimate port of destination (except where impracticable) the customs authority could enforce more readily the prohibition against shipments to South Africa. At all material times the export of jute goods to all destinations was subject to an export licence issued by the Indian government, and it would seem that through the necessity for the export licence the provisions of this export control could be enforced.

Mr. Nissim said that in his view the Indian authorities in administering the prohibition for export to South Africa indirectly were not acting on mere suspicion and were freely issuing licences for export to Genoa, not wishing to interfere too much with a vital export from India. That is hardly a matter of law, but he said also that mere knowledge or suspicion that the goods might go to South Africa would not affect the shipper. It would seem that the question would arise on the shipper's application for an export licence and whether he could faithfully state what was the destination of the goods. As far as confiscation of the goods is concerned, the right would appear to depend on what in fact was the destination of the goods, whether the shipper knew of it or not.

Reference was made to s. 56 of the Indian Contract Act, 1872, and that part of it which provides as follows:

"where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

In my view that provision would not have benefited either of the parties to this action in a suit in India against the Indian shipper, if such could be envisaged, as I am clearly of opinion that both of the parties were well aware of the restrictions and that it would have been unlawful for the shipper to export directly or indirectly to South Africa. It was not, however, unlawful for goods to be shipped to European ports, either Genoa or Hamburg, and there appear to have been legitimate quotas allocated for these ports and to some extent additional quotas to shippers who could obtain an export licence and lawfully ship. A shipment, however, to these ports would have been contrary to the Regulation and therefore illegal if it had in fact, for its ultimate destination, South Africa.

There is no evidence that the proposed shippers, of whom little was said at the trial, knew of the intended ultimate destination of the goods in question. The defendants either told the shippers, which is perhaps unlikely, or concealed from them the destination of the goods and in any case, if the contract had been fulfilled, there would have been released from India goods which, if the true facts had been known by or revealed to the authorities, would have been prohibited from export. Both parties to this contract contemplated and intended that the contract goods should be shipped from India and be made available in Genoa so that the plaintiff might make a re-sale or fulfil a bargain of re-sale to the South African buying agency. That had been decided generally by the agents and Mr. B. L. Sethia at Zürich. Not only was India the source of supply discussed at their meeting, but that India was to be the source of supply is indicated

- A although that is not conclusive by the high price, and is supported by the evidence of Mr. Young that, at the time of the contract, India would have been the only source of supply for a contract of five hundred thousand bags for fairly prompt delivery and not spread over a very long time. On the other hand, the contract, no doubt for good reason, did not expressly state that the goods were to be of Indian origin and a delivery of the specified quantity of B. twills c.i.f. Genoa
- B would have been a good delivery from whatever source they had come.

It is in these circumstances that the question has to be considered whether the contract is to be treated as unenforceable in these courts.

- I reject counsel for the plaintiff's submission that the prohibiting Regulation is to be regarded as either a penal or a revenue enactment (although infringement of the Regulation might involve penalties and fines which would enhance the revenue) or to be regarded as confiscatory (as, for example, in *Frankfurter v. Erner, Ltd.* (2), [1947] Ch. 629) so that these courts would not give effect to it. Restrictions on trade, both ingoing and outgoing, have been imposed by many, if not all, countries on a variety of commodities and for varying reasons. For instance, in *Ralli Brothers v. Compañía Naviera Sota y Aznar* (3) ([1920] 2 K.B. 287) SCRUTTON, L.J., states (*ibid.*, at p. 298) that the Spanish decree which
- D fixed the maximum freight on jute imported into Spain appeared to be part of a system for keeping down the price of goods essential for national welfare by, amongst other means, fixing the freight on goods coming into Spain. Penal consequences followed infractions of those laws. The court held the Spanish decree to be effective and as it made the payment of freight above 875 pesetas per ton illegal that part of the contract which required the payment of freight
- E in excess of that amount was invalid and could not be enforced against the charterers.

It was submitted before me, however, that the Indian prohibition was a "political" law which our courts would disregard. Reference was made to DICEY'S r. 22 which states that the court has no jurisdiction at all to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue or political law of a foreign state (DICEY'S CONFLICT OF LAWS (6th Edn.), p. 152). It is stated (at p. 155):

"There is a marked tendency, by no means confined to the courts of England, to construe foreign legislation of a political and confiscatory character as restrictively as possible, for example by construing it as operating only within the territory of the sovereign."

- G The prohibition here does only operate in India. Can it be disregarded as being "political"? If "political" is to be interpreted as comparable to "confiscatory", this Indian law was not that. It was argued that the motive behind the prohibition made it a "political" law which our courts would disregard, and especially so as India and South Africa are both within the British Commonwealth of Nations. I reject the argument. I would be most reluctant to enter
- H on a delicate and perhaps distasteful inquiry into another country's motives for its legislation within its own realm, unless there were the most compelling necessity.

In a New York case* (cited in CHESHIRE, PRIVATE INTERNATIONAL LAW (4th Edn.), p. 143) CARDOZÁ, J., said:

- I "... We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home . . . The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent concept of good morals, some deep rooted tradition of the common weal."

* *Louches v. Standard Oil Co. of New York* (1918), 224 N.Y. 99.

It may be recalled that Art. XVI of the League of Nations Covenant, 1919, A recognised internationally what have been called "economic sanctions". I see no reason to condemn the Indian Regulation as a "political" law which this country would disregard. In my judgment, this court ought to recognise that in September/October, 1948, it was illegal for an Indian shipper to export jute fabrics from India where the ultimate destination was the Union of South Africa. B The vital question for consideration is whether that fact makes the contract sued on unenforceable.

The defendants' case was advanced on the basis of the majority decision and the statements of the law in *Foster v. Driscoll* (4) ([1929] 1 K.B. 470). The three cases which were tried together in that action revealed a complicated set of facts relating to an attempt to load a cargo of whisky into a ship to be carried across the Atlantic and sold in the United States of America or on the high seas closely adjacent at some point from which it could easily be smuggled into the United States of America in violation of the laws of that country. SCRUTTON, L.J., and WRIGHT, J., the trial judge, held that, as the whisky might have been sold in Canada or Nova Scotia or on the high seas without any breach by the parties of the law of the United States against the importation of alcohol, the agreement or the scheme of the parties was valid; but the majority of the Court of Appeal (LAWRENCE and SANKEY, L.J.J.) held that the facts established an illegal joint adventure which our courts would not enforce. I cite the following extracts from the judgments. SANKEY, L.J., said (*ibid.*, at p. 518): C

"In my view the present position of the law is that the mere fact that a vendor of goods knows that the purchaser proposes to run them into a country where they are prohibited by some revenue law is not sufficient to render the contract of sale illegal, but if beyond mere knowledge the vendor actively engages in an adventure to get the goods into such country, the court will not assist the parties to the adventure by entertaining or settling any dispute between the parties arising out of the contract. Even if these principles as to revenue laws are to stand, I can see no ground for extending them, as it seems to me we must if we decide in favour of the present appellant or, indeed, for holding that they are applicable to the facts of the present case. Two facts differentiate the present case: (1) The American law which it was proposed to infringe in the present case was no mere revenue law; it was intended to prevent a *malum in se* rather than a *malum prohibitum*. (2) The parties concerned have taken an active part in the adventure, a distinction which the court dwelt upon in *Pellecat v. Angell* (5) (1835) (2 Cr. M. & R. 311). I can find no case which compels this court to hold that it must or ought to entertain a dispute upon a contract made between parties to further an adventure to break the laws of a foreign state, which as above pointed out are not mere revenue laws. It is true that such a contract has not been made illegal by any English statute, nor does it subject persons making such a contract to the penalties provided, for example, in cases which come under the Foreign Enlistment Act, but none the less I think that the courts of this country are not bound to entertain such actions in view of the obligations of international comity, as now understood." D E F G H

SANKEY, L.J., also said (*ibid.*, at p. 521): I

"To sum up, in my view an English contract should and will be held invalid on account of illegality if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country notwithstanding the fact that there may be, in a certain event, alternative modes or places of performing which permit the contract to be performed legally."

A I now read an extract from the judgment of SCRUTTON, L.J. (ibid., at p. 495):

“ The main contract is for the sale of whisky in the British Isles between British subjects for a price to be paid by bills in England. There seems no doubt that this by itself is legal and that the fact that the seller knows the buyer intends to smuggle the goods into the United States does not make it illegal; see per LORD MANSFIELD in *Holman v. Johnson* (6) (1775) (1 Cowp. 341) where the seller in Dunkirk knew that the buyer intended to smuggle the goods into England. In this case LORD MANSFIELD declined to give effect to the laws of his own country. It is different where the seller, besides knowing the purpose, assists in the purpose, as in *Clugas v. Penultima* (7) (1791) (4 Term Rep. 466), where the seller in Guernsey packed the goods in such a way as to assist smuggling into England, and BULLER, J., made this assistance, and GROSE, J., the collusion, the ground of their decision. I have no doubt that if the seller and buyer agreed to ship the whisky into the United States contrary to the laws of that country the contract would not be enforced here: *Ralli Brothers v. Compañía Naviera Sota y Aznar* (3), not because it was illegal here but as a matter of public policy based on international comity. On the other hand, if the adventure was to import into Canada and there sell to some person with the knowledge that he was going to import into the United States, I do not think, following LORD MANSFIELD’s decision, that the courts would treat this as contrary to public policy.”

Both sides claimed support from the later case of *Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Akt. & Hungarian General Creditbank* (8) ([1939] 3 All E.R. 38), in which it was held that since the contract was to be performed in England it was enforceable in the English courts, even although its performance might involve a breach by the defendants of the law of Hungary. No question of any performance of the contract in Hungary arose. It was a contract to do something in England. Apart from robust emphasis that it is an elementary principle of English law that people should keep their contracts and carry them out, I do not think the case has any bearing on the present controversy.

For the plaintiff reliance was placed on *Twentsche Overseas Trading Co., Ltd. v. Uganda Sugar Factory, Ltd.* (9) (1944) (172 L.T. 163), but that case was decided by the Judicial Committee of the Privy Council on the basis that the parties did not contract on the footing or common assumption that the goods sold would come only from Germany. If the correct view of the present case is that the parties did not contract on the footing or common assumption that the jute bags were to come from India, then the contract did not necessitate any violation of the law of India and no question arises. If, on the other hand, the contrary is the position, *Twentsche Overseas Trading Co., Ltd. v. Uganda Sugar Factory, Ltd.* (9) is clearly distinguished.

At the beginning of this judgment I stated that the meeting at Zürich in 1947 was important. The success of the business venture contemplated at that meeting depended on Mr. B. L. Sethia, through the defendant company (which he then appeared to control, or at least of which he was an active director) obtaining supplies of jute bags from Indian shippers so that they could be re-sold to South Africa. The fulfilment of the contract sued on by the plaintiff involved to the knowledge and intention of both the parties a violation of the law of India prohibiting their export. The correspondence reveals that the nature of the transaction was fully understood; it was not regarded as very creditable; its “difficulties” were fully recognised; but the profits to be obtained were high. They were made high by the very restriction which the parties were seeking to have broken by some shipper and were to be achieved only by the shipper’s success in deluding the Indian control. In my opinion, this transaction falls into a category similar to that of the whisky-running to the United States of America during the time of the prohibition there and in violation of the laws of the United

States (*Foster v. Driscoll* (4)). There the venture was to get a prohibited commodity into the United States by finding someone, when the cargo was sufficiently close to the coast, to take or smuggle it into the country and so earn high profits. Here the venture was dependent on someone getting out of the country the prohibited commodity which would fulfil this contract and enable the plaintiff in his turn to steal a march on lawful traders and make his profit out of the urgent demand of South Africa for jute bags. The trial judge in *Foster v. Driscoll* (4), WRIGHT, J., and SCRUTTON, L.J., thought that the whisky might have been lawfully sold to Canada and would have upheld the agreement as it could have been lawfully performed. In the present case I find that there was in effect no chance of the contract being fulfilled unless the jute bags escaped the Indian control and no intention that it should be otherwise carried out.

It may be that to hold a contract unenforceable because it takes advantage of a situation such as this can be taken too far. It could be said that the plaintiff did not actively engage to get the goods out of India, that he left that to the defendants and that he was a mere buyer with knowledge of the origin of the goods and of the prohibition which, having regard to their ultimate destination, attached to them. That view might be said to be supported by the passage in the judgment of SANKEY, L.J., in *Foster v. Driscoll* (4) ([1929] 1 K.B. at p. 518) which I have cited previously*. The facts of this case, as I have found them, go, I think, beyond the circumstances contemplated in that passage, quite apart from its application only to revenue law, since the whole transaction here emanated from the original agreement in Zürich and was a fulfilment of it. Those discussions left it to the defendants to find a way of getting the goods out of India in face of the control and to provide the plaintiff as buyer with the means of reaping the reward of their success.

In my judgment, this contract to the knowledge of both parties at the time of contracting could not in fact have been performed without the performance in a foreign and friendly country of an act which was illegal by the law of that country, and I must hold the contract to be invalid and unenforceable.

Judgment for the defendants.

Solicitors: *Buckeridge & Braune* (for the plaintiff); *Stuart Hunt & Co.* (for the defendants).

[Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.]

* See p. 234, letters E to H, ante.

MILLER v. EMCER PRODUCTS, LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.J.J.),
December 1, 2, 5, 6, 20, 1955.]

Landlord and Tenant—Covenant—Breach—Covenant for quiet enjoyment—Express covenant's effect as excluding implied covenants.

Easement—Right to lavatory accommodation—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 1 (2) (a).

By a sub-underlease (called herein "the underlease") dated Feb. 6, 1950, the landlords demised to the tenant for a term of years "four rooms or offices comprising the ground floor of the messuage or building known as Groveland House . . . (hereinafter called 'the said premises') " together with the right for the tenant to use "in common with the landlords and superior landlords and all persons authorised by them and the other tenants of Groveland House aforesaid the lavatories on the first and second floors thereof and for that purpose and no other to pass and repass along the staircase leading from the said premises to the said lavatories . . ." The underlease contained the following covenant for quiet enjoyment: "That if the tenant shall duly pay the rent hereby reserved and shall duly perform and observe the covenants . . . the tenant shall and may peaceably and quietly hold and enjoy the said premises during the term hereby created without any interruption by the landlords or the superior landlords [E. Ltd.] or any person rightfully claiming under or in trust for it or them". The use of the lavatory on the second floor was denied to the tenant by the tenants (S. & Sons) of another part of Groveland House who claimed under a title paramount to that both of the landlords and E. Ltd. The lease to S. & Sons was granted in 1939 and by it they had been granted exclusive use of the lavatory on the second floor. The tenant claimed damages against the landlords for breach of the landlords' implied covenant for title, and alternatively for breach of an implied covenant on the part of the landlords that they would put the tenant in possession or enjoyment of the right to use the lavatory.

Held: (i) the tenant was not entitled to damages because—

(a) no covenant for title was implied in the underlease since the express covenant for quiet enjoyment extended, on the true construction of the underlease, to all the property demised (including the right to use the lavatories), and the presence of the express covenant excluded the implication of any covenant as to title or for quiet enjoyment (*Line v. Stephenson* (1838), 5 Bing. N.C. 183, applied; see p. 242, letter H, p. 244, letter D, post), and

(b) an obligation, independent of any express covenant for quiet enjoyment, to put the tenant into possession of the right to the lavatory accommodation did not arise, since in the present case there was a formal instrument of demise, viz., the underlease (*Coe v. Clay* (1829), 5 Bing. 440 and *Jinks v. Edwards* (1856), 11 Exch. 775, distinguished, and *Line v. Stephenson* (1838), 5 Bing. N.C. 183, applied; see p. 244, letter A, post).

(ii) the right to use the lavatory accommodation in common with other authorised persons was an easement created at law within s. 1 (2) of the Law of Property Act, 1925 (*Heywood v. Mallalieu* (1883), 25 Ch.D. 357, considered, and *Copeland v. Greenhalf*, [1952] 1 All E.R. 809, distinguished; see p. 241, letter A, post).

Per CURIAM: it is highly questionable whether the principle which governed *Coe v. Clay* (1829) (5 Bing. 440) and *Jinks v. Edwards* (1856) (11 Exch. 775), that is to say, the principle that a lessor impliedly contracts to give to the lessee possession of the property demised at the beginning of the term, can have any application to an easement such as a right to use

lavatory accommodation in common with other people (see p. 242, letter C, A post).

Appeal dismissed.

[As to the implication of covenants for quiet enjoyment and for title, see 20 HALSBURY'S LAWS (2nd Edn.) 241-243, paras. 268-270; and for cases on the subject, see 31 DIGEST (Repl.) 132-134, 2696-2724.

As to the characteristics of an easement, see 12 HALSBURY'S LAWS (3rd Edn.) 527-529, paras. 1143-1145; and for cases on the subject, see 19 DIGEST 9-12, 16, 17, 6-19, 42-48.]

Cases referred to:

- (1) *Copeland v. Greenhalf*, [1952] 1 All E.R. 809; [1952] Ch. 488; 3rd Digest Supp. C
- (2) *Heywood v. Mallalieu*, (1883), 25 Ch.D. 357; 53 L.J.Ch. 492; 49 L.T. 658; 40 Digest 108, 858.
- (3) *Coe v. Clay*, (1829), 5 Bing. 440; 7 L.J.O.S.C.P. 162; 130 E.R. 1131; 31 Digest (Repl.) 132, 2699.
- (4) *Jinks v. Edwards*, (1856), 11 Exch. 775; 26 L.T.O.S. 276; 20 J.P. 184; 156 E.R. 1045; 30 Digest (Repl.) 461, 1031. D
- (5) *Drury v. Macnamara*, (1855), 5 E. & B. 612; 25 L.J.Q.B. 5; 26 L.T.O.S. 74; 119 E.R. 608; 30 Digest (Repl.) 489, 1334.
- (6) *Burnett v. Lynch*, (1826), 5 B. & C. 589; 4 L.J.O.S.K.B. 274; 108 E.R. 220; 31 Digest (Repl.) 133, 2714.
- (7) *Hart v. Windsor*, (1844), 12 M. & W. 68; 13 L.J.Ex. 129; 2 L.T.O.S. 440; 8 J.P. 233; 152 E.R. 1114; 31 Digest (Repl.) 133, 2716. E
- (8) *Line v. Stephenson*, (1838), 4 Bing. N.C. 678; 132 E.R. 950; *affd.* Exch. Ch., (1838), 5 Bing. N.C. 183; 132 E.R. 1075; 31 Digest (Repl.) 131, 2685.
- (9) *Wallis v. Hands*, [1893] 2 Ch. 75; 62 L.J.Ch. 586; 68 L.T. 428; 31 Digest (Repl.) 141, 2800.
- (10) *Bandy v. Cartwright*, (1853), 8 Exch. 913; 22 L.J.Ex. 285; 21 L.T.O.S. 196; 155 E.R. 1624; 31 Digest (Repl.) 132, 2701. F
- (11) *Markham v. Paget*, [1908] 1 Ch. 697; 77 L.J.Ch. 451; 98 L.T. 605; 31 Digest (Repl.) 134, 2724.
- (12) *Ludwell v. Newman*, (1795), 6 Term Rep. 458; 101 E.R. 647; 31 Digest (Repl.) 147, 2855. G

Appeal.

Appeal by the plaintiff, the sub-undertenant of part of a building, from an order of DANCKWERTS, J., dated July 25, 1955, dismissing the plaintiff's action for damages for alleged breaches by the defendants, his immediate landlords, of covenants contained by implication in his underlease.

J. A. Plowman, Q.C., and *H. E. Francis* for the plaintiff tenant. H

J. G. Strangman, Q.C., and *D. S. Chetwood* for the defendant landlords.

Cur. adv. vult.

Dec. 20. **SIR RAYMOND EVERSHED, M.R.:** In this case I have had the advantage of reading in advance the judgment which ROMER, L.J., has prepared. I agree with it, and do not desire to add anything of my own. I

BIRKETT, L.J.: I, too, have had the same opportunity, and I make the same observations as those made by my Lord.

ROMER, L.J.: This is an appeal from an order of DANCKWERTS, J., whereby he dismissed the plaintiff's action against the defendants, who are his landlords, for damages for an alleged breach of covenant.

By a sub-underlease (hereinafter referred to as "the underlease") dated

A Feb. 6, 1950, the defendants (herein called "the landlords") granted a tenancy to the plaintiff in the following terms:

B "1. The landlord hereby demises unto the tenant all those the four
rooms or offices comprising the ground floor of the messuage or building
known as Groveland House No. 12 Bow Church Yard in the City of London
(hereinafter called 'the said premises') together with the landlords' fixtures
and fittings in and about the said premises And together also with the right
for the tenant to use in common with the landlords and superior landlords
and all persons authorised by them and the other tenants of Groveland
House aforesaid the lavatories on the first and second floors thereof and for
that purpose and no other to pass and repass along the staircase leading
C from the said premises to the said lavatories to hold the same unto the
tenant from the date hereof until June 18, 1961, yielding And paying
therefor during the said term yearly and proportionately for any fraction of
a year the clear yearly rent of £625 by equal quarterly payments in advance
on the usual quarter days in every year the first of such payments being in
respect of the period from the date hereof to Mar. 25, 1950, to become due
D and payable on the date hereof And also paying as additional rent a sum
equivalent to the annual premium required to insure two years rent of the
said premises such additional rent to be paid on the quarter day next
following the payment of such premium."

Clause 3 (3) of the underlease contained the following covenant for quiet
enjoyment by the landlords:

E "That if the tenant shall duly pay the rent hereby reserved and shall duly
perform and observe the covenants on the part of the tenant hereinbefore
contained the tenant shall and may peaceably and quietly hold and enjoy
the said premises during the term hereby created without any interruption
by the landlords or the superior landlords or any person rightfully claiming
under or in trust for it or them."

F The "superior landlords" referred to in this sub-clause were the Englefield
Trading Co., Ltd. This company had granted to the landlords on Apr. 9, 1948,
an underlease from Mar. 25, 1948, until June 21, 1961, and the parcels thereby
demised were precisely the same, including the right to use the lavatories on the
first and second floors, as those comprised in cl. 1 of the underlease of Feb. 6,
G 1950. There are no lavatories in No. 12 Bow Church Yard other than these two.
When the plaintiff (hereinafter called "the tenant") entered into possession of
the demised premises on Mar. 1, 1950, he found that these lavatories were
locked. He thereupon communicated with the landlords' agents, and as a result
the first floor lavatory was unlocked, and thenceforward the tenant had the use
of it. It was, however, highly inconvenient for the tenant, whose staff consisted
H of both men and women, to have only one lavatory available, and arrangements
were made whereby further lavatory accommodation was temporarily placed
at his disposal in the adjoining building, No. 11 Bow Church Yard. He was,
however, never able to make use of the lavatory on the second floor which, as
subsequently transpired, had been included in a very much earlier lease granted
in 1939 under a title anterior to that of the Englefield Trading Co., Ltd. A firm of
I chartered accountants, Messrs. B. A. Smith & Son, were at all material times in
possession of the premises comprised in the 1939 lease under a title derived there-
from, and a partner in that firm said in evidence at the trial of this action that
they always kept the second floor lavatory locked, and that his firm and their
employees had the exclusive use of it. He also said that they had and exercised
the right, in common with others, to use the lavatory on the first floor. Having
regard to the manifest inconvenience and trouble to which the tenant was put
by his inability to exercise the right, which had been granted to him by the under-
lease, to use the second floor lavatory, he issued a writ on July 16, 1954, claiming

damages for breach of the landlords' implied covenant for title. The tenant could not, of course, sue on the covenant for quiet enjoyment which was contained in the underlease for that covenant was in a qualified form and limited the landlords' liability to interruption by themselves or the Englefield Trading Co., Ltd., or persons claiming under them or it, and Messrs. Smith, who claimed under a paramount title, were not within this category of persons.

By para. 3 (as amended) of his statement of claim, the tenant pleaded his case as follows:

"There was and is implied in the said sub-underlease a covenant on the part of the defendants that they had and have a good right or title to demise to the plaintiff the right to use the said lavatories in common with the defendants and their superior landlords and all persons authorised by them and the other tenants of Groveland House aforesaid for the term granted by the said sub-underlease. Further or alternatively there was and is implied in the said sub-underlease a covenant on the part of the defendants that they would put the plaintiff in possession or enjoyment of the right to use the said lavatories in manner aforesaid."

By para. 4 the tenant alleged a breach by the landlords of the implied covenants mentioned in para. 3, and he claimed damages accordingly. The landlords' defence was, in substance, that their express covenant for quiet enjoyment in cl. 3 (3) of the underlease excluded any such implied covenants as those alleged in para. 3 of the amended statement of claim. DANCKWERTS, J., upheld this contention of the landlords and dismissed the tenant's action.

Before turning to the principal questions of law which were argued before us, it is convenient to deal with two preliminary matters, viz., as to the legal quality of the right granted by the underlease to use the lavatories, and whether this right formed part of "the said premises" to which the landlords' covenant for quiet enjoyment related.

As to the first point, it was suggested that inasmuch as the landlords had no title to grant to the tenant the right to use the lavatory on the second floor of the premises, the purported grant of this right amounted to no more than an agreement to grant a licence or an easement, and that the tenant is entitled to damages for breach of this agreement. This way of presenting the case was not in fact pleaded in the statement of claim, but I am in any case unable to accept it. In my opinion it is impossible to construe the express grant to use the lavatories as a contract to make a grant in the future merely because it subsequently transpired that the landlords had no title. The landlords thought that they were in a position to grant this right and unequivocally attempted to do so, and no question of an agreement to grant some interest in the future arises; nor, in my opinion, is any such agreement to be implied in law. The question remains, however, as to the nature of the right which the landlords purported to include in the demise, and, in particular whether it was a licence or an easement? In my judgment, the right had all the requisite characteristics of an easement. There is no doubt what were intended to be the dominant and servient tenements respectively, and the right was appurtenant to the former and calculated to enhance its beneficial use and enjoyment. It is true that during the times when the dominant owner exercised the right, the owner of the servient tenement would be excluded, but this in greater or less degree is a common feature of many easements (e.g., rights of way) and does not amount to such an ouster of the servient owner's rights as was held by UPJOHN, J., to be incompatible with a legal easement in *Copeland v. Greenhalf* (1) ([1952] 1 All E.R. 809). No case precisely in point on this issue was brought to our attention, but the right to use a lavatory is not dissimilar, I think, to the right to use a neighbour's kitchen for washing, the validity of which as an easement was assumed without question in *Heywood v. Mallalieu* (2) (1883) (25 Ch.D. 357). No objection can fairly be made based on uncertainty, and it follows, in my judgment, that the right may properly be

A regarded as an easement which the landlords were professing to grant for a term of years; and such an easement would rank as an interest in or over land capable of being created at law by virtue of the Law of Property Act, 1925, s. 1 (2) (a).

The next question is whether this easement which the landlords purported to grant is within the covenant for quiet enjoyment in cl. 3 (3) of the underlease, and this depends on whether it comes within the words "the said premises" as
B therein used. The tenant contends that it does not on the ground that by cl. 1 of the underlease it is only the four rooms or offices comprising the ground floor of No. 12 Bow Church Yard which are "hereinafter called 'the said premises'", and that the right to use the lavatories is accordingly excluded from that phrase when it appears in cl. 3 (3). If so, it would follow that the landlords' fixtures and fittings, which were included in the demise, would be similarly excluded.
C In my opinion, however, "the said premises" in cl. 3 (3) include the whole subject-matter of the demise notwithstanding the definition which appears in cl. 1. Although many of the provisions of the underlease related only to the rooms or offices, and it was therefore convenient to refer to them under the compendious description of "the said premises", that phrase as used in other contexts (e.g., in the provision for payment of additional rent at the end of cl. 1)
D requires an interpretation co-extensive with the whole subject-matter of the underlease; and I have little doubt that such an interpretation should be put on the phrase in cl. 3 (3). In my judgment, accordingly, the easement which the landlords purported to grant to the tenant in relation to the lavatories is within the covenant for quiet enjoyment.

These conclusions being then adverse to the tenant, counsel's main argument
E on his behalf may be summarised in brief as follows: (i) The landlords were under an obligation (to be implied from the relationship of landlord and tenant) to put the tenant into possession of the premises demised. (ii) These premises included the easement to use the lavatories. (iii) The obligation remains unaffected by the express covenant for quiet enjoyment in cl. 3 (3) of the underlease. (iv) The landlords have failed to fulfil the obligation, and must therefore pay
F damages to the tenant.

As to the first point, the tenant founds himself on the principle of law which is stated in WOODFALL ON LANDLORD AND TENANT (25th Edn.), p. 673, in the following terms:

"Where there is an actual demise for one year or more, the lessor impliedly
G contracts to give the lessee possession at the commencement of the term, and if he fails to do so, by reason of a previous tenant wrongfully holding over, the lessee may recover damages, and is not driven to bring ejectment against the previous tenant."

This passage (to which the learned judge himself referred in his judgment) receives undoubted support from the two cases to which the author refers,
H viz., *Coe v. Clay* (3) (1829) (5 Bing. 440) and *Jinks v. Edwards* (4) (1856) (11 Exch. 775). In the former of these cases the defendant had agreed to let to the plaintiff certain premises per verba de praesenti, and the plaintiff, being unable to get possession because a preceding occupier wrongfully refused to quit, sued the defendant for damages. The defendant's case was that as the plaintiff had an interest on which he might have brought an ejectment, he had shown no
I breach by the defendant. A verdict was, however, found for the plaintiff, and the Court of Common Pleas refused a motion to set it aside. The reporter says (5 Bing. at p. 440):

"The court were all clearly of opinion, that he who lets, agrees to give possession, and not merely to give a chance of a law suit . . ."

In *Jinks v. Edwards* (4) by an agreement in writing the defendants agreed to let to the plaintiff certain premises for one year from Sept. 29, 1854, and so on from year to year. The plaintiff sued the defendants alleging a failure or refusal by

them to give or let the plaintiff into possession on the agreed date or subsequently. The defendants demurred on the ground that the agreement did not contain any contract on the part of the defendants to give the plaintiff possession of the premises. The authority of *Coe v. Clay* (3) to the effect that every person who lets premises impliedly undertakes to give possession of them was challenged by SERJEANT HAYES in supporting the demurrer who argued (11 Exch. at p. 775):

“That doctrine cannot be supported. In *Drury v. Macnamara* (5) (1855) (5 E. & B. 612) LORD CAMPBELL, C.J., points out that the foundation of the judgment in *Coe v. Clay* (3) was, that the instrument operated as a lease.”

ALDERSON, B., interjected: “It is the same here”. The court held that the case of *Coe v. Clay* (3) was directly in point, and that there must be judgment for the plaintiff.

It appears to me, apart altogether from other considerations, to be highly questionable whether the principle which governed these two cases can have any application to an easement such as the right to use lavatory accommodation in common with other people. The principle is readily intelligible in relation to property such as a dwelling-house and land which are let to a tenant, for so long as some third party insists on occupying the property or some material part thereof the tenant is either wholly or partially ousted from the exclusive possession to which, under his tenancy, he is *prima facie* entitled. In the present case the tenant was in fact put in exclusive possession of all that part of the subject-matter of the grant to the exclusive possession of which he was, by the terms of the grant, entitled. In the case, however, of a right merely to share the use of a part of premises—be it the lavatory, bathroom, kitchen or any other room—no question of exclusive possession can arise, and, therefore, a landlord is neither able nor obliged to put his tenant in sole possession of that part at the beginning of the tenancy. It is, however, unnecessary to express a concluded view on this point for the principle of *Coe v. Clay* (3) does not, in my judgment, apply to the present case for an altogether different reason.

It has long been established that if a lessor demises property to a tenant and enters into no express covenants for title or for quiet enjoyment, certain promises are implied by him by force of the word “demise”, viz., that he is entitled to grant some term in the demised premises, and that the lessee shall have quiet enjoyment of the premises: *Burnett v. Lynch* (6) (1826) (5 B. & C. at p. 609); *Hart v. Windsor* (7) (1844) (12 M. & W. at p. 85). It was pointed out in *Line v. Stephenson* (8) (1838) (4 Bing. N.C. 678; 5 Bing. N.C. 183) that these promises are more properly to be regarded as embodied in one single implied covenant, and that this covenant may be broken either by want of title or by the eviction of the tenant. It was also, however, decided in *Line v. Stephenson* (8) that there is no room for the implication of the covenant in a demise if the lessor enters into an express covenant for quiet enjoyment. The reason for this is that an express covenant as to one branch of the covenant implied by the word “demise” excludes the other, on the principle *expressio unius est exclusio alterius*: per LORD ABINGER, C.B. (5 Bing. N.C. at p. 184).

Accordingly in the underlease now in question there can be no implied covenant by the landlords either as to title or for quiet enjoyment. Counsel for the tenant conceded this, but he contended that the implied promise by a lessor to put his tenant into possession at the commencement of the tenancy, which was recognised in *Coe v. Clay* (3), has an existence of its own which is independent of the covenant either for title or for quiet enjoyment, and which is accordingly unaffected by the principle of *Line v. Stephenson* (8). Counsel argued in the alternative that that principle only displaces implied covenants which are in *pari materia* with covenants for title and for quiet enjoyment, and that such cannot be said of the obligation in *Coe v. Clay* (3). As to the former of these submissions he relied on a passage in the judgment of CHITTY, J., in *Wallis v. Hands* (9) ([1893] 2 Ch. 75). In that case the plaintiff in 1887 took a lease of certain minerals which, to his

A knowledge, had already been included in a lease to other parties which had been granted in 1884. The plaintiff never entered into possession under the lease of 1887, although it purported to be a lease in possession, and in 1888 the lessees of the lease of 1884 assigned the term thereby demised. The plaintiff then brought an action against the assigns in order to establish the priority of his own title over them and against his lessor on the implied covenant for quiet enjoyment, for the lease of 1887 contained no express covenant in that behalf. CHITTY, J., held that in the circumstances the plaintiff had no more than an interesse termini, and accordingly could not maintain an action on the implied covenant. The decision on this point has in effect been overruled by s. 149 of the Law of Property Act, 1925, which abolished the doctrine of interesse termini. In so far, therefore, as the decisions in *Coe v. Clay* (3) and *Jinks v. Edwards* (4) may have depended on the view that any covenant for quiet enjoyment, whether express or implied, could not be asserted by a tenant before actual entry, the basis of the decisions has been taken away by the Law of Property Act, 1925, since it is provided in terms by s. 149 (2) of that Act that a lease operates from the date fixed for commencement of the term without actual entry. In the course of his judgment on this matter, however, CHITTY, J., expressed himself as follows

D ([1893] 2 Ch. at p. 85):

“ The law provides a person having an interesse termini with an adequate remedy against the grantor of the term, without there being any necessity to have recourse to an action on the covenant for quiet enjoyment; he can bring an action against the grantor of the term for not putting him in possession: see *Coe v. Clay* (3) and *Jinks v. Edwards* (4). This right of action is also founded on implied covenant. The present action is not to enforce any such right; nor are there any facts proved which would give rise to it.”

E Counsel for the tenant submitted accordingly on that that the learned judge was expressing the view that the *Coe v. Clay* (3) obligation (if I may so describe it) has in any event a distinct operation from that of the covenant for quiet enjoyment, and imposes on the landlords a liability separate from that which arises under the latter covenant. The isolation and independence of the obligation from the implied covenant for title and quiet enjoyment appears indeed also to be recognised in some of the text-books (see, e.g., 20 HALSBURY'S LAWS OF ENGLAND (2nd Edn.), pp. 242, 243, and HILL & REDMAN'S LAW OF LANDLORD AND TENANT (11th Edn.), para. 113). This view would also appear to receive support at first

F sight from the fact that in neither *Coe v. Clay* (3) nor in *Jinks v. Edwards* (4) did the tenants claim relief under either an implied covenant for quiet enjoyment or an implied covenant for title; in each case they rested their claim on the duty of a landlord, implicit in the relationship into which he enters with his tenant, to put the tenant into possession at the beginning of the tenancy; and it was on that ground and no other that the court awarded damages. I think,

G however, that even apart from the question, already mentioned, of suing on the covenant for quiet enjoyment before entry, this point is sufficiently answered by the fact that in neither of these cases was a formal lease executed by the landlord; in *Coe v. Clay* (3) the letting was oral, and in *Jinks v. Edwards* (4) the tenancy arose out of an agreement for a lease. It was held in *Bandy v. Cartwright* (10) (1853) (8 Exch. 913) and had for long been the law that no covenant for title is implied in oral lettings. The question whether a covenant for quiet

H enjoyment should be implied in parol lettings and in mere agreements was an uncertain one over a period of many years, and it was not until *Markham v. Paget* (11) ([1908] 1 Ch. 697) that SWINFEN-EADY, J., after a review of the authorities, decided definitely that it should.

I In these circumstances it may well be that the actions in *Coe v. Clay* (3) and *Jinks v. Edwards* (4) were not brought or decided on an implied covenant for quiet enjoyment or title because it was thought that no such implication existed or could be relied on in view of the informal character of the lettings which were

there in question. For myself, I do not think that there is any ground for implying the *Coe v. Clay* (3) obligation in addition to the covenant for title and quiet enjoyment which is implicit in a formal instrument of demise or grant. By the very force of the liability which is imposed on a lessor under the covenant for quiet enjoyment, the tenant is entitled to be put into possession of the premises which are leased to him at the outset of his tenancy (*Ludwell v. Newman* (12) (1795), 6 Term Rep. 458) and to remain quietly in possession thereof throughout the term. Counsel for the tenant relied on the statement by CHITTY, J., in *Wallis v. Hands* (9) ([1893] 2 Ch. at p. 84) that

“ . . . the essence of a breach of a covenant for quiet enjoyment in a lease appears to me to be a disturbance of the lessee's possession.”

I do not, however, think that CHITTY, J., was intending to say that the covenant does not begin to operate until the tenant has obtained possession, for it is quite clear that it operates from the moment when the demised term starts to run. There is, in my opinion, no necessity, therefore, for implying the *Coe v. Clay* (3) obligation in a formal demise, and I would accordingly have felt considerable difficulty in implying it in the underlease even if no express covenant for quiet enjoyment has been incorporated. Even, however, if I am wrong in that, I am quite clear that any such implication is excluded by reason of this express covenant on the principle of *Line v. Stephenson* (8).

Counsel for the tenant rightly said (and this was his alternative way of putting the point) that an express covenant will operate only to displace an implied covenant if they both cover the same ground—or, in other words, if they are in *pari materia* (*NORTON ON DEEDS* (2nd Edn.), p. 601). This is true, but it appears to me, as I have already indicated, that the purpose of the *Coe v. Clay* (3) obligation is fully covered by the covenant for quiet enjoyment which is implied from the word “demise”. Such a covenant entitles the tenant to be put into possession as well as to remain in possession thereafter, and this is exactly the purpose of the obligation which was implied in *Coe v. Clay* (3). In any case I find it impossible to regard a covenant to put the tenant in possession at the beginning of the term as being otherwise than in *pari materia* with a covenant that he should remain in possession thereafter. It was not suggested that the form of the express covenant in cl. 3 (3) of the underlease is of narrower scope than a covenant for quiet enjoyment which is implied from the word “demise”, and it accordingly follows that this covenant also answers the purpose of the obligation in *Coe v. Clay* (3).

In these circumstances it is not possible, as I think, successfully to contend that if, contrary to my own view, the obligation on which the tenant relies can be incorporated by implication in a formal lease, it can survive the eliminating effect of an express covenant for quiet enjoyment such as that which is contained in the underlease. In my judgment, accordingly, the learned judge came to a correct conclusion in this case, and the appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *J. G. Bosman, Robinson & Co.* (for the tenant); *Herbert Smith & Co.* (for the landlords).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A CUNDY v. CUNDY, SMITH AND FINCH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Mr. Commissioner Blanco White, Q.C.), December 6, 7, 8, 9, 12, 13, 1955.]

Divorce—Condonation—Revival of adultery—Revival by conduct less than adultery—Considerations to be applied.

B The question whether impropriety of conduct on the part of a wife is sufficient in gravity to revive condoned adultery is ultimately one of fact. There must be taken into consideration (i) the circumstances of the adultery and the light it throws on the character of the wife; (ii) the time which has elapsed since the adultery; (iii) the behaviour of the wife meanwhile; C (iv) the behaviour of the husband to the wife; and (v) the seriousness of the conduct complained of and its circumstances, including the manners and customs of the grade of society to which the parties belong.

[As to revival of adultery by acts of gross familiarity, see 12 HALSBURY'S LAWS (3rd Edn.) 306, para. 609, note (s); and for cases on the subject, see 27 D DIGEST (Repl.) 409, 3377-3380 and 410, 3389 and SUPPLEMENT.]

Petition.

The husband petitioned for a divorce on the ground of the wife's desertion, and adultery which had been condoned and revived by subsequent acts of gross familiarity. The parties were married in 1921, the husband then being twenty-two and the wife eighteen years of age. There were five children, four E being of the marriage and one born in 1932 whose paternity was in doubt. The wife committed adultery in 1927, and again in 1931, but the husband forgave her on each occasion. On June 18, 1949, the husband left the matrimonial home. In 1950 the husband applied to the magistrates for a separation order under the Matrimonial Causes Act, 1937, s. 11 (2), on the ground that the wife had committed adultery on June 4, 1950. The magistrates found that adultery had not F been proved and dismissed the husband's complaint.

The husband now petitioned for divorce on the ground of constructive desertion by the wife in 1949, of her adultery in 1927 and 1931, and of a revival of that adultery by her conduct on June 4, 1950. The wife denied desertion, admitted adultery in 1927 and 1931 and said that it had been condoned and cross-prayed for a divorce on the ground of the husband's desertion praying for the exercise G of the court's discretion in her favour. The case is reported only for the court's formulation of the test whether conduct is sufficient to revive condoned adultery.

L. Jellinek for the husband.

S. Ibbotson and *Michael Catliff* for the wife.

H MR. COMMISSIONER BLANCO WHITE, Q.C., stated the facts and continued: The facts relating to the incident on June 4, 1950, are that a man, M., having worked on a hot afternoon in the garden, being appparelled suitably for that purpose in a vest and a pair of trousers, after coming in and washing himself went to the wife, who was against the wall, put his arm round her, talked to her for a bit and kissed her, she agrees, on the neck, once only. There could not have been very much kissing, because though the daughter did not say much about it I in the magistrates' court, a little later the daughter said there was no kissing, but today she said that he kissed her mother on the neck and the mother agrees that that is right.

That is the incident, and the question in the present case is: Is that conduct sufficient to revive adultery that has been condoned nineteen, nearly twenty, years? It is hard to find authority as to what degree of impropriety in conduct does revive adultery.* I have heard careful argument in this case on the

* See, e.g., RAYDEN ON DIVORCE (6th Edn.), p. 182, para. 23, note (b).

subject and counsel for the wife has gone to a great deal of trouble in extracting the cases* and quoting them to me and I feel that I owe him the compliment of formulating my conclusions on that point. I think this is an accurate statement: that the question whether impropriety of conduct on the part of a wife is sufficient in gravity to revive condoned adultery is ultimately one of fact. There must be taken into consideration (i) the circumstances of the adultery and the light it throws on the character of the wife; (ii) the time which has elapsed since the adultery; (iii) the behaviour of the wife meanwhile; (iv) the behaviour of the husband to the wife; (v) the seriousness of the conduct complained of and its circumstances, including the manners and customs of the grade of society to which the parties belong. The test is whether a jury of reasonable citizens guiding themselves by the foregoing considerations would be of opinion that the conduct complained of was of sufficient gravity to exonerate the husband from his expressed or implied terms to forgive his wife and to entitle him to reassert the adultery as a ground for divorcing her. To say that something is a question of fact for the jury is much the same as to say it is a matter of discretion for the court to be exercised on proper principles. I have included among the things to be considered the behaviour of the husband to the wife, because I think it clear that that is a matter which must be taken into consideration. If a wife were found guilty of adultery and the husband had previously deserted her or had been guilty of conduct conducing to the adultery, then the ultimate decision would be in the discretion of the court. To revive adultery something less than adultery is necessary and in considering whether a lesser offence revives the adultery, just as in considering whether a decree is to be granted on an actual finding of adultery, I think it clear that the husband's behaviour also must have been, and would have been, considered in the ecclesiastical courts. That is the best formulation I can make.

Endeavouring to apply that to the present case and the incident on June 4, 1950, what does it come to? The wife twice committed adultery when she was in her twenties. The husband had, therefore, a very great deal to complain about with regard to her fidelity at that time. On the other hand, that was nineteen years ago. For nineteen years she led a respectable life. There was nothing against her. She had done well by the children and in the keeping of the house. After nineteen years she is deserted by the husband. After she is deserted by her husband she gets a friend in to do her gardening for her. When he has finished doing her gardening he goes up to her where she is standing, puts his arm round her and gives her a kiss. I do not believe that any reasonable jury in this world would consider that that was conduct exonerating the husband from his forgiveness in the circumstances, the wife having lived respectably for nineteen years. I am satisfied that it would be totally unreasonable to regard that incident as reviving the adultery.

The husband then took proceedings in the magistrates' court, as I have said, based on adultery. He failed, and I think that the decision was obviously right. In this court he is not relying on his charge of adultery with regard to M., but he is saying that it revived his wife's earlier adultery and that it was conduct which gave him good cause to remain away from the wife and therefore prevented him from being in desertion. I do not think that the conduct gave him any good cause to remain away, particularly after he had charged the wife with adultery in the magistrates' court and the magistrates had found that the charge was not proved.

Even if he had "good cause" before, he had then no reasonable ground to remain away from the wife. Even if he were not in desertion from June, 1949, as I think that he was, I am satisfied that he was in desertion from the time

* *Collins v. Collins* (1884) (9 App. Cas. 205), *Richardson v. Richardson* ([1949] 2 All E.R. 330), *Beale v. Beale* ([1950] 2 All E.R. 539), *Kemp v. Kemp* ([1953] 2 All E.R. 553); see also *Moss v. Moss* ([1916] P. 155) and *Beard v. Beard* ([1945] 2 All E.R. 306).

- A when the magistrates gave their decision in 1950. That is more than three years from the date of the wife's answer and, therefore, it is sufficient for the purposes of her cross-prayer. For these reasons the prayer of the petition will be rejected. It is to my mind clearly a proper case for the exercise of the court's discretion, both because the wife's adultery was so very long ago and also because on any view this marriage has completely broken down. In the exercise of the
- B court's discretion there will be a decree nisi on the answer.

Decree nisi on cross-prayer.

Solicitors: *Alan, Edmunds & Phillips* (for the husband); *R. H. Marcus* (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

C

D

LYLE-MELLER v. A. LEWIS & CO. (WESTMINSTER), LTD.

[COURT OF APPEAL (Denning, Hodson and Morris, L.J.J.), November 25, 28, 29, 1955.]

E

Estoppel—Estoppel in pais—Estoppel by conduct—Licence for the exploitation of inventions—Inventor's right to determine licence if royalties less than £2,000 a year—Royalties exceeding that sum paid—Subsequent repudiation of liability for further royalties—Licensee estopped from denying that articles embodied the inventions.

F

By an agreement in writing the plaintiff, who had applied for letters patent for his inventions concerning gas lighters and parts thereof, agreed to grant to the defendants the sole right of exploiting his inventions in return for royalties on every lighter and refill embodying his inventions. He retained the right to determine the agreement and to exploit his inventions elsewhere if the royalties did not realise £2,000 a year. For two years the defendants made lighters and paid royalties thereon exceeding £2,000 a year, and the plaintiff in reliance on the agreement refrained from otherwise exploiting the inventions. In December, 1954, a statement was delivered on behalf of the defendants to the plaintiff showing a sum of £7,123 4s. 4d. due to the plaintiff for royalties on sales to Nov. 30, 1954. Subsequently the defendants repudiated their liability to pay this sum and any further royalties in respect of lighters and refills which they had made on the ground (among other grounds) that their lighters and refills did not embody the plaintiff's inventions.

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Held: it was not open to the defendants to deny that the lighters and refills which they had sold embodied the plaintiff's inventions because

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(i) (per HODSON, L.J., and MORRIS, L.J.): the defendants were estopped at common law because they had by their conduct represented that the lighters and refills embodied the plaintiff's inventions and they intended the plaintiff to act on the representation and he had acted on it to his detriment, since he had refrained from ending the agreement and exploiting his inventions elsewhere (principles stated by LORD TOMLIN in *Greenwood v. Martins Bank, Ltd.*, [1933] A.C. at p. 57, and by LORD BIRKENHEAD, L.C., in *Mac-laine v. Gatty*, [1921] 1 A.C. at p. 386, applied; see p. 253, letter E, and p. 255, letters F, G, post) and

(ii) (per DENNING, L.J.): the defendants had by their conduct given an assurance that the lighters and refills embodied the plaintiff's inventions and that they were liable to pay royalties thereon and, as it was intended that the plaintiff should act on the assurance and he had acted on it, the defendants could not, by virtue of the new estoppel affecting legal relations, go back on their assurance as regards past sales, whether the assurance were a representation of fact or of mixed law and fact or of law alone (*Central London Property Trust, Ltd. v. High Trees House, Ltd.*, p. 256, post, *Tool Metal Manufacturing Co., Ltd. v. Tungsten Electric Co., Ltd.*, [1955] 2 All E.R. 657, and *Robertson v. Minister of Pensions*, [1948] 2 All E.R. 767, considered and applied). See p. 250, letter I, and p. 251, letters F to H, post.

Per HODSON, L.J.: a mere admission of liability, erroneous in law, in circumstances which do not amount to an agreement for consideration, does not give rise to an estoppel (see p. 253, letter G, post).

Appeal dismissed.

[Editorial Note. Although it was the plaintiff who set up the estoppel and succeeded, yet the doctrine of estoppel, whether it is estoppel at common law or the development to which DENNING, L.J., refers as the new estoppel which affects legal relations (see p. 250, letter I, post) does not create a cause of action (see at p. 251, letter F, p. 252, letter I, p. 255, letter E, post). It is a weapon of defence used, in the present case, to counter a contention put forward by the defendants that the lighters and refills sold did not embody the plaintiff's inventions. Compare, concerning promises without consideration as constituting defences, 8 HALSBURY'S LAWS (3rd Edn.) 113, para. 197, text and note (t), and as regards waiver, see *ibid.*, p. 198, para. 355, text and note (d).

As to what conduct gives rise to an estoppel at common law, see 13 HALSBURY'S LAWS (2nd Edn.) 486, para. 555; and for cases on the subject, see 21 DIGEST 292-294, 1041-1051.]

Cases referred to:

- (1) *Central London Property Trust, Ltd. v. High Trees House, Ltd.*, [1956] 1 All E.R. 256; [1947] K.B. 130; [1947] L.J.R. 77; 175 L.T. 332; 31 Digest (Repl.) 247, 3823.
- (2) *Tool Metal Manufacturing Co., Ltd. v. Tungsten Electric Co., Ltd.*, (1953), 69 R.P.C. 108.
- (3) *Tool Metal Manufacturing Co., Ltd. v. Tungsten Electric Co., Ltd.*, [1954] 2 All E.R. 28; 71 R.P.C. 201; *revisd.* H.L., [1955] 2 All E.R. 657; 3rd Digest Supp.
- (4) *Robertson v. Minister of Pensions*, [1948] 2 All E.R. 767; [1949] 1 K.B. 227; [1949] L.J.R. 323; 2nd Digest Supp.
- (5) *Harnam Singh v. Jamal Pirthai*, [1951] A.C. 688; 2nd Digest Supp.
- (6) *Low v. Bouverie*, [1891] 3 Ch. 82; 60 L.J.Ch. 594; 65 L.T. 533; 21 Digest 136, 5.
- (7) *Greenwood v. Martins Bank, Ltd.*, [1933] A.C. 51; 101 L.J.K.B. 623; 147 L.T. 441; Digest Supp.
- (8) *Pease & Partners, Ltd. v. Birch*, [1941] 1 All E.R. 343; sub nom. *Birch v. Pease & Partners, Ltd.*, [1941] 1 K.B. 615; 110 L.J.K.B. 273; 165 L.T. 146; 2nd Digest Supp.
- (9) *Hughes v. Metropolitan Ry. Co.*, (1877), 2 App. Cas. 439; 46 L.J.Q.B. 583; 36 L.T. 932; 31 Digest (Repl.) 556, 6757.
- (10) *Birmingham & District Land Co. v. London & North Western Ry. Co.*, (1888), 40 Ch.D. 268; 60 L.T. 527; 31 Digest (Repl.) 565, 6856.
- (11) *MacLaine v. Gatty*, [1921] 1 A.C. 376; 90 L.J.P.C. 73; 124 L.T. 385; 21 Digest 390, 1556.

A (12) *Pickard v. Sears*, (1837), 6 Ad. & El. 469; 112 E.R. 179; 21 Digest 290, 1032.

Appeal.

B The plaintiff was the inventor of a gas-filled lighter, for which he had applied for letters patent. On Dec. 24, 1952, he entered into a written agreement with the defendants under which he agreed to grant to them as licensees the sole right to exploit the inventions, on payment of royalties in respect of all gas lighters and gas refills sold embodying the inventions, and subject to his right to determine the agreement in the event of royalties not equalling £2,000 a year. The defendants made and sold gas lighters during the ensuing two years and paid the plaintiff royalties exceeding £2,000 a year. Subsequently they repudiated liability for the payment of royalties on further lighters which they C had made and sold. The plaintiff brought an action for recovery of a sum representing the royalties thereon. The defendants contended that no royalties were payable *inter alia* because they had not sold any lighters or refills embodying the inventions. The plaintiff contended that, by reason of their payment of royalties to the plaintiff since the agreement, the defendants had induced him to believe that they admitted the lighters and refills they sold embodied his D inventions and would continue to pay royalties thereon, and that, in that belief, he had not determined the agreement or sought to grant licences to other manufacturers on the ground that the minimum royalties had not been paid, as he would otherwise have done. On July 28, 1955, LLOYD-JACOB, J., found that the plaintiff had been induced by the conduct of the defendants to refrain from seeking alternative methods of exploiting his inventions and that that would E have been a detriment to him if he were held to have rendered himself unable to procure any remuneration from their exploitation. He held that the defendants were estopped from contending that the lighters they had manufactured and sold did not embody the inventions of the plaintiff and he gave judgment for the plaintiff. The defendants appealed.

F *Sir Lionel Heald, Q.C.*, and *G. T. Aldous* for the defendants.
Lord Hailsham, Q.C., and *P. J. S. Bevan* for the plaintiff.

DENNING, L.J.: In 1952 the plaintiff invented a new kind of lighter and refill. Instead of the well-known lighter with a wick and petrol, he invented one which was gas-filled, and he made applications for patents in this country and in G countries overseas. He was associated with a company which was making them under the name of the Bedford lighter, but he soon found out that the defendants were also making gas-filled lighters and were putting them on the market under the name Silver Match lighter. Thereupon the plaintiff said that their lighters would infringe his patent if and when he got it. He pointed out to them that, if he got a patent on his applications, they would have to pay back royalties in respect of infringements from the beginning. After some H negotiations an agreement was reached between them on Dec. 24, 1952, as a result of which the plaintiff's company gave up making the Bedford lighter and he promised to make available to the defendants all his information about the inventions and not to give any information to anyone else. The defendants agreed to pay the plaintiff a royalty of 6d. on every complete gas lighter "embodying his inventions", or any of them, and 2d. on any gas refill which I "embodied his inventions" but the plaintiff had a right, if the royalties did not come to £2,000 a year, to determine the agreement and exploit his inventions elsewhere.

During the next two years the defendants made lighters, and they paid royalties to the plaintiff which exceeded £2,000 a year. They rendered statements of account to him, and in a letter on Dec. 23, 1954, their solicitors wrote saying:

"We now have pleasure in enclosing detailed statement in respect of the royalties paid and payable to [the plaintiff] up to Nov. 30, 1954."

The detailed statement showed the exact number of lighters which they had made and the royalties which they had paid. It showed that there was still payable in respect of lighters and refills £7,123 4s. 4d., subject, of course, to tax. Within a few weeks, however, the defendants repudiated their liability. They have never paid the £7,123 4s. 4d. and the plaintiff has brought this action to recover it. The defendants say that the £7,123 4s. 4d. is not payable at all and indeed that they made a mistake in paying the earlier royalties. They say that none were ever payable. They take two entirely new points, which they had never thought of in the first two years. Their first point is that no royalties were payable until the patent was actually granted in England and sealed. Their second point is this:

“The lighters which we have made and the refills do not embody your invention, so we are not liable at all.”

[HIS LORDSHIP considered the construction of the agreement, held that the defendants were wrong in their contention that no royalties were payable until letters patent had been granted and continued:] As regards the second point, the defendants say that these lighters which they have made, and the refills also, do not embody the inventions, and they wish the court to embark on a grand inquiry on that matter. They wish to take the applications for patents and the claims therein, and to go through them and compare the lighters with them to see whether the lighters which they have made would infringe those claims when they are properly construed. The judge has held that it is far too late for them to take that point, seeing that for two years they have paid royalties and accounted on the basis that these lighters did embody the inventions. It was proved to the satisfaction of the judge that, if the plaintiff had had any idea that they would repudiate their liability, he would at once have determined the agreement and exploited his inventions elsewhere. This agreement says that, if £2,000 was not paid in any year by way of royalties, he could determine it, and he said that so he would have done. I have no doubt that he would, and the learned judge has found that he would.

Here then is a course of conduct by the defendants, which, in my opinion, amounts to the plainest possible assurance to the plaintiff in these terms: “We acknowledge that the lighters and refills which we are making embody your inventions and that we are liable to pay you royalties thereon”. The plaintiff acted on that assurance and altered his position in this way, that, if it had not been given, he would undoubtedly have sought to exploit his inventions elsewhere. As it was, he refrained from so doing. The question is whether in the circumstances the assurance is binding on the defendants.

Counsel for the defendants urged on us that this course of conduct amounted only to a representation of law and that such a representation did not give rise to an estoppel. He said that the plaintiff knew all the facts quite well. He knew the nature of the Silver Match lighter, he knew how it was made and the mechanism of it. If the defendants made any representation to the effect that it “embodied his inventions”, that was a representation as to the true interpretation of the contract, and of the patent applications, which was a matter of law and gave rise to no estoppel.

I do not think it necessary to go into these refinements about law and fact. I am clearly of opinion that this assurance was binding, no matter whether it is regarded as a representation of law or of fact or a mixture of both, and no matter whether it concerns the present or the future. It may not be such as to give rise to an estoppel at common law, strictly so called, for that was confined to representations of existing fact; but we have got far beyond the old common law estoppel now. We have reached a new estoppel which affects legal relations.

This new estoppel applies to representations as to the future. Take the kind of assurance which was held binding in *Central London Property Trust, Ltd. v.*

- A *High Trees House, Ltd.* (1), p. 256, post, and in *Tool Metal Manufacturing Co., Ltd. v. Tungsten Electric Co., Ltd.* (2) (3) in the Court of Appeal (1953) (69 R.P.C. 108) and in the House of Lords ([1955] 2 All E.R. 657). In each of those cases a creditor during the war gave a promise or assurance to the other party that he would for the time being forgo sums which were thereafter to become due to him. In *Central London Property Trust, Ltd. v. High Trees House, Ltd.* (1) it was rent. In *Tool Metal Manufacturing Co., Ltd. v. Tungsten Electric Co., Ltd.* (2) (3) it was sums payable by way of compensation. The assurance was not a contract binding in law, but it was an assurance as to the future; it was intended to be acted on, it was acted on, and it was held binding on the party who gave it. This appears distinctly from the speech of LORD COHEN ([1955] 2 All E.R. at pp. 685, 686). The creditor was not allowed to resume his right to the periodic payments until he made it clear (as he did after the war) that he wanted them again, and then he only regained his right to them for the future, not for the past. He had forgone the past sums beyond recall.

- This new estoppel also applies to representations about legal relations. Take the kind of assertion or assurance which was held binding in *Robertson v. Minister of Pensions* (4) ([1948] 2 All E.R. 767) and in the decision of the Privy Council in *Harnam Singh v. Jamal Pirbhai* (5) ([1951] A.C. 688) to which counsel for the plaintiff drew our attention this morning. In each of those cases one party had made to the other a clear and explicit assertion of the legal relationship existing between them. In *Robertson v. Minister of Pensions* (4) it was a statement by the Crown to an army officer: "Your disability has been accepted as attributable to military service". In *Harnam Singh v. Jamal Pirbhai* (5) it was an unequivocal statement by a tenant that he "will remain in occupation as a statutory tenant". The statement was not in either case a contract, and not regarded as such, but it was an assurance as to the legal position—as to the legal consequences of the facts known to both—which was intended to be acted on, was acted on, and was held to be binding. It did not give rise to a cause of action in itself, but it did prevent the party making it from setting up a defence which would otherwise be open to him. In that sense it gave rise to an estoppel, but it was not the old kind of estoppel, which was only a rule of evidence. It was the new kind of estoppel which affects legal relations.

- I am unwilling to regard the present case as an old common law estoppel, for the simple reason that I doubt whether there was an estoppel as to the precise number of lighters made. If the defendants, after rendering their accounts, found out that they had made an arithmetical mistake and had stated the figure at one hundred lighters too many, I should have thought that they should be allowed to correct the mistake. No such mistake is suggested, however, and the whole course of conduct by them amounted to a clear assurance that the lighters and refills which they were making did "embody the inventions" within the meaning of the agreement, and that they were liable to pay royalties thereon. The plaintiff acted on that assurance, he altered his position on the faith of it, and it is binding on the defendants. They cannot now be allowed to go back on it, at any rate, not in respect of past lighters and refills on which they have acknowledged that royalties are payable, and that is all we are concerned with here.

I think the judge was right on both points and would dismiss the appeal.

- I HODSON, L.J.: In my opinion the learned judge was right on both points in this appeal, i.e., on the construction of the agreement of Dec. 24, 1952, and on the estoppel point, to which I shall refer.

The claim was for royalties on articles sold by the defendants, and was based on an agreement whereby the plaintiff had agreed to grant the defendants the right to exploit certain of his inventions. The defendants had contended that, on the true construction of the agreement, no royalties were payable at all, and that none would be payable until the plaintiff had actually been granted

letters patent in respect of his inventions. They have also contended that no royalties are payable because the articles they have sold do not fall within the claims of any of the applications put forward by the plaintiff, and so are outside the scope of the agreement because they do not embody the inventions, the subject of the agreement. To this the plaintiff has replied (and I shall have to refer to the pleading later for the way in which the matter is put) that the defendants are estopped from giving evidence to prove that the articles did not embody the inventions by reason of their conduct. A

[His LORDSHIP considered the construction of the agreement, held that royalties were payable under the agreement before the grant of letters patent, and continued:] The question of estoppel was raised only in reply after the defendants had specifically pleaded by amendment that royalties were not payable by them in respect of lighters and refills sold by them which were not protected by the claims. It is pleaded in this way: B

"If the plaintiff should contend (contrary to the defendants' submission) that royalties are payable by the defendants in respect of lighters and refills sold by them which were not protected by the claims of any granted patent or patents but which embody the inventions of the complete specifications [of which the numbers are given] as published, then the defendants will contend that no royalties are payable by them because (i) they have not sold any lighters or refills falling within any claim of any of the said specifications as published on their true construction." C

In reply to the amended pleading of the defendants, the plaintiff by amendment pleaded *inter alia* as follows: D

"By reason of the payment by the defendants to the plaintiff of all royalties payable by the defendants under the said agreement during the period from the commencement of the said agreement until Mar. 31, 1954, the defendants induced the plaintiff to believe that they admitted that the lighters and refills manufactured and sold by them embodied the inventions the subject of the said agreement or some of them and that the defendants would continue to pay royalties thereon. Acting on such belief the plaintiff did not determine the said agreement, or, alternatively, seek to grant licences to other manufacturers, on the ground that the minimum royalties reserved by cl. 8 (a) thereof had not been paid, as he would otherwise have done, but maintained the said agreement", E

and so on.

The defendants were seeking to prove that the articles which they manufactured did not embody the inventions the subject of the agreement, and it was in connection with that that the question of estoppel arose. The plaintiff objected to the calling of that evidence and said that the defendants were estopped from calling it by reason of the representations which they had made by their conduct throughout the currency of the agreement in paying the royalties on the footing that they were bound to do so. That, to my mind, as pleaded and as found by the learned judge, was an estoppel of the kind which is well recognised at common law. I think that as pleaded and as found the estoppel is perfectly sound. F

BOWEN, L.J., in *Low v. Bouverie* (6) ([1891] 3 Ch. 82), said (at p. 105): G

"Estoppel is only a rule of evidence; you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said . . . Now an estoppel, that is to say, the language upon which the estoppel is founded, must be precise and unambiguous. That does not necessarily mean that the language must be such that it cannot possibly be open to different constructions, but that it I

A must be such as will be reasonably understood in a particular sense by the person to whom it is addressed."

It seems to me that in this case the representations by conduct which the defendants made were perfectly clear and unambiguous, and were representations of fact, viz., that the articles which they made embodied the inventions which covered the subject-matter of the agreement. That to my mind is a representation of fact. It matters not that questions of law may be involved and that it may be necessary to construe the agreement in order to find out whether there is an embodiment. That there may be a mixed question of law and fact does not destroy the estoppel. Nor does it matter that questions of patent law may be involved in considering whether or not there is an invention which is covered by a patent. But that there was a question of fact in this case which was relevant seems clear from the course which the trial took when the estoppel point was taken, because the defendants were then seeking to call evidence to show that the article which they manufactured did not embody the plaintiff's inventions which were covered by the agreement. To my mind there was no question of having to carry the doctrine of estoppel beyond what I might perhaps describe as the ancient field which was being considered by BOWEN, L.J., in *Low v. Bouverie* (6).

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In *Greenwood v. Martins Bank, Ltd.* (7) ([1933] A.C. 51), in the House of Lords, LORD TOMLIN spoke* on this subject in the passage which the learned judge cited. I will not repeat what he said, but I agree with the learned judge in taking the view that, following on the instruction to be obtained from that speech, the plaintiff had satisfied all that it was necessary for him to do in the way of establishing an estoppel. There was a representation, or conduct amounting to representation, which was intended to induce a course of conduct on the part of the person to whom the representation was made—those last words are a citation from LORD TOMLIN'S speech—and finally there was a detriment to such person as the consequence of the act. Here there is no doubt (and counsel for the defendants has not argued to the contrary) that, if there was a representation creating an estoppel, the plaintiff did alter his position by holding to the agreement and by not looking round for fresh licensees.

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The only question remaining on the estoppel point is whether the representation was simply a representation of law or one of fact or mixed fact and law. If the representation had been a mere representation of law, I should find it difficult to get an estoppel out of it. There are indeed passages in various authorities to the effect that, if one merely admits liability and says one is wrong in law, no estoppel arises. There may be an agreement for consideration which produces the same result, but, in the absence of agreement, the mere admission of liability standing by itself does not as a rule produce anything in the nature of an estoppel on the authorities because it may be taken to be reasonable that each party is in as good a position as the other to satisfy himself on what the law is; and, if one party admits he is wrong in law, he is not necessarily estopped from changing his mind hereafter. I think that LLOYD-JACOB, J., put it in this way.

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Some support for what I have just been saying is to be found in the decision of this court in *Pease & Partners, Ltd. v. Birch* (8) ([1941] 1 All E.R. 343), where there was an admission of liability, but the case was decided on an agreement; I think that appears quite clearly from the judgments of SCOTT and GODDARD, L.JJ. GODDARD, L.J. (*ibid.*, at p. 353), drew attention to the consideration for the agreement which existed in that case.

I

* LORD TOMLIN, at p. 57 stated the essential factors giving rise to an estoppel as being:

"(1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made. (2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made. (3) Detriment to such person as a consequence of the act or omission."

Here I see no difficulty at all in supporting the judgment on this ground as on the other ground, and I would accordingly dismiss the appeal. A

MORRIS, L.J.: The claim in this action was for a sum of money representing royalties which it was said were due under the terms of the agreement of Dec. 24, 1952. The defendants previously admitted that they owed the sums claimed. With their letter of Dec. 23, 1954, they sent a detailed statement which they said was in respect of royalties paid and payable up to Nov. 30, 1954. B
They never paid, and so the action was brought.

By their defence as originally drafted, the defendants' principal point arose, they said, by reason of cl. 6 (a) of the agreement. The concluding words of cl. 6 (a) are

"so long as such inventions as may be embodied shall be protected by currently valid letters patent in the United Kingdom." C

In reliance on those words, the defendants pleaded that there had at no time been any currently valid letters patent, or any letters patent at all, subsisting in the United Kingdom, and so they said, by para. 4 of their defence:

"No royalties are or have ever been payable by the defendants to the plaintiff under cl. 6 of the said agreement." D

They also counterclaimed for a sum of nearly £7,000, that sum being the amount of royalties that they had paid to the plaintiff. At some stage, that counterclaim was abandoned.

The matter came before the learned judge, LLOYD-JACOB, J., who gave a preliminary judgment dealing with the construction of the agreement. After that preliminary judgment, there was a further hearing and in the meantime the defence was amended. By the amended defence, the defendants said, in effect, that they had not sold any lighters or refills falling within any claim of any specification referred to in the agreement. They also pleaded certain points as to amount, about which we have heard nothing. The amended reply to that amended defence raised the question of estoppel. E

[His LORDSHIP considered the construction of the agreement, held that the plaintiff was entitled to royalties if he proved the facts of his case, and continued:] The plaintiff accordingly had to prove his case and establish his facts. He had to show that articles had been sold which had embodied the inventions. He would get 6d. for every gas lighter embodying his inventions, or any of them, and he would get 2d. for every gas refill embodying his inventions, or any of them. He might not in the ordinary course know how many lighters and refills had been sold. So the agreement provided for that matter. Under cl. 6 (b), there was an obligation to send a full statement as to the manner in which the royalties were calculated. Such statement would include a statement as to the number of the articles sold. Furthermore, there was the obligation in cl. 7 of the agreement to keep proper books, which were to be subject to inspection. F

The defendants in the first place made a very clear admission of the amount that was payable by them. Their solicitors in a letter of Nov. 30 wrote as follows: G

"We are enclosing a statement which we have today received showing the royalties due for the six months ended Sept. 30, 1954." H

With their December letter, they sent a statement showing what had happened in the past and the amount then payable. That statement showed that the defendants had recorded the numbers of lighters sold and the numbers of refills sold. The defendants had first paid the £1,000 on account for which the agreement provided: they had sent a cheque on June 23, 1953: another one on Oct. 28, 1953: a further cheque on the same date: another cheque on June 11, 1954: and another cheque on that same date. The statement recorded the I

A number of lighters and refills sold in the eight months to Nov. 30. I do not gather that there is any withdrawal by the defendants in regard to the number of the articles they had sold.

It is at this stage that the plaintiff refers to what was done in the past. We had much discussion at the Bar as to the results of conduct which induces a belief that rights will not be exercised. The position in such a case may be governed by the principle of equity expressed in *Hughes v. Metropolitan Ry. Co.* (9) (1877) (2 App. Cas. 439) and described by BOWEN, L.J., in his judgment in *Birmingham & District Land Co. v. London & North Western Ry. Co.* (10) (1888) (40 Ch.D. at p. 286). BOWEN, L.J., said:

“ . . . if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a court of equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before.”

Here, however, we are not concerned with any situation where on equitable principles there is to be a disallowance of rights. Here the plaintiff is enforcing his rights, and in doing so he is using the principle of estoppel to prove his case.

What was said in *Low v. Bouverie* (6) is of direct application to the facts of this case. BOWEN, L.J., said ([1891] 3 Ch. at p. 105):

“ Estoppel is only a rule of evidence; you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said.”

Reference has been made to the words of LORD TOMLIN in *Greenwood v. Martins Bank, Ltd.* (7)*. In *MacLaine v. Gatty* (11) ([1921] 1 A.C. 376), LORD BIRKENHEAD, L.C., said (at p. 386):

“ Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time. Whether one reads the case of *Pickard v. Sears* (12) (1837) (6 Ad. & El. 469) or the later classic authorities which have illustrated this topic, one will not, I think, greatly vary or extend this simple definition of the doctrine.”

In my judgment, that applies to the facts of this case. The claim here is for money due down to Nov. 30, 1954. The plaintiff says: “ You have sold 116,000 lighters and 506,000 refills which embody my inventions. You at all times down to the end of 1954, either expressly or impliedly, stated that you had used and were using my inventions. You told me the numbers of the lighters and the refills which you had made which embodied my inventions, and you paid me on that basis”. I think, therefore, that the plaintiff can say that the defendants, by word and conduct, made the representation that their lighters and refills embodied the plaintiff's inventions. Secondly, I think he can say that it was made in such a way that he acted on it. Thirdly, I think the plaintiff can say that he acted on it to his detriment, because he refrained from seeking another licensee and he refrained from exploiting his inventions himself.

The learned judge was satisfied in regard to the issues of fact. He said (in his second judgment, of July 28):

“ I have heard the plaintiff in the witness-box and he has told me that, had he any reason to suppose that the obligation of the defendants as a consequence of this licence was to cause them to manufacture and distribute lighters and refills on which no royalty was payable, he would have desired

* See footnote p. 253, ante.

to exploit his inventions by seeking another licensee or other licensees. Indeed, the agreement contains provision whereby, if the royalties payable under it do not reach the specified amount, he is to have freedom so to exploit his invention. I see no reason whatsoever to doubt the evidence he gave, which I accept as evidence of truth, that, having regard to the payment of royalties by the defendants in respect of this agreement, he refrained from seeking alternative methods of exploiting his invention and that, if it were now held that in so doing he had rendered himself unable to procure any remuneration from the exploitation of his invention, that would plainly amount to a detriment to him."

I think that the way in which the learned judge approached the matter as illustrated by that passage was entirely correct.

The plaintiff, therefore, can say that this rule of estoppel prevents the defendants from asserting that the articles which they sold did not embody the plaintiff's inventions. It seems to me that the defendants were themselves in the best position to know. It was really a question of fact. Had the case had to proceed further before the learned judge the admission of liability, though later retracted, might have had some evidential value. But it seems to me that, in common fairness, which lies at the root of the application of the principle of estoppel, the defendants ought not in this case to be heard to say that the articles which they sold, the numbers of which they presumably still admit, did not embody the plaintiff's inventions. I would dismiss the appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Lewis & Lewis and Gisborne & Co.* (for the defendants); *Herbert Baron & Co.* (for the plaintiff).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

NOTE.

In *Lyle-Meller v. A. Lewis & Co. (Westminster), Ltd.*, DENNING, L.J., bases his judgment on a new estoppel, which applies to representations as to the future and to representations about legal relations, and which derives from the decision in *Central London Property Trust, Ltd. v. High Trees House, Ltd.*, a report of which follows below.

CENTRAL LONDON PROPERTY TRUST, LTD. v. HIGH TREES HOUSE, LTD.

[KING'S BENCH DIVISION (Denning, J.), July 18, 1946.]

Estoppel—Estoppel in pais—Estoppel by conduct—Lease of flats—Written promise to reduce rent owing to war-time conditions—No consideration—Reduced rent paid—Binding effect of promise—Effect of ending of war-time conditions.

Landlord and Tenant—Rent—Reduction of rent—Lease of flats—Written promise to reduce rent owing to war-time conditions—No consideration—Reduced rent paid—Binding effect of promise—Effect of ending of war-time conditions.

Landlords let a new block of flats in 1937 to H. Ltd. (called "the tenants"), on a ninety-nine years' lease at a ground rent of £2,500 a year. Few of the flats had been let at the outbreak of war in 1939, and, in view of the tenants' difficulty in paying the rent out of profits in prevailing conditions, the landlords agreed in writing in 1940 to reduce the rent to £1,250. No duration of the reduction of rent was specified and there was no consideration for it. The tenants paid the reduced rent. By early in 1945 the whole block of flats was let. On Sept. 21, 1945, the landlords wrote asking that the full rent of £2,500 should be paid and claiming arrears of £7,916. They subsequently brought a test action to recover the balance of rent for the quarters ending Sept. 29 and Dec. 25, 1945.

Held: (i) the promise of a reduction of rent, being intended to be legally binding and to be acted on, and having been acted on by the tenants, was binding on the landlords to the extent that they would not be allowed to act inconsistently with it, although it was not the subject of estoppel at common law; but

(ii) the promise was for a reduction of rent which was temporary and was to endure so long only as the block of flats was not substantially let, and, since the block of flats was substantially let early in 1945, the landlords were entitled to the full rent for the quarters ending Sept. 29 and Dec. 25, 1945.

[As to what conduct gives rise to an estoppel at common law, see 13 HALSBURY'S LAWS (2nd Edn.) 486, para. 555; and for cases on the subject, see 21 DIGEST 292-294, 1041-1051.

As to the inadmissibility of extrinsic evidence to vary deeds, see 11 HALSBURY'S LAWS (3rd Edn.) 396 et seq; and as to variation by agreement without consideration, see *ibid.*, p. 325, para. 518, text and note (b).]

Cases referred to:

- (1) *Berry v. Berry*, [1929] 2 K.B. 316; 98 L.J.K.B. 748; 141 L.T. 461; Digest Supp.
- (2) *Jorden v. Money*, (1854), 5 H.L. Cas. 185; 23 L.J.Ch. 865; 24 L.T.O.S. 160; 10 E.R. 868; 21 Digest 292, 1041.
- (3) *Fenner v. Blake*, [1900] 1 Q.B. 426; 69 L.J.Q.B. 257; 82 L.T. 149; 31 Digest (Repl.) 574, 6947.
- (4) *Re Wickham*, (1917), 34 T.L.R. 158; [1917] H.B.R. 272; 21 Digest 299, 1079.
- (5) *Re Porter (William) & Co., Ltd.*, [1937] 2 All E.R. 361; Digest Supp.
- (6) *Buttery v. Pickard*, (1946), 174 L.T. 144; 31 Digest (Repl.) 247, 3822.
- (7) *Hughes v. Metropolitan Ry. Co.*, (1877), 2 App. Cas. 439; 46 L.J.Q.B. 583; 36 L.T. 932; 31 Digest (Repl.) 556, 6757.
- (8) *Birmingham & District Land Co. v. London & North Western Ry. Co.*, (1888), 40 Ch.D. 268; 60 L.T. 527; 31 Digest (Repl.) 565, 6856.
- (9) *Salisbury v. Gilmore*, [1942] 1 All E.R. 457; [1942] 2 K.B. 38; 111 L.J.K.B. 593; 166 L.T. 329; 31 Digest (Repl.) 378, 5069.

Action.

The landlords let a block of flats to the tenants on a ninety-nine years' lease under seal in 1937 at a ground rent of £2,500, which in view of war-time conditions and without consideration they agreed in writing in 1940 to reduce to £1,250. Early in 1945 the flats became fully occupied and in September, 1945, the landlords claimed that rent was payable at the full rate of £2,500 and they also claimed arrears in respect of earlier years. They brought a test action for the recovery of the full rent for the two quarters ending on Sept. 29, 1945, and Dec. 25, 1945. The tenants contended that the reduced rent was payable for the whole term of the lease, or alternatively that it was payable up to September, 1945, on the ground that the landlords were estopped from now claiming the additional rent or alternatively that they were bound by their promise of a reduction in the rent, which was made with the intention that it should be binding and should be acted on and which was, in fact, acted on by the tenants.

Robert Fortune for the landlords.

Ronald Hopkins for the tenants.

DENNING, J.: On Sept. 27, 1937, Central London Property Trust, Ltd., the landlords, let a block of flats to High Trees House, Ltd., the tenants, for a term of ninety-nine years from Sept. 29, 1937, at a rent of £2,500 a year, the lease being by deed and properly executed. Those two companies were closely linked. The plaintiffs held all the shares of the defendant company (the tenants) and they were linked by directors and secretaries.

This new block of flats had not been fully occupied by the beginning of the war in 1939 owing to the absence of people from London; I think only one-third of it had been let by the outbreak of war. With war conditions prevailing, it was plain to those who ran these companies that the rent payable under the lease could not be paid out of the profits. In those circumstances, as a result of discussions, an arrangement was made between the directors concerned, which was put into writing. On Jan. 3, 1940, the landlords wrote to the tenants in these terms:

"We confirm the arrangement made between us by which the ground rent should be reduced as from the commencement of the lease to £1,250 per annum";

and at a meeting of the plaintiff company (the landlords) in April, 1940, the resolution was confirmed that the tenants be charged ground rent from Mar. 1, 1939, at the reduced rate of £1,250 a year in place of the £2,500 a year provided in the lease.

I am satisfied that that arrangement was intended simply as a temporary expedient to deal with the exceptional conditions then prevailing, under which the block of flats was only partially let. The arrangement had no reference to events in which the block of flats was wholly let, if they subsequently occurred. Indeed, having regard to the close connection between these two companies, I do not suppose anything would have come before the courts but for the fact that in March, 1941, the debenture-holders of the plaintiff company (the landlords) appointed a receiver, by whom the affairs of the landlords have since been managed.

Before and after his appointment the tenants paid the reduced rent of £1,250 a year; in one bad year they could not pay even that, but paid a smaller amount. Otherwise £1,250 a year was paid in 1941, 1942, 1943, and 1944. Even when the premises were fully let, at the beginning of 1945, the reduced rent of £1,250 was paid. The receiver had not looked into the lease, or realised what the rent was. Only in September, 1945, did he realise that the rent reserved was £2,500 a year. Accordingly, on Sept. 21, 1945, he wrote to the tenants saying that the £2,500 a year must be paid, and also arrears, which he says are £7,916.

No payment being received, he brings this action to test the position in law. It concerns two periods, which provide a critical test of the rights of the parties. Rent is claimed of £625 for the quarter ending Sept. 29, 1945, and also of £625 for the quarter ending Dec. 25, 1945.

The tenants said first that the reduction of £1,250 was to apply throughout the term of ninety-nine years, and that the reduced rent was payable during the whole of that time. Alternatively, they said that was payable up to Sept. 24, 1945, when the increased rent would start.

If I consider this matter without regard to recent developments in the law there is no doubt that the whole claim must succeed. This is a lease under seal, and at common law, it could not be varied by parol or by writing, but only by deed; but equity has stepped in, and the courts may now give effect to a variation in writing (see *Berry v. Berry* (1), [1929] 2 K.B. 316). That equitable doctrine could hardly apply, however, in this case because this variation might be said to be without consideration.

As to estoppel, this representation with reference to reducing the rent was not a representation of existing fact, which is the essence of common law estoppel; it was a representation in effect as to the future—a representation that the rent would not be enforced at the full rate but only at the reduced rate. At common law, that would not give rise to an estoppel, because, as was said in *Jorden v. Money* (2) (1854) (5 H.L. Cas. 185), a representation as to the future must be embodied as a contract or be nothing. So at common law it seems to me there would be no answer to the whole claim.

What, then, is the position in view of developments in the law in recent years? The law has not been standing still even since *Jorden v. Money* (2). There has been a series of decisions over the last fifty years which, although said to be cases of estoppel, are not really such. They are cases of promises which were intended to create legal relations and which, in the knowledge of the person making the promise, were going to be acted on by the party to whom the promise was made, and have in fact been so acted on. In such cases the courts have said these promises must be honoured. There are certain cases to which I particularly refer: *Fenner v. Blake* (3) ([1900] 1 Q.B. 426), *Re Wickham* (4) (1917) (34 T.L.R. 158), *Re William Porter & Co., Ltd.* (5) ([1937] 2 All E.R. 361) and *Buttery v. Pickard* (6) (1946) (174 L.T. 144). Although said by the learned judges who decided them to be cases of estoppel, all these cases are not estoppel in the strict sense. They are cases of promises which were intended to be binding, which the parties making them knew would be acted on and which the parties to whom they were made did act on. *Jorden v. Money* (2) can be distinguished because there the promisor made it clear that she did not intend to be legally bound, whereas in the cases to which I refer the promisor did intend to be bound. In each case the court held the promise to be binding on the party making it, even though under the old common law it might be said to be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for breach of such promises, but they have refused to allow the party making them to act inconsistently with them. It is in that sense, and in that sense only, that such a promise gives rise to an estoppel. The cases are a natural result of the fusion of law and equity; for the cases of *Hughes v. Metropolitan Ry. Co.* (7) (1877) (2 App. Cas. 439), *Birmingham & District Land Co. v. London & North Western Ry. Co.* (8) (1888) (40 Ch.D. 268), and *Salisbury v. Gilmore* (9) ([1942] 1 All E.R. 457), show that a party will not be allowed in equity to go back on such a promise. The time has now come for the validity of such a promise to be recognised. The logical consequence, no doubt, is that a promise to accept a smaller sum in discharge of a larger sum, if acted on, is binding, notwithstanding the absence of consideration, and if the fusion of law and

A equity leads to that result, so much the better. At this time of day it is not helpful to try to draw a distinction between law and equity. They have been joined together now for over seventy years, and the problems have to be approached in a combined sense.

B It is to be noticed that in the sixth interim report of the Law Revision Committee, it was recommended that such a promise as I have referred to should be enforceable in law even though no consideration had been given by the promisee. It seems to me that, to the extent I have mentioned, that has now been achieved by the decisions of the courts.

C I am satisfied that such a promise is binding in law, and the only question is the scope of the promise in the present case. I am satisfied on the evidence that the promise was that the ground rent should be reduced to £1,250 a year as a temporary expedient, while the block of flats was not fully or substantially fully let owing to the conditions prevailing. That means that this reduction of rent applied up to the end of 1944. But early in 1945 the flats were fully let and the rents received from them (many were not caught by the Rent Restrictions Acts) had been increased more than originally anticipated. At all events the revenue from them must have been very considerable. The conditions prevailing when the reduction was made had completely passed away, as I find, by the early months of 1945. I am satisfied that the promise was understood by all parties only to apply in the conditions prevailing at the time of the flats being partially let, and the promise did not extend any further than that. When the flats became fully let early in 1945 the reduction ceased to apply.

D In those circumstances under the law as I hold it, it seems to me that the quarter's rents are fully payable for the quarter ending Sept. 29, 1945, and the quarter ending Dec. 25, 1945, which are the amounts claimed in this action.

E If it had been a case of estoppel, it might have been said that the estoppel in any event would end with the ending of the conditions to which the representation applied, or alternatively only on notice. But in either case it is only a way of asking what is the scope of the representation. I prefer to apply the principle that the promise, intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply. It is binding as covering the period down to early 1945, and from that time full rent is payable. I therefore give judgment for the amount claimed, credit to be given for the £275 paid and accepted.

Judgment for the landlords.

Solicitors: *Henry Boustred & Sons* (for the landlords); *Callingham, Griffith & Bate* (for the tenants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

RADIO CORPORATION OF AMERICA v. RAULAND CORPORATION AND ANOTHER.

[QUEEN'S BENCH DIVISION (Barry, J.), December 21, 1955.]

Evidence—Examination of witnesses in relation to matters pending before foreign tribunal—Production of documents—Discovery against persons not parties to foreign action—Foreign Tribunals Evidence Act, 1856 (19 & 20 Vict. c. 113), s. 1.

The defendants and cross-claimants in litigation which was proceeding in the United States of America applied to the High Court under R.S.C., Ord. 37, r. 54, for an order under the Foreign Tribunals Evidence Act, 1856, s. 1,* that certain named witnesses, who were the directors of two English companies, and "such officers and agents" of the two companies, "as may have custody or possession of documentary evidence material to the issues" in the United States action, should attend for examination on oath before an American consul in London and for the production of certain documents. Neither the companies nor their officers were parties to the United States action and there was no evidence that the officers of the company might be material witnesses in the action. Production of the documents asked for would disclose confidential information in regard to the dealings of the English companies not only with the plaintiffs and cross-defendants in the United States action, but also among themselves and with other companies not parties to the action. An order under s. 1 of the Act of 1856 was also sought against S., who was an official of one of the English companies but was not a witness named in the letters rogatory addressed to the judicial authorities in England.

Held: (i) the power to make an order under the latter part of s. 1 of the Foreign Tribunals Evidence Act, 1856, for "the production of any writings or other documents" was ancillary to the order, under the first part of the section, for the examination of witnesses whose evidence was required at the trial of the foreign action, and the court had no power to order what was, in effect, discovery against a witness, or to call a witness for examination merely to obtain discovery or to examine him on the documents which might be in his possession or control; and, therefore, the court had no jurisdiction to make an order on "such officers and agents" of the companies "as may have custody or possession of documentary evidence material to the issues" in the United States action, because an order in those terms would amount to an order for discovery.

Dicta of LORD HALSBURY, L.C., LORD ESHER, M.R., and FRY, L.J., in *Burchard v. Macfarlane, Ex p. Tindall* ([1891] 2 Q.B. at pp. 244, 246, 249) applied.

(ii) the court had no jurisdiction to make an order under s. 1 of the Act of 1856 against S., since he was not a witness whose testimony the foreign court had expressed a desire to obtain.

[As to evidence for use before foreign tribunals, see 13 HALSBURY'S LAWS (2nd Edn.) 795, para. 874; and for cases on the subject, see 22 DIGEST (Repl.) 603, 6940-6942.]

As to production of documents at proceedings other than trial, see 13 HALSBURY'S LAWS (2nd Edn.) 739, para. 813.

For the Foreign Tribunals Evidence Act, 1856, s. 1, see 9 HALSBURY'S STATUTES (2nd Edn.) 576.

For the Evidence by Commission Act, 1843, s. 5, see 9 HALSBURY'S STATUTES (2nd Edn.) 561.

* The terms of the section are set out at p. 265, letters D to G, post.

A For the Evidence by Commission Act, 1859, s. 1, see 9 HALSBURY'S STATUTES (2nd Edn.) 579.

For R.S.C., Ord. 37, r. 54, see the ANNUAL PRACTICE, 1956, p. 670.]

Cases referred to:

- B (1) *Desilla v. Fells & Co.*, (1879), 40 L.T. 423; 22 Digest (Repl.) 582, 6673.
(2) *Eccles & Co. v. Louisville & Nashville Railroad Co.*, [1912] 1 K.B. 135; 81 L.J.K.B. 445; 105 L.T. 928; 22 Digest (Repl.) 603, 6942.
(3) *Burchard v. Macfarlane, Ex p. Tindall*, [1891] 2 Q.B. 241; 60 L.J.Q.B. 587; 65 L.T. 282; 18 Digest 56, 136.
(4) *Elder v. Carter, Ex p. Slide & Spur Gold Mine*, (1890), 25 Q.B.D. 194; 59 L.J.Q.B. 281; 62 L.T. 516; 54 J.P. 692; 18 Digest 120, 700.

C (i) **Appeals.**

These were two appeals by Mr. John Stenson, as a nominal party acting on behalf of two American corporations, Rauland Corporation and Zenith Radio Corporation (referred to hereinafter as the appellant corporations), from two orders of Master BURNAND, dated June 29, 1955, and June 30, 1955, respectively, discharging an order of Master GRUNDY, dated Apr. 21, 1955, and made on an ex parte application by Mr. Stenson, on behalf of the appellant corporations, under R.S.C., Ord. 37, r. 54. The respondents to the appeals were English Electric Co., Ltd., and its subsidiary, Marconi's Wireless Telegraph Co., Ltd., and their directors, in the one case, and Electrical and Musical Industries, Ltd. (referred to hereinafter as "E.M.I.") and its directors, in the other case.

E (ii) **Application.**

This was an application by Mr. Isaac Shoenberg to discharge an order made against him by SLADE, J., on an ex parte application made on July 8, 1955, under R.S.C., Ord. 37, r. 54, on behalf of the appellant corporations. The application was heard separately from the appeals, but the judgment is in respect of all three matters.

The matters arose out of litigation proceeding in the United States District Court for the Northern District of Illinois, between the Radio Corporation of America, as plaintiff, and the appellant corporations, as defendants and cross-claimants. The Radio Corporation's claim was for infringement of patents. G The appellant corporations, by way of defence and cross-claim, alleged a conspiracy (which was said to have begun in 1919) between Radio Corporation and other American and foreign companies to violate, and an actual violation of, the anti-trust laws of the United States, the gist of the conspiracy being an arrangement to pool a large number of patents connected with the electronics industry and, by means of licensing agreements, to parcel out trading rights in various parts of the world among the alleged conspirators. H The appellant corporations claimed that Radio Corporation's patents were unenforceable against them by reason of the alleged conspiracy and infringement of the anti-trust laws, and sought to recover a large sum in damages. Among the foreign companies alleged to be involved in the conspiracy was Marconi's Wireless Telegraph Co., Ltd. (referred to hereinafter as "the Marconi Co."). I Neither English Electric Co. nor E.M.I. was specifically mentioned in the pleadings in the United States action. In March, 1955, the appellant corporations petitioned for and obtained from the District Court of Illinois letters rogatory addressed to the appropriate judicial authorities in England and three other European countries for the examination of certain specified witnesses and the production of documents in the possession of those witnesses. The named witnesses in England included E.M.I., English Electric Co., and the Marconi Co., and a number of individuals who were directors of these companies.

In their petition the appellant corporations stated that the depositions of these witnesses and companies and the obtaining by subpoena or other process of documents in their possession were sought by the appellant corporations "for the purpose of discovery or for use as evidence in this action, or for both purposes", and that the scope of the desired examination of the witnesses was to sustain the allegations of the appellant corporations' counterclaims and to show the existence of cartel arrangements between Radio Corporation and the other companies referred to in the cross-claim. The petition went on to say that the issuance of the letters rogatory was necessary because counsel for Radio Corporation had advised counsel for the appellant corporations that the witnesses whose testimony was sought and the documents sought to be obtained by process could not be voluntarily produced by Radio Corporation and that the witnesses were officers, agents, employees or directors of companies named or alleged to be conspirators with Radio Corporation and were hostile witnesses and would not appear voluntarily before an American consular officer, nor would they voluntarily produce documentary evidence within their possession without the issuance of process by the respective foreign courts.

The learned American judge (JUDGE IGOE) stated the grounds on which he allowed the letters rogatory to be issued in a memorandum, in which he pointed out that the principal grounds asserted by Radio Corporation in support of a motion to set aside the letters rogatory were (i) that the appellant corporations had not shown (a) that the witnesses sought to be examined had knowledge of any facts or documents relevant to the subject-matter involved in the pending action, and (b) that all the documents sought to be obtained and the facts sought to be elicited were not available in the United States; and (ii) that in no case should the depositions be permitted until Radio Corporation had had an opportunity of examining the appellant corporations' witnesses to ascertain the nature of the claims for damage about which information was sought from a foreign witness. The learned judge then said:

"I can find no authority, and none has been cited, for the proposition that a party must show what relevant and material evidence proposed witnesses have in their possession as a condition precedent to taking of depositions of alleged co-conspirators in an anti-trust case. It seems obvious that examination of the officers and agents of alleged co-conspirators may lead to the discovery of relevant evidence, and that is all that is required. Counsel for [Radio Corporation] appears to concede in his argument that there may have been contracts with foreign companies 'dividing up the world', but stated that in so far as they did exist they were terminated some twenty years ago . . . [the appellant corporations] are entitled to discovery as to these agreements, not only to show background and purpose of the conspiracy alleged but for the purpose of ascertaining the extent to which they may still be in existence."

The letters rogatory, which emanated from the President of the United States of America, contained a long list of persons who were said to reside in London and were directors of English Electric Co. or E.M.I., and stated that the evidence of these persons was necessary in the trial of the issues in the United States action and that without their testimony "justice cannot be completely done between the parties". The letters also set out the names of four companies, three of whom were E.M.I., English Electric Co., and the Marconi Co., and said that

"correspondence and documentary evidence material and relevant to the trial of the said issues is in the custody and possession of agents and officials" of the companies named. The letters then went on to say:

"We therefore request you that in furtherance of justice you will by the proper and usual processes of your court cause the witnesses hereinabove

A named, and such officers and agents of the hereinabove named corporations as may have custody or possession of documentary evidence material to the issues in the instant proceedings, to appear before the consul of the United States [giving the address and date] and at such time or times or day or days thereafter as may be necessary for the completion of the examination of said witnesses on oral interrogatories to be asked by counsel for the
B respective parties to the aforesaid cause, and then and there to produce such documentary evidence as is in the custody or possession of said witnesses and is relevant and material to the issues pending in the suit, and also there to answer on their oaths and affirmations to the oral interrogatories propounded to them and each of them, and that you will authorise the consul of the United States of America in London, England, to cause such
C depositions to be committed to writing and returned to us under cover duly closed and sealed up, together with these presents.”

In April, 1955, Mr. Stenson, on behalf of the appellant corporations, made an ex parte application to the High Court, under R.S.C., Ord. 37, r. 54, for an order under the Foreign Tribunals Evidence Act, 1856, that the witnesses named in the
D letters rogatory should attend for examination on oath before a consul of the United States of America in London and that the appropriate officers of English Electric Co., the Marconi Co., and E.M.I. should also attend for examination and for the production of certain documents. The letters rogatory did not name any specific documents, but a schedule to one of Mr. Stenson’s affidavits in support of the ex parte application stated the documents and classes of documents in fact required. On Apr. 21, 1955, Master GRUNDY made the order which was
E sought. By the order the witnesses named therein (who were directors of the respondent companies) “and such officers and agents of the [respondent] companies as may have custody or possession of documentary evidence material to the issues” in the United States action were ordered to attend for examination on oath before a consul of the United States of America in London at a specified
F time and place, and to produce the documents described in the schedule to Mr. Stenson’s affidavit.

On June 20, 1955, English Electric Co., and the Marconi Co., and their directors applied for an order to discharge these companies and the personal applicants from compliance with Master GRUNDY’s order on the ground that enforcement of the order against them would be vexatious and oppressive and an abuse of
G the process of the court. Affidavits in support of this application were sworn by Sir George Horatio Nelson. A similar application was made by E.M.I. and its directors on June 29, 1955, and affidavits in support were sworn by Mr. J. F. Lockwood and Mr. L. J. Brown. Both Sir George Nelson and Mr. Lockwood disclaimed any detailed knowledge of any facts relating to the documents mentioned in Master GRUNDY’s order and indicated the burden which would be
H placed on their companies if those documents were to be searched for and produced. On June 29, 1955, Master BURNAND made an order discharging English Electric Co., the Marconi Co., and their directors from compliance with Master GRUNDY’s order. On June 30 Master BURNAND made an order discharging E.M.I. and its directors from compliance with Master GRUNDY’s order.

Mr. Shoenberg, who had been a director of E.M.I. since February, 1955, was
I not one of the witnesses named in the letters rogatory or Master GRUNDY’s order of Apr. 21, 1955, but a similar order was made against him by SLADE, J., on July 8, 1955, on an ex parte application on behalf of the respondent corporations.

On Oct. 14, 1955, the appellant corporations submitted a revised “request” in which their requirements were very much more limited than those which had been incorporated in Master GRUNDY’s order. In the revised request the appellant corporations asked for the following relief: (i) an order against each of the respondent companies to produce by their proper officers (a) certain specific

and identified documents, (b) all letters and other documents showing "the steps in the negotiation" of each of the agreements mentioned in the request, and (c) "all documents mentioned in any of the foregoing documents"; and (ii) as regards oral testimony, an order for the examination on oath of Sir George Nelson and Mr. H. G. Nelson on (a) "such of the above-mentioned agreements and documents and the conversations, transactions, activities and negotiations referred to therein, as may be within the knowledge of them or either of them"; and (b) certain other documents.

On the appeals, counsel for the appellant corporations while asking for Master GRUNDY'S order to be restored in its entirety, said that the appellants would be content with an order limited to the extent indicated in the "request". Counsel for the respondents submitted that even an order limited to the terms of the "request" would be oppressive and, in the circumstances, outside the true scope of s. 1 of the Foreign Tribunals Evidence Act, 1856. The respondents' main objection to the revised "request" related to the demand for disclosure of documents showing "the steps in the negotiation" of each of the agreements mentioned in the request and "all documents mentioned" in any of the documents produced. The respondents did not object to the production, on payment of the cost incurred, of the documents which were actually specified in the request, if the court considered that any useful purpose would be served thereby.

The appeals and application were heard by BARRY, J., in chambers, but judgment was given in open court.

Sir Frank Soskice, Q.C., and J. G. Le Quesne for the Rauland Corporation and Zenith Radio Corporation (appellants on the appeals and respondents to the application of Mr. I. Shoenberg).

Sir Hartley Shawcross, Q.C., and R. J. Parker for English Electric Co., Ltd., and the other respondents to one of the appeals.

K. Diplock, Q.C., and A. L. Figgis for Electrical and Musical Industries, Ltd., and the other respondents to the other appeal, and for Mr. I. Shoenberg.

Cur. adv. vult.

Dec. 21. BARRY, J., read a judgment in which he stated the facts and, after reading the relevant passages from the petition for letters rogatory and from the learned American judge's memorandum, said: Counsel for the respondents in the present appeals contend that these documents [the petition and the memorandum] disclose that the primary object, if not the only object, sought by the appellant corporations was to make an examination of the witnesses named for the purposes of obtaining discovery against the named companies and individuals resident in this country, who are not parties to the American action. It was suggested by counsel for English Electric Co., Ltd. that an "examination for discovery" of this kind was part of the normal American procedure in a civil action, and that the appellant corporations were now attempting to apply that procedure to witnesses resident outside the jurisdiction of the American courts. There was no evidence as to the American law or practice on this subject, and, indeed, I think that it is quite immaterial, but certain passages in JUDGE TGOE'S memorandum certainly appear to indicate that some such practice does in fact exist. If it does, and however beneficial it may be, it is wholly foreign to the civil procedure in this country.

[After reading the relevant passages from the letters rogatory, HIS LORDSHIP said:] Counsel for the respondents submit that Master GRUNDY'S order of Apr. 21, 1955, read in its ordinary and literal sense, would compel the disclosure of the whole of the trade secrets and other confidential information in the hands of two of the most important companies in the electronics industry in this country (whether those documents be relevant or irrelevant), not only in relation to their dealings with the American companies concerned in this suit, but also with other European companies and even, as I see it, among themselves. Indeed, as I

A read the order, it would require English Electric Co. to disclose the whole of the arrangements concerning patents, licences and contracts relating to the manufacture or sale of radio and television apparatus, made between themselves and their own wholly-owned subsidiary, Marconi's Wireless Telegraph Co. So wide, indeed, are the terms of the order that even, as I thought, counsel for the appellants felt a little diffidence in making his application that it should be wholly
B restored.

The wording of the letters rogatory and the interpretation placed on them by the appellants are, I think, of considerable significance in considering one of the major issues in these appeals, namely, whether "the real object of the exercise" (as counsel for the English Electric Co. somewhat graphically described it) was to obtain full discovery of all the documents in the hands of the respondents
C which might have any bearing on the issues in the American litigation or, as the appellants contend, to obtain the evidence of witnesses likely to be able to depose to facts in issue in that litigation, for use as part of the evidence at the trial.

[HIS LORDSHIP then summarised the terms of the revised "request", and continued:] As to the law which I should apply in considering these matters, I must first turn to the Foreign Tribunals Evidence Act, 1856, s. 1, which provides:
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"Where, upon an application for this purpose, it is made to appear to any court or judge having authority under this Act that any court or tribunal of competent jurisdiction in a foreign country, before which any civil or commercial matter is pending, is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction of such first-mentioned court, or of the court to which such judge belongs,
E or of such judge, it shall be lawful for such court or judge to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly."

There then follows a semi-colon which marks the end of the first portion of the section. The second portion of the section reads:
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"and it shall be lawful for the said court or judge, by the same order, or for such court or judge, or any other judge having authority under this Act, by any subsequent order to command the attendance of any person to be named in such order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order,
G and to give all such directions as to the time, place, and manner of such examination, and all other matters connected therewith, as may appear reasonable and just; and any such order may be enforced in like manner as an order made by such court or judge in a cause depending in such court or before such judge."

H The only two authorities cited to me which bear directly on the interpretation of this section were *Desilla v. Fells & Co.* (1) (1879) (40 L.T. 423) and *Eccles & Co. v. Louisville & Nashville Railroad Co.* (2) ([1912] 1 K.B. 135). I do not think I need refer to the facts or judgments in *Desilla v. Fells & Co.* (1). As I understand it, the case establishes that the evidence taken on an examination made under this section need not be confined to evidence which would be strictly
I admissible in the English court and, secondly, that the master or other person before whom the examination takes place may exercise his discretion whether or not he shall allow cross-examination of a witness by the party calling that witness. subject, as I think, to any limitations imposed by the order of the court under which the examination is held. Lastly, the case establishes that the English courts should endeavour to comply with the requirements of the foreign court in so far as they properly can.

In *Eccles & Co. v. Louisville & Nashville Railroad Co.* (2) the real issue concerned the duties of a servant who was required to produce documents which

were, in truth, not in his own possession, custody or control, but in that of his master. There is, however, one passage in the judgment of VAUGHAN WILLIAMS, L.J., which throws considerable light on the proper interpretation of s. 1 of the Act. VAUGHAN WILLIAMS, L.J., said ([1912] 1 K.B. at p. 142):

"I do not think that I need go at length into the provisions of [the Foreign Tribunals Evidence Act, 1856]. It is enough for the present purpose to say that it is an Act which, in the case of an action pending in the court of a foreign country, enables that court to request the English court to take part in the trial of the action brought in the foreign country to this extent, namely that, on the request of the foreign court, it empowers the English court to make such an order as will enable the evidence of a witness in this country to be given before a commissioner appointed to take his evidence. This is not a power given to the court in this country to order discovery of documents. It is a power to make an order for the taking of evidence not altogether unlike that which is often made by the court in this country for the issue of a commission to take evidence in some foreign country in a case pending in the English court, though there are certain differences between the two procedures."

For the purpose of the present case, the significant words in this judgment are:

"This is not a power given to the court in this country to order discovery of documents. It is a power to make an order for the taking of evidence . . ."

Before passing from *Eccles & Co. v. Louisville & Nashville Railroad Co.* (2) I ought to refer to an argument submitted to me by counsel for the appellants which was based on the very wide terms of the order for production of documents in that case (see [1912] 1 K.B. at p. 138). It was, however, pointed out by the respondents that the documents in question in that case belonged, in a sense, to the defendants in the action, Louisville and Nashville Railroad Co., as was stated by VAUGHAN WILLIAMS, L.J. (*ibid.*, at p. 142). VAUGHAN WILLIAMS, L.J., said (*ibid.*):

"In order to prove this, the plaintiffs sought to obtain the production of documents, which belonged to the defendants, the railroad company, in the sense that they had, in the course of correspondence or of business, passed between them and the agents of the steamship company, the firm of whom the appellant was a servant or an employee, and which were in the possession of that firm. I do not think that it is denied that these documents were in the possession and custody of that firm."

In any event, one thing is clear: in *Eccles & Co. v. Louisville & Nashville Railroad Co.* (2) no question was raised as to the compendious nature of the order in relation to the classes of documents to be produced, nor did the appellant in that case suggest that the order, in effect, amounted to an order for discovery.

I was referred to a further authority decided under the Evidence by Commission Act, 1843. Section 5 of that Act made provisions for compelling the attendance of witnesses and the production of documents before commissions to take evidence issued in one part of the United Kingdom to be executed in another part. The concluding words of s. 5 bear, I think, close similarity to the words of s. 1 of the Foreign Tribunals Evidence Act, 1856. Section 5 of the Act of 1843 provides that

" . . . it shall be lawful for the court or judge to whom such application shall be made by rule or order to command the attendance and examination of any person to be named or the production of any writings or documents to be mentioned in such rule or order."

A The case relating to s. 5 of the Evidence by Commission Act, 1843, is *Burchard v. Macfarlane, Ex p. Tindall* (3) ([1891] 2 Q.B. 241). The headnote reads:

B “In pursuance of a commission issued by the Court of Session, in an action pending in Scotland with regard to the sale of a vessel by the defenders to the pursuers, an order was made at chambers under [the Evidence by Commission Act, 1843], s. 5, that the chairman and secretary of Lloyd’s should attend before the commissioner for examination as to, and to produce the documents which Lloyd’s had under their control answering the description in the specifications of documents by the pursuers and the defenders. The specifications stated that the documents called for were correspondence between Lloyd’s and their surveyor at Hamburg, relating to the condition or the surveys of the vessel between certain dates, and all reports and communications addressed to Lloyd’s by their agent at Hamburg relating to these matters. On appeal against this order:—*Held* (reversing the decision of the Queen’s Bench Division), that the only process intended to be enforced by the statute was the production of documents as ancillary to the examination of a witness; that the order amounted to one for discovery against persons not parties to the action; and that there was no jurisdiction to make such an order.”

D The judgments in that case, if they be applicable to the proceedings now before me, seem to me to be extremely illuminating in their entirety. I shall, however, confine myself to citing two or three passages. LORD HALSBURY, L.C., said ([1891] 2 Q.B. at p. 244):

E “Sitting in this court, and treating the dispute as if it had happened in England, I am bound by the decision of the Court of Appeal in *Elder v. Carter* (4) (1890) (25 Q.B.D. 194), and I am remitted consequently to the inquiry, whether or not this is in substance an order for inspection and discovery, or whether it is part of a procedure to examine witnesses in the course of proof for the purpose of establishing the facts. I do not know what facts are to be established. I do not know what documents are asked for. I do not know that the parties have ever condescended upon any particular document, or intimated that they have any knowledge of any document existing at all, and I am led to the conclusion that it is inspection and discovery that is sought, and not proof. The meaning of the order is, as I construe the language of this instrument, that the witness is to be examined if he has got in his possession documents which may become part of the necessary evidence in the cause. If that is the meaning of it, it is quite clear that such a roving order for discovery is not rendered valid because it is limited to a particular ship and the particular years over which these transactions are spread. The order of the Scotch court has been obtained, not adversely by one of the parties against the other, but by both of them against a third person who has not been consulted, and who has never been heard as to whether or not such an order ought to be made. I am of opinion that to enforce such an order would be a serious invasion of private rights.”

H LORD ESHER, M.R., said (*ibid.*, at p. 246):

I “The order assumes, on the face of it, to be made against Tindall and Dryhurst in an action, and for the purposes of an action, with which they have no relation whatever, to which they are mere strangers, in respect of which they can only be called upon as one calls a witness. It is objected, therefore, on their behalf that the order is beyond the jurisdiction of the judge, first of all because it is made upon third parties who have nothing to do with the action in respect of documents which are not alleged to be the documents of either party in the action, but which are admitted upon the affidavits to be the documents and the property solely of these third parties; and secondly, because it requires them not only to state whether there are

such documents, but to produce them, and allow them to be read before it is determined whether they are evidence either on behalf of the plaintiffs or defendants. What the meaning of this document is I confess I have myself no doubt. It is ordered that Tindall and Dryhurst do respectively attend before a commissioner for examination, not for examination in the trial, but for examination 'as to the documents which Lloyd's Register of British and Foreign Shipping have in their possession' answering certain descriptions, and those descriptions are of the largest kind; 'and also that they do respectively produce to the said commissioner the documents mentioned in the said specifications'. Reading the affidavits and this order, and the summons, I cannot have a doubt that the real meaning of that last part of it is, produce them in order that the persons applying for them may read them and know their contents. The question comes to be whether such an order is within this Act of Parliament. In my opinion it is beyond the jurisdiction of the judge to make the order. He has made an order upon third persons for discovery, and I take it that that has been determined in England, at all events, to be beyond the jurisdiction of the judge, and when I come to this Act of Parliament I shall consider whether it is not the same upon this Act of Parliament. Even supposing that the documents had been identified, and that the witnesses had been asked to produce a document which it is admitted, or shown clearly, is not the document of either the plaintiff or the defendant, and had been ordered to produce it for the purpose of its being read, not at the trial, but before the trial, not before the examiner as part of the trial but as preliminary to the trial, then in that case also I should have thought that it is beyond the jurisdiction of the judge to make the order."

Lastly, I must refer to a passage in the judgment of FRY, L.J. (*ibid.*, at p. 249):

"Therefore it is undoubted to my mind that the true conclusion is that the order really is, what on its face it appears to be, an order that Mr. Tindall and Mr. Dryhurst come before the examiner in order that they may make discovery of documents. It is analogous to a bill of discovery against a mere witness. Now is such an order as that within the meaning of the statute [the Evidence by Commission Act, 1843]? In my judgment it plainly is not. That statute enables the court in England or Scotland or Ireland to direct a commission for the examination of witnesses—that means persons who are able to bear testimony with regard to the issues in controversy between the litigant parties. It does not mean that they may be examined with regard to the possession of documents which may be relevant to the controversy between the parties. That observation governs, in my opinion, the whole of the section, and I think the words at the end 'for the production of any writings or documents to be mentioned in such rule or order', are only ancillary to the examination of witnesses. The words may enable the parties to require the production of the documents which the witness produces as a witness; but they cannot for one moment be stretched so as to enable any one to obtain discovery against a witness."

It is perhaps worth referring to the following paragraph of the judgment of FRY, L.J. (*ibid.*, at p. 250), in view of the point raised by counsel for the English Electric Co.:

"Mr. Lyttelton [for the respondents] put forward a very ingenious argument indeed, which was this. He said that the law of Scotland must govern the Scotch commission in England, and the law of England must govern the English commission in Scotland, and if the law of Scotland enables you to get discovery against a witness in Scotland, you must be able in England to obtain discovery from the witness in England. There are

- A two answers to that suggestion. In the first place I do not think that it is the true meaning of the clause; but even if it were, there is no evidence at all before us that in Scotland discovery can be obtained against a witness. If that were the Scotch law it must be borne in mind that the English court must exercise a discretion. I say without hesitation if I were the judge at chambers, I never would make an order which enabled a Scotch commission in England to obtain discovery of documents from a mere witness in the cause. Therefore I do not doubt that even if Mr. Lyttelton were right in his contention, and the law of Scotland is that which he suggests ought to be gathered from this consent order, the court of England should not follow it in granting discovery against a mere witness. It is to be observed that according to the law of England, as it exists at the present time, it is impossible to obtain discovery against a witness by any process."
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- Basing themselves on these authorities, the respondents contend that the appellants' case is misconceived on two broad grounds: first, that the application is wholly, or in great part, an application for what amounts to an order for discovery against third parties, that is to say, companies and individuals (such as English Electric Co., Marconi Co., and E.M.I. and their directors) who are not parties to the American litigation. In so far as the application is, in truth, one for discovery, the respondents submit that the court has, in fact, no jurisdiction to make the order. Secondly, they say that in any event the court should exercise its discretion to refuse the order on the ground that the whole application is oppressive and an abuse of the process of the court. Counsel for the appellants, while not conceding the validity of any objections raised in relation to Master GRUNDY's order, which he is (nominally, at least) seeking to restore, contends that his revised request is unexceptionable and that an order in these limited terms at least should be made. All the pre-requisites for an order under s. 1 of the Foreign Tribunals Evidence Act, 1856, have, he says, been fulfilled and, therefore, the fullest possible assistance should be given to the American court which has expressed a desire for the evidence of the witnesses named and the production of the specified documents.
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- I turn first to the question of jurisdiction. In considering the true construction of s. 1 of the Act of 1856, I propose to apply to it the principles enunciated in *Burchard v. Macfarlane* (3). I have already referred to the similarity between the relevant words in the two Acts. Despite this similarity, counsel for the appellants submitted that there was no real analogy between them. According to his argument, the Act of 1843 contains no provision which can be used for the protection of witnesses, whereas under s. 1 of the Act of 1856 this purpose can be achieved by the exercise of the power to give directions as to the manner of the examination and all other matters connected therewith. Furthermore, counsel argued, the compulsory examination of a witness under the Evidence by Commission Act, 1843, only reflects the wish of one or perhaps both of the parties to an action in some part of the United Kingdom, whereas under the Foreign Tribunals Evidence Act, 1856, it is the court of competent jurisdiction in the foreign country which desires the testimony of the witness. Despite these undoubted distinctions, I am unable to find any substantial difference between the effective wording of the two sections, and I am certainly not prepared to hold that persons or corporations within the jurisdiction of the English courts should be subjected to a wider form of inquisition in relation to an action pending in a foreign court than that to which they would be liable if the action were being tried in Scotland or in Northern Ireland, or, for that matter, in this country. So far as I am aware, *Burchard v. Macfarlane* (3) has always been regarded as an authority in relation to s. 1 of the Evidence by Commission Act, 1859, which relates to Her Majesty's Dominions and Overseas Possessions, and that section is in almost exactly similar terms to s. 1 of the Foreign Tribunals Evidence Act, 1856. Although I am not, I think, strictly bound by *Burchard v*
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Macfarlane (3), I propose to use it as an authoritative guide to the correct interpretation of the Act now under consideration, and the judgments in that case fortify me in the conclusion at which I should, in any event, have arrived, namely, that any order requiring the production of documents under any of these Acts to which I have referred is ancillary to the order for the examination of witnesses, whose evidence is required at the trial of the foreign action. To repeat the words of *Fry, L.J.* ([1891] 2 Q.B. at p. 250):

“The words [that is, the relevant words of s. 5 of the Act of 1843 relating to documents] may enable the parties to require the production of the documents which the witness produces as a witness; but they cannot for one moment be stretched so as to enable any one to obtain discovery against a witness.”

Indeed, I think the judgments in *Burchard v. Macfarlane* (3) provide a foundation for, and they certainly enlarge on, the words of *Vaughan Williams, L.J.*, in *Eccles & Co. v. Louisville & Nashville Railroad Co.* (2) ([1912] 1 K.B. at p. 142):

“This [namely, s. 1 of the Act of 1856] is not a power given to the court in this country to order discovery of documents. It is a power to make an order for the taking of evidence . . .”

When this principle is applied, as I think it must be applied, to the present appeals, it is I think apparent that any order made on “such officers and agents of the [respondent] companies as may have custody or possession of documentary evidence material to the issues” in the United States action* is quite outside the jurisdiction of the court and is bad. In the absence of any evidence, or even suggestion, that any of these officers (who, in all probability, are purely administrative officials in the secretarial offices of the companies) could or might be material witnesses in the action, an order in these terms is an order for discovery, and nothing more and nothing less. I hold that under the Foreign Tribunals Evidence Act, 1856, as under the Evidence by Commission Act, 1843, the power to make an order for “the production of any writings or other documents” is ancillary to the order for the examination of witnesses, and that the court has no power to order what is, in effect, discovery against a witness, or to call a witness for examination merely to obtain discovery or to examine him on the documents which may be in his possession or control. Should I be wrong in my view on the question of jurisdiction, I am quite satisfied that, as a matter of discretion, Master *Grundy’s* order, in so far as it relates to the production of documents, cannot be supported. The enforcement of such an order against any company or person not a party to the action would, I think, be grossly oppressive when judged by the standards of our own civil procedure, and I do not propose to judge it by any other standard. I also think that it would be oppressive to enforce the modified request, in so far as it requires the disclosure of documents relating to the “steps in the negotiation” of any of the agreements mentioned in the request or “documents mentioned” in any of the documents specified in the request.†

I am, of course, anxious to render every possible assistance to the courts of the United States, but I feel confident that the District Court of Illinois will not regard it as a breach of the comity which should and does exist if I decline to grant a form of relief against a company or individuals within the jurisdiction of this court which could not be obtained by a litigant in Scotland or Northern Ireland, or, as I think, could not be obtained at the request of the court in any part of the British Commonwealth.

The position of the witnesses named in the letters rogatory is, of course, wholly different, and here I think my discretion is unfettered. It would, in my judgment, be oppressive, and grossly oppressive, to order the attendance for examination of all the persons mentioned in the letters rogatory, namely, almost

* See p. 263, letter E, ante.

† See p. 264, letter A, ante.

- A every member (including, incidentally, certain deceased members) of the boards of directors of both the two English companies, English Electric Co., and the subsidiary Marconi Co. and E.M.I. On the other hand, I think that I should be wrong in refusing to make an order which would enable facts relevant in the American action to be proved by parol evidence taken in this country. Both the respondent companies have made offers as to the production of witnesses which
- B were, I think, entirely reasonable, but I am satisfied that, at this stage at least, no satisfactory solution can be arrived at except as a result of an order of this court. I do not think that I should substitute my opinion as to the identity of witnesses likely to have some knowledge of relevant facts for that of the American court, and in consequence I am satisfied on that and other grounds that any order made by this court should be limited to persons who are among
- C those named in the letters rogatory, such persons being, of course, entitled to refuse to answer questions which may tend to incriminate them under the laws of this country or the United States. On the whole, the evidence satisfies me that Sir George Horatio Nelson and Mr. H. G. Nelson may both have some knowledge—I am far from saying detailed knowledge—of the matters in issue in the American action. The appellants' revised request does not ask for the examination of any witness on behalf of E.M.I., but this omission is, I think, explained
- D by the order of SLADE, J., for the examination of Mr. Shoenberg, which order counsel for Mr. Shoenberg now invites me to discharge. In view of the conclusion which I have reached on Mr. Shoenberg's application, I think that I should go back to Master GRUNDY's order which names, among others, Mr. Leonard John Brown, a gentleman who admittedly may have some knowledge of the
- E matters in question.

Therefore, in my judgment, these appeals should be allowed to the following very limited extent. First, Sir George Horatio Nelson, Mr. H. G. Nelson, and Mr. Leonard John Brown must attend for examination on the subject-matters referred to in section B* of the revised request, and must produce such of the documents specified† in this request as, on notice given a certain number of days

F before the examination, the appellants may require, other than documents showing the steps in the negotiation of the agreements referred to and the documents mentioned in the documents produced, unless these other documents are specifically identified in such notice. Secondly, the examination of these gentlemen is to be conducted before a master of the Supreme Court, and the witnesses are to be examined in the manner prescribed by the procedure of the

G English courts for the examination of witnesses in chief, unless the master in his discretion shall consider it proper to allow cross-examination on any ground which would justify the exercise of such discretion in a civil court in this country. Thirdly, the expenses of witnesses are to be met by the appellants under s. 4 of the Foreign Tribunals Evidence Act, 1856, and the appellants are to bear the reasonable expense of and incidental to the production of the documents specified

H in their notice, any question as to amount being determined by the master before whom the examination is held. Fourthly, there must be liberty to apply. Liberty to apply is of particular importance in this case because, should it transpire that the deposition of witnesses taken before a master of the Supreme Court and duly authenticated and certified is not evidence acceptable to the

I American court, this order must not be frustrated, and the appellants would be entitled to return to the court and to ask for a variation of the order, should that be found to be the true position. As I understand it, I do not think that is the position, but I am wholly unacquainted with American law or procedure on this matter.

* Section B dealt with oral testimony, while section A dealt with production of documents.

† HIS LORDSHIP, after delivering his judgment, said that by "specified documents" he meant documents identified by date and nature or name, if they had a name.

I must now turn to Mr. Shoenberg's application, which, in my judgment, succeeds. It is unnecessary for me to refer in detail to the evidence, as I am satisfied that, had he heard the arguments addressed to me on Mr. Shoenberg's behalf, SLADE, J., would not have made the order which he did. When I say this, I do not, of course, for one moment suggest that the facts and arguments, as known, were not fully and frankly presented to the judge on the ex parte application. On a full examination of the facts and law, I have, however, no doubt that the court was without jurisdiction to make any such order. I am satisfied that, as counsel for Mr. Shoenberg put it, there is no dichotomy between the first and second parts of s. 1 of the Foreign Tribunals Evidence Act, 1856. I accept his suggestion that the first part of the section was enacted to enable the court to order an examination on oath by some person before whom an oath could not otherwise be lawfully administered. Section 3 of the Act, on which counsel for the appellants relies, does not, in my judgment, in any way tend to invalidate this view. The latter section is, I think, only a consequential provision legalising the administration of the oath by the person authorised to take the examination. On its true construction, the second limb of s. 1 of the Act of 1856 applies only, in my opinion, to a witness whose testimony the foreign court has expressed a desire to obtain. That expression of desire may be proved by various means, but it must, I think, relate to a named witness or, at the very least, to a witness in a named class. Any other construction would lead, I think, to a roving inquisition to which there might, virtually, be no end. It is true that the evidence already elicited shows that Mr. Shoenberg may have some knowledge of some relevant facts, but the American court has not desired his evidence, unless it can be said, as was suggested, that it desired the evidence of every person and company resident in the United Kingdom who might be able to throw any light on the matters in issue in the American action. The evidence of Sir Ernest Fisk has, for example, shown that Mr. Shoenberg may come within this class. If Mr. Shoenberg's evidence were to be taken, it might, in its turn, disclose the identity of some other person who could be included in it, and so on, as I think, almost ad infinitum.

Counsel for the appellants sought to support the order on another ground. He submitted that Mr. Shoenberg was, in fact, a person named in the letters rogatory as being an "officer or agent" of E.M.I. "who may have custody or possession of documentary evidence". The short answer, as I think, to this point is that, if it is well founded, Mr. Shoenberg was a person covered by Master GRUNDY's order, from which E.M.I. were discharged by Master BURNAND's order dated June 30, 1955. In those circumstances, the ex parte application to SLADE, J., was, on this assumption, an indirect attempt to appeal from the order of Master BURNAND. This application must, I think, clearly be allowed, and Mr. Shoenberg must be discharged from compliance with the order made on July 8, 1955.

Appeals allowed to a limited extent. Order against Mr. Shoenberg discharged.

Solicitors: *Theodore Goddard & Co.* (for the appellants); *Linklaters & Paines* (for the English Electric Co., Ltd.); *Herbert Smith & Co.* (for Electrical and Musical Industries, Ltd. and others and for Mr. I. Shoenberg).

[Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.]

A

AMON v. RAPHAEL TUCK & SONS, LTD.

[QUEEN'S BENCH DIVISION (Devlin, J.), November 10, 23, December 7, 19, 1955.]

Practice—Parties—Adding persons as parties—Defendants applying for order to join another defendant—Prima facie case that proposed defendant's rights might be legally affected by the result of the action—R.S.C., Ord. 16, r. 11.

B

By his statement of claim in an action against the defendants the plaintiff alleged that he was the inventor of a new design of adhesive dispenser in the shape of a pen, known as the Fastik pen; that he disclosed the "know-how" of the pen to the defendants during negotiations for an agreement whereby the defendants were to market the pen; that in February, 1954, the negotiations broke down; that there was an implied contract that the defendants would treat as confidential the information given to them during the negotiations; and that the defendants were in breach of that contract in that they had made use of the information by manufacturing an adhesive dispenser called the Stixit pen which contained three distinctive features of the Fastik pen. The plaintiff claimed damages against the defendants and an injunction to restrain the defendants from disclosing to other persons or making use of the information disclosed by the plaintiff without his consent. The defendants, before filing a defence, applied by summons under R.S.C., Ord. 16, r. 11*, for leave to join as a defendant one D. who by affidavit alleged, among other things, that he was the inventor of the Stixit pen. Subsequently D. filed another affidavit alleging, among other allegations, that the defendants were under contractual obligation to him to manufacture and distribute the Stixit pen in certain territories.

C

D

E

Held: (i) the test whether under R.S.C., Ord. 16, r. 11, the court had jurisdiction to add as defendant a person whom the plaintiff did not wish to sue was whether the order for which the plaintiff was asking in the action might directly affect the intervener (i.e., the person proposed to be added as a party) by curtailing the enjoyment of his legal rights (see p. 281, letter C, p. 290, letter E, post); for the only reason which might render the presence of a party before the court to be "necessary" to enable the court to adjudicate completely (within the meaning of R.S.C., Ord. 16, r. 11) was that he should be bound by the result of the proceedings (see p. 287, letter B, post).

F

G

Moser v. Marsden, [1892] 1 Ch. 487, as interpreted by BUCKLEY, J., in *McCheane v. Gyles* (No. 2), [1902] 1 Ch. 911, and dictum of WYNN-PARRY, J., in *Dollfus Mieg et Compagnie S.A. v. Bank of England*, [1950] 2 All E.R. at p. 611, followed; observations of WYNN-PARRY, J., in *Atid Navigation Co., Ltd. v. Fairplay Towage & Shipping Co., Ltd.*, [1955] 1 All E.R. at p. 699, considered; dicta of LORD ESHER, M.R., in *Byrne v. Brown & Diplock* (1889), 22 Q.B.D. at p. 666, criticised.

H

(ii) D. should be added as defendant in the present case because the defendants were shown prima facie to be bound to him in contract to

I

* The full text of R.S.C., Ord. 16, r. 11, is: "No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice."

manufacture the Stixit pen, which obligation constituted a legal right of D.'s the enjoyment of which might be curtailed by relief (i.e., the injunction) asked by the plaintiff in this action (see p. 289, letter G, p. 290, letter F, post).

[Editorial Note.] The fact that a proposing intervenor may be commercially, as distinct from legally, prejudiced by the result of an action to which he is not a party does not afford ground enabling the court to order him to be added as defendant against the wish of the plaintiff (see p. 281, letter I, to p. 282, letter A, post). A person is legally interested if the answer to the question in issue may curtail his legal rights (see p. 287, letter D, post). Illustration of the distinction between commercial and legal prejudice will be found at p. 289, letters A to E, et seq., post.

As to joinder of defendants, see 26 HALSBURY'S LAWS (2nd Edn.) 19-21, paras. 16, 17; and for cases on the subject, see DIGEST (Practice) 429-431, 1243-1266.

For R.S.C., Ord. 16, r. 11, see the ANNUAL PRACTICE, 1956, p. 255.]

Cases referred to:

- (1) *Atid Navigation Co., Ltd. v. Fairplay Towage & Shipping Co., Ltd.*, [1955] 1 All E.R. 698.
- (2) *Norris v. Beazley*, (1877), 2 C.P.D. 80; 46 L.J.Q.B. 169; 35 L.T. 846; Digest (Practice) 429, 1243.
- (3) *McCheane v. Gyles (No. 2)*, [1902] 1 Ch. 911; 71 L.J.Ch. 446; 86 L.T. 217; Digest (Practice) 429, 1246.
- (4) *Hood Barrs v. Frampton, Knight & Clayton*, [1924] W.N. 287; 69 Sol. Jo. 125; Digest (Practice) 429, 1250.
- (5) *Montgomery v. Foy, Morgan & Co.*, [1895] 2 Q.B. 321; 65 L.J.Q.B. 18; 73 L.T. 12; 40 Digest 413, 354.
- (6) *Norbury Natzio & Co. v. Griffiths*, [1918] 2 K.B. 369; 87 L.J.K.B. 952; 119 L.T. 90; Digest (Practice) 430, 1259.
- (7) *Bentley Motors (1931), Ltd. v. Lagonda, Ltd.*, [1945] 2 All E.R. 211; 114 L.J.Ch. 208; 173 L.T. 87; 2nd Digest Supp.
- (8) *Dix v. Great Western Ry. Co.*, (1886), 55 L.J.Ch. 797; 54 L.T. 830; Digest (Practice) 427, 1229.
- (9) *Vavasseur v. Krupp*, (1878), 9 Ch.D. 351; 39 L.T. 437; Digest (Practice) 912, 4543.
- (10) *Dollfus Mieg et Compagnie S.A. v. Bank of England*, [1950] 2 All E.R. 605; [1951] Ch. 33; 2nd Digest Supp.
- (11) *Moser v. Marsden*, [1892] 1 Ch. 487; 61 L.J.Ch. 319; 66 L.T. 570; Digest (Practice) 423, 1194.
- (12) *Byrne v. Brown & Diplock*, (1889), 22 Q.B.D. 657; 58 L.J.Q.B. 410; 60 L.T. 651; Digest (Practice) 425, 1207.
- (13) *Townend v. Toker*, (1866), 1 Ch. App. 446; 35 L.J.Ch. 608; 14 L.T. 531; 42 Digest 542, 1205.

Procedure Summons.

The defendants, Raphael Tuck & Sons, Ltd., applied by summons under R.S.C., Ord. 16, r. 11, for an order that Hugo Dachinger be added as a defendant to an action whereby the plaintiff, Robert Amon, claimed (a) damages for breach of agreements to treat as confidential information disclosed by the plaintiff to the defendants relating to the plaintiff's design of an adhesive dispenser; (b) damages for breach of duty owed by the defendants to the plaintiff not to disclose to other persons or to make use of the said information without the consent of the plaintiff; and (c) an injunction restraining the defendants by their servants, agents, subsidiary companies, or otherwise, from disclosing to other persons or making use of the said information without the consent of the plaintiff. The application was refused by Master HARWOOD on July 21, 1955, and the defendants appealed. The appeal was heard by DEVLIN, J., in chambers, on Oct. 20 and 27, 1955. The learned judge then adjourned the hearing into open court and heard further argument on Nov. 10, 23, and Dec. 7, 1955.

- A The nature of the plaintiff's claim and the reasons for the application by the defendants appear from the judgment.

G. T. Aldous for the defendants.

E. V. Falk for the plaintiff.

Cour. adv. vult.

- B Dec. 19. **DEVLIN, J.**, read the following judgment: The plaintiff alleges in his statement of claim that he is the inventor of an adhesive dispenser in the shape of a pen which he calls the Fastik pen and in respect of which he has filed an application for a provisional patent. He alleges that in August, 1953, he was in negotiation with the defendants with the object of arriving at an agreement under which they were to market the pen and that in the course of the negotiations
- C he disclosed the "know-how" of his pen. On Feb. 22, 1954, the negotiations broke down. The plaintiff now finds, he says, that the defendants are manufacturing a pen which they call the Stixit pen and which contains three distinctive features of the Fastik pen. In short, he claims that the defendants have stolen his "know-how". In legal language he says that there was an implied contract that the defendants would treat as confidential the information given to them
- D during the negotiations and that they are in breach of that contract.

- The statement of claim was delivered on June 1, 1955. Before delivering a defence the defendants applied to the master for an order under R.S.C., Ord. 16, r. 11, that a certain Mr. Dachinger should be joined as a defendant. They filed an affidavit by him in which he expresses his willingness to be joined. He says, in effect, that he is the inventor of the Stixit pen, that he is in the employment of the defendants and is assisting them in marketing the pen. He also, in his affidavit, gave an account of the negotiations in August, 1953, very different from that set out in the statement of claim. He says that he came to England in April, 1953, and was introduced to the plaintiff and disclosed to him confidentially his invention. According to him, the negotiations to which the plaintiff has referred took place between himself and the defendants with the
- E plaintiff acting as an intermediary. The Fastik pen is, he says, an embodiment of his invention and made by the plaintiff in breach of confidence; and he wished to be made a defendant so that he could counterclaim against the plaintiff. The plaintiff objected to the joinder and the master refused to order it; against this refusal the defendants now appeal. The master refused because he decided that he had no jurisdiction to make the order, and, at the first hearing before me,
- F counsel for the plaintiff supported the master's decision solely on that ground. He said, however, that he wished to contend in the alternative that, if the court had jurisdiction, this is not a case in which its discretion should be exercised. For this purpose he had filed some further affidavits which the defendants had not then had time to consider and answer. In these circumstances he asked that I should deal first with his submission on jurisdiction. This is not usually the
- G convenient course, but as a special appointment had been made for the hearing of the summons it seemed to me, on the whole, the best one to take.
- H

- [His LORDSHIP referred to R.S.C., Ord. 16, r. 11, to his provisional conclusion, to the further consideration and argument, and continued:] I shall begin my judgment by considering the case for the narrow construction of the rule and the arguments of counsel for the plaintiff thereon. I have already set out the
- I material parts of the rule which requires that the party to be joined must be one

"... whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter . . ."

This is, in form, an application by the defendants to join Mr. Dachinger. In my judgment, however, they cannot show that, so far as they are concerned, Mr. Dachinger is a necessary party to the action. They are sued by the plaintiff simply for breach of confidence, and the essence of their case is that they owed

no duty to him. On this issue they will, no doubt, require to have Mr. Dachinger as a witness on their behalf and it may be convenient to them to have him as a party, but it cannot be said that it is necessary to their case that he should be a party. The application must, therefore, be treated as an application by Mr. Dachinger for leave to intervene. The authorities which relate to the application of the rule to proposed interveners are quoted in a note in the *ANNUAL PRACTICE*, 1955, at p. 232*, and the material parts of it are as follows:

“ Generally in common law and Chancery matters a plaintiff who conceives that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant alone. He cannot be compelled to proceed against other persons whom he has no desire to sue . . . Generally speaking, intervention can only be insisted upon in three classes of case, namely: (A) In a representative action where the intervener is one of a class whom plaintiff claims to represent. The intervener may say, ‘ I deny that plaintiff represents me—add me as a defendant . . . ’ (B) Where the proprietary rights of the intervener are directly affected by the proceedings . . . (C) In actions claiming the specific performance of contracts where third persons have an interest in the question of the manner in which the contract should be performed.”

The first submission of counsel for the plaintiff is that there is no jurisdiction to join an intervener if the plaintiff has no claim against him and does not desire to prosecute any. He relied strongly on the recent decision in *Atid Navigation Co., Ltd. v. Fairplay Towage & Shipping Co., Ltd.* (1), in which WYNN-PARRY, J., said ([1955] 1 All E.R. at p. 699):

“ After all, the basis of the whole jurisdiction to add defendants is that there is a cause of action by the plaintiff against not only the existing defendant but the person who would be joined if the application were successful. In *Norris v. Beazley* (2), LORD COLERIDGE, C.J., after referring to Ord. 16, r. 13 [now Ord. 16, r. 11] said (1877) (2 C.P.D. at p. 83): ‘ It seems to me to be correctly argued that those words plainly imply that the defendant to be added must be a defendant against whom the plaintiff has some cause of complaint, which ought to be determined in the action, and that it was never intended to apply where the person to be added as defendant is a person against whom the plaintiff has no claim, and does not desire to prosecute any ’.”

WYNN-PARRY, J., having quoted this passage, later expressed his own conclusion that he had no jurisdiction to make the order asked for.

Several earlier cases were referred to. *McCheane v. Gyles* (No. 2) (3) ([1902] 1 Ch. 911) was an action in which a beneficiary charged one of several trustees with a breach of trust and the defendant applied to have the executrix of a co-trustee joined as a co-defendant. BUCKLEY, J., refused to make the order, and according to the headnote he held that the executrix ought not to be added as a defendant against the plaintiff's wish. I think that this condenses the judgment too much. BUCKLEY, J., certainly referred (*ibid.*, at p. 915) to “ a class of cases . . . in which a person may be added as a defendant to an action without the plaintiff's consent ” and held that this was not one of them. He did, I think, also decide the case as a question of jurisdiction and not of discretion, because he said at the beginning of his judgment (*ibid.*, at p. 914) that he would have made the order asked for if he could, and (*ibid.*, at p. 917) that he had not power to make it. I think, however, that the precise ground for his holding that he had no jurisdiction is expressed where he says (*ibid.*): “ . . . her presence is not necessary to enable the court to decide whether Gyles is liable for a breach of trust ”. That is rather a different point which I shall consider later.

* Now the *ANNUAL PRACTICE*, 1956, p. 236.

- A In *Hood Barrs v. Frampton, Knight & Clayton* (4) ([1924] W.N. 287), the plaintiffs employed the defendants to collect on their behalf the rents of a certain flat. After a while the defendants refused to pay over the rents because they had been informed by a third party that she was entitled to receive them. The plaintiffs sued the defendants who asked for the other party to be joined. EVE, J., refused the application and said that the defendants had no right to require
- B the plaintiffs to sue another party; and that convenient as it no doubt would be to have the whole matter discussed, they could not claim to have it decided on the record as it stood. He declined to make the order for adding a defendant against whom no relief was sought. Here, again, I do not think that the gist of the learned judge's decision was that he had no jurisdiction to make the order in a case where the plaintiffs sought no relief; I think the true effect of it
- C is that the defendants were not entitled to have the other party joined because the question involved did not arise on the record as it stood.

These cases show that the learned judges felt the difficulty of joining as defendant a party whom the plaintiff said he did not want to sue. BUCKLEY, J., said in the course of the argument ([1902] 1 Ch. at p. 913): "Supposing I did so, how could I make him allege anything against or claim anything from the new

D defendant?" In his judgment he pointed out (*ibid.*, at p. 917) that, if the party were joined and the plaintiff made no allegation against her, she might apply to be dismissed from the action. In some cases it may be apparent from the statement of claim that the plaintiff must have a cause of action against the intervener as well as the defendant. In others it may be apparent from admitted facts that he has a good cause of action. But suppose that, on the facts which the

E plaintiff is going to prove, he would have no cause of action against the intervener, can the intervener be joined? Or suppose that the plaintiff has not, on any view, a cause of action against the intervener, can he still be joined? LORD COLERIDGE, C.J., in *Norris v. Beazley* (2) thought not. His reference to the rule* in the passage cited by WYNN-PARRY, J., is a reference to the last sentence of it which now reads:

- F "Every party whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter mentioned . . ."

The present Ord. 16, r. 13, orders that where a defendant is added the writ of summons shall be amended and the plaintiff shall serve the new defendant with the amended writ or with notice thereof in the same manner as original defendants

G are served, and the proceedings shall be continued as if the new defendant had originally been made a defendant. This seems to contemplate that the plaintiff must show a good cause of action on the amended writ and must deliver a statement of claim in amplification of it. The willing intervener might dispense with this; but the rule is the same for the willing and the unwilling, and the unwilling, as BUCKLEY, J., pointed out ([1902] 1 Ch. at p. 917), could immediately apply

H to have his name struck out if the writ and statement of claim disclosed no cause of action against him.

Nevertheless, later authorities, which are binding on me, show conclusively that a party can be joined as defendant even though the plaintiff does not think that he has any cause of action against him. In *Montgomery v. Foy, Morgan & Co.* (5) ([1895] 2 Q.B. 321), the plaintiff carried cargo to London consigned to the

I defendant; the defendant was the agent of the shipper to sell the goods in England and had no right of property in the cargo. As the defendant did not take delivery, the plaintiff placed it in the custody of a warehouseman with a notice that it was subject to a lien for freight under the Merchant Shipping Act, 1894, s. 493. The defendant obtained possession of the cargo under s. 495 by depositing the amount claimed for the freight with the warehouseman and giving him notice to retain it under s. 496, as the defendant did not admit any sum to be

* Now R.S.C., Ord. 16, r. 11.

payable. The plaintiff brought an action against the defendant for a declaration that he was entitled to a lien on the deposit and an order that the sum should be paid to him. The intervener, as owner of the cargo, had a claim for short delivery and damage to the cargo and applied to be joined as defendant so that he could counterclaim. This was allowed by the Court of Appeal. LORD ESHER, M.R., said ([1895] 2 Q.B. at p. 325) with regard to *Norris v. Beazley* (2) that, while he did not say that the actual decision was wrong, he did not think that all the statements made in the judgments could now be supported. In this case [*Montgomery v. Foy, Morgan & Co.* (5)] the plaintiff was, in substance, suing the intervener because he was the person, as LORD ESHER, M.R., said (*ibid.*, at p. 323), who made the contract of affreightment and out of whose pocket the freight came. But the plaintiff was not suing the intervener in form and it does not appear that the Court of Appeal thought it necessary that he should.

In *Norbury Natzio & Co. v. Griffiths* (6) ([1918] 2 K.B. 369), the defendant and the intervener as executors sold a printing business to the plaintiffs. One of the terms of the contract was that the plaintiffs should complete work in progress at the time of the sale at agreed rates. The plaintiffs alleged that by a special arrangement made with the defendant only they printed a catalogue at a special rate different from the agreed rate and they sued him for the cost. The defendant admitted that the sum was due but denied that it was due under a special arrangement to which he alone was a party; he said that the work was not done for him separately but for himself and the intervener as executors. If the case had stopped there, the defendant need not have applied for the joinder; if the defendant was successful in proving that the contract was a joint one, it would be the plaintiffs who would have to ask for the joinder. But the defendant also said that there were other sums due to himself and the intervener as executors under the contract of sale and for which he wanted to counterclaim; he could not do that without joining the intervener on the counterclaim and so he applied to have the intervener joined as a defendant. The Court of Appeal allowed the joinder, saying, in effect, that it did not matter that the plaintiffs were not suing on a joint contract and that it was not necessary for the court to determine whether there was or was not a joint contract; the joinder was justified if the defendant could show a *prima facie* case of joint contract. The form of the order made is set out ([1918] 2 K.B. at p. 380). It is not quite clear from it whether the plaintiffs were required to frame a cause of action against the intervener or not. It rather looks as if they were not, for the order says that the intervener is to be joined as a co-defendant, and that the defendants be then at liberty to bring a counterclaim jointly against the plaintiffs.

Finally, in *Bentley Motors* (1931), *Ltd. v. Lagonda, Ltd.* (7) ([1945] 2 All E.R. 211), EVERSHED, J., held in terms that it was unnecessary that the plaintiffs should have any cause of action. In this case the plaintiffs' registered trade mark consisted of the word "Bentley". In 1932 they agreed with Mr. Bentley, who was apparently leaving their employment, that notwithstanding the registration of the trade mark he might permit the use of his name by any company who employed him. He was employed by the defendants. The plaintiffs sued the defendants claiming an injunction for infringement of their trade mark. The defendants challenged the validity of the trade mark and also relied on the contract of 1932. Mr. Bentley sought to intervene on the ground that the plaintiffs were acting in breach of his contract. EVERSHED, J., allowed the joinder and said at the end of his judgment (*ibid.*, at p. 213) that it did not matter if the plaintiffs in the action did not prefer any claim against the party joined and that the practical effect of the joinder was so that the party joined might assert his case by way of counterclaim against the plaintiffs.

The decisions in the Court of Appeal make it clear that it is no bar to an intervention that the plaintiff cannot, on his view of the facts, formulate any cause of action against the intervener. The decision in *Bentley Motors* (1931),

A *Ltd. v. Lagonda, Ltd.* (7) may go further and support a submission that it is not necessary that on any view of the facts a cause of action should be shown. *Bentley Motors (1931), Ltd. v. Lagonda, Ltd.* (7) was apparently not cited to WYNN-PARRY, J., and I think that it is convenient that I should consider again the dicta on which counsel for the plaintiff relies after I have expressed my view about the construction of the rule.

B I shall take the same course with the second submission of counsel for the plaintiff, namely, that there is no jurisdiction to make the order in a case in which the sole purpose of the intervention is to advance a counterclaim. Here, again, counsel relies on a sentence in the judgment of WYNN-PARRY, J., which comes just before the passage which I have already cited*. The learned judge said ([1955] 1 All E.R. at p. 699):

C "I know of no authority which goes so far as saying that the court would make an order, as asked in this case, merely to enable the proposed interveners to join with the existing defendants in prosecuting a counterclaim."

The question of jurisdiction must depend on the meaning and scope of the rule. One cannot say that the court has no power to join a party against whom the plaintiff has no cause of action, unless the requirement that he should have one is contained expressly or impliedly in the rule. Nor can one say that some counterclaims, such as that in *Montgomery v. Foy, Morgan & Co.* (5) are permissible, and that others, such as that in *Bentley Motors (1931), Ltd. v. Lagonda, Ltd.* (7), are not, unless the line between them is drawn somewhere in the rule. Accordingly, this case, in my view, really turns on the true construction of the rule, and, in particular, the meaning of the words

E "... whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter ... "

The beginning and end of the matter is that the court has jurisdiction to join a person whose presence is necessary for the prescribed purpose and has no jurisdiction under the rule to join a person whose presence is not necessary for that purpose.

F It is not, I think, disputed that "the cause or matter" is the action as it stands between the existing parties. If it were otherwise, then anybody who showed a cause of action against either a plaintiff or defendant could, of course, say that the question involved in his cause of action could not be settled unless he was made a party. Counsel for the defendants does not contend for so wide a construction as that; but he submits that, if the intervener has a cause of action against the plaintiff relating to the subject-matter of the existing action, the court has power to join the intervener so as to give effect to the primary object of the order, which is to avoid multiplicity of actions. In the present case he submits that the subject-matter of the dispute between the existing parties is the "ownership", if I may so put it, of an invention; the plaintiff claims that he is the owner of it and the intervener alleges that he is, and both disputes ought to be determined at the same time. This construction stresses the amplitude of the closing words of the passage which I have just cited from Ord. 16, r. 11, "all the questions involved in the cause or matter."

H The alternative construction treats the opening words as dominant. "All the questions involved" is a phrase that, unless it is cut down, would be impossibly wide. It is cut down, the plaintiff submits, by the opening words of the passage which I have cited. The intervener must be a party whose presence is necessary to enable all questions in the action to be adjudicated on and settled, but the question must be one which has to be adjudicated on in the issue between the existing parties and not in any new issue raised by an intervener. The criticism that at once suggests itself of this construction is that it is impossibly

* See p. 276, letter E, ante.

narrow. If the adjudication is limited to something that lies between the plaintiff and the defendant, what parties can be necessary to it except the plaintiff and the defendant? The court is for this purpose concerned only with actions in personam, and in such actions either the necessary defendant is sued or the action fails. If all the parties who "ought to have been joined"* under the first limb of the rule are joined, who are the "necessary parties" contemplated by the second limb?

It is true that, in actions in personam, the order which the court makes is binding only on the parties. There is, nevertheless, a distinction between those orders that were formerly made by the courts of common law and those that were made by a court of equity. When a court orders a defendant to pay damages, no other person is, as a rule, legally affected by the order. Someone else may be commercially affected, because if there is a similar cause of action pending against him, he may have good reason to think that another court may make him liable to pay damages in another action. Nevertheless, until that other action is decided his legal rights are unimpaired. When, however, a man is ordered to do or refrain from doing something, the legal repercussions are far wider. A plaintiff may, for example, claim that goods held by a warehouseman are his goods and may obtain an injunction to prevent the warehouseman from parting with them. Suppose that a third party says that the goods are his. It is true that he is not in law bound by the order against the warehouseman, but in practice he would not be able to get possession of them. So long as the order stands, he cannot effectually exercise his legal right. It is in this way, I think, that the three classes enumerated in the ANNUAL PRACTICE, 1955, at p. 232, have been developed. Let me take first the third class, the case of a contract for specific performance, because it illustrates the point most clearly. In *Dix v. Great Western Ry. Co.* (8) (1886) (55 L.J.Ch. 797), the railway company entered into three separate agreements with three separate covenantees to make a road for their use. One of them sued the company for specific performance. If the court made an order for specific performance at the instance of one covenantee only, what would happen? The others might come along later and say that they had quite different ideas about the way in which the contract should be performed. As KAY, J., said (*ibid.*, at p. 798), they might "entertain very different views from the plaintiff as to the line of the road . . ." If they were not allowed to intervene, then an order might be made, which, although not in strictness binding on them, could seriously and directly affect their rights because the railway company might claim that it was bound to perform the contract in a way which injured them. The court can make only one order for specific performance; it cannot order a contract to be performed in three different ways. Accordingly, the court could not completely and effectually settle the question involved in the action between Mr. Dix and the railway company unless it made one order binding on all the parties who were interested in the subject-matter of that action, namely, the performance of the contract.

The same principle is illustrated by those cases which have been decided in relation to proprietary rights. It is not the bare fact that the intervener has proprietary rights that matters. It is the fact that an order in the nature of an injunction may be made which affects his rights. In *Vavasour v. Krupp* (9) (1878) (9 Ch.D. 351), the plaintiff complained that Krupps had infringed his patent for making shells. Some of the shells were in England awaiting delivery to the government of Japan. The plaintiff obtained an injunction against the owners of the wharf and against the agents of the purchaser, the Japanese government, restraining them from delivering the shells to the government. The Mikado was allowed to be added as a defendant. The injunction clearly impaired the exercise of his legal rights. I do not think it matters whether or not they are called proprietary rights. His rights would be equally affected if

* See footnote p. 273, ante, where the rule is set out.

- A his power to require his agent to obey his instructions was met with the answer that the agent was prohibited by an order of the court from doing so. *Dollfus Mieg et Compagnie S.A. v. Bank of England* (10) ([1950] 2 All E.R. 605) was a case of the same sort, except that the governments who wanted to intervene did not assert a right of property in the gold bars which they had deposited with the bank (see *ibid.*, at p. 611). An injunction against the bank would have interfered with their right against the bank to call for delivery, and they were allowed to intervene.

The remaining class of those enumerated in the ANNUAL PRACTICE, 1955, p. 232, is that of the representative action where the intervener says that he is not truly represented. The order made in the action will not merely affect the intervener's rights but may settle them conclusively. This type of case is, therefore, in accordance with the principle which I have been considering, and is, indeed, a fortiori, so that I need not do more than allude to it.

- If this is the line of authority that is the correct one to apply, then I think the test is: "May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights?" It is not, on this view, enough that the plaintiff's rights and the rights which the intervener wishes to assert should be connected with the same subject-matter. Nor is it enough that the intervener's commercial interests may be affected by an order made in the action. This distinction between legal and commercial interests appears to be sharply drawn in the decision of the Court of Appeal in *Moser v. Marsden* (11) ([1892] 1 Ch. 487), on which counsel for the plaintiff strongly relies. In this case the defendant used in England a machine which had been manufactured by the intervener in Prussia under a patent which he had obtained in that country. The plaintiff alleged that the machine infringed his English patent and brought an action to restrain the defendant from using it. The intervener disputed the plaintiff's contention and there was manifestly only one subject-matter out of which the two disputes arose. Nevertheless, the Court of Appeal reversed the order of the Vice-Chancellor of the County Palatine of Lancaster who had allowed the intervention, and said that it was a question of jurisdiction and not of discretion. Counsel for the defendants has subjected the case to a close analysis as a result of which he submits that the joinder could not have been made any way because the plaintiff had no cause of action against the intervener, and the intervener had no cause of action against the plaintiff. The plaintiff, counsel says, could not have sued the intervener because the machine had been manufactured abroad: the intervener could not sue the plaintiff because the only relief obtainable would be by way of declaration and until 1949 a declaratory judgment in this form of action was not permitted. It appears that the intervener wanted to undertake the defence of the action but the defendant would not let him and counsel submits that the only object of the application was so that the intervener could see that the action was defended properly. I confess that I do not know the answer to counsel's point and I do not propose to add to the burdens which I have already undertaken the additional one of investigating how the English patent law stood in the year 1892. Whether counsel's point is a sound one or not, it is not the point that was argued in the case nor that on which the court proceeded. The decision, as expressed in the judgments, is a stringent and very precise application of what I have called the narrower construction of the rule. The plaintiff was seeking an injunction to restrain the defendant from using a machine manufactured by the intervener. It was not, however, the intervener's machine but merely his invention; the defendant was not his agent; the intervener had no legal right which would be impaired if the defendant stopped using the machine. LINDLEY, L.J., with whose judgment KAY, L.J., entirely concurred, said ([1892] 1 Ch. at p. 490) that the only question involved in the action was whether what the defendant was doing was an infringement of the plaintiff's patent. A judgment to that effect might affect

the intervener commercially but would not affect him legally. KAY, L.J., said (ibid., at p. 491) that judgment in the action would not bind the intervener; it might affect him indirectly and commercially, but not directly. A

The case which the advocates of the narrower construction find most difficult to fit in with it is *Montgomery v. Foy, Morgan & Co.* (5) which I have already considered* in another connection; it was the case in which the shipowner was claiming freight deposited under the Merchant Shipping Act, 1894. The case can be brought within the narrower construction by treating the deposit as, in substance, the property of the intervener. The plaintiff was seeking to take the deposit in satisfaction of his claim to freight and the intervener was seeking to retain part of it to satisfy his counterclaim for damages. The deposit represented the cargo on which the plaintiff had had a lien, and there can be no doubt that an order enforcing a lien on the cargo directly affects the cargo owner. Dicta can be cited from all the judgments to support this view of the case. B

LORD ESHER, M.R., said ([1895] 2 Q.B. at p. 324): C

"The plaintiff claims the whole amount deposited in respect of the freight; but the amount to which he is entitled may be diminished by his being liable to pay to the defendants whom it is sought to add damages for breach of the same contract under which the freight is claimed." D

KAY, L.J., said (ibid., at p. 326) that the question raised by the counterclaim must be determined in order to determine the question what amount the plaintiff was entitled to receive in respect of his freight. A. L. SMITH, L.J., said (ibid., at p. 328):

". . . the real question involved is what amount, if any, the shipowner is entitled to receive from the shippers for having brought the goods to this country when the disputes between them are adjusted." E

In *McCheane v. Gyles* (No. 2) (3) BUCKLEY, J., said ([1902] 1 Ch. at p. 917) that the ratio decidendi in *Montgomery v. Foy, Morgan & Co.* (5) was

". . . that in the question what the plaintiff was entitled to receive out of the deposit there was involved the question whether he owed anything to the shippers." F

There are also, however, dicta to support the wider construction. LORD ESHER, M.R., said ([1895] 2 Q.B. at p. 324):

". . . the matter before the court is the contract of affreightment, and there are disputes arising out of that matter as between the plaintiff and the defendants and the [intervener] . . . where there is one subject-matter out of which several disputes arise, all parties may be brought before the court, and all those disputes may be determined at the same time . . ." G

A. L. SMITH, L.J., said, in effect (ibid., at p. 328), that there was jurisdiction because the whole matters in dispute arose under the one contract of affreightment.

Byrne v. Brown & Diplock (12) (1889) (22 Q.B.D. 657) was an unusual case in its facts. The plaintiffs let certain premises to Mrs. Brown. Mrs. Brown allowed a Mr. Diplock to go into possession under an arrangement whereby he paid her the rent and agreed to indemnify her against any breach of covenant. The plaintiffs, on the expiry of the lease, brought an action for dilapidations for breach of covenant to repair. If the action had been brought in Mrs. Brown's lifetime, she would have been the defendant and would, doubtless, have joined Diplock as third party and there would have been no difficulty. But before the lease expired she was dead and her executors, in the distribution of her estate, had executed an assignment of the lease to her son, Stanley Brown. So the plaintiff sued the son and he brought in Diplock as third party. But a doubt arose whether Diplock was liable to indemnify the son; he had contracted with the mother but not with the son. The son, therefore, asked to have Mrs. H

* See p. 277, letter H, to p. 278, letter B, ante. I

- A Brown's executors joined as defendants and the plaintiffs had no objection; the object was, of course, so that the executors should make Diplock a third party and thus deprive him of his technical answer that there was no privity between him and the son. The application was allowed by the official referee who was trying the case, but refused on appeal to the Divisional Court by DENMAN and STEPHEN, JJ., who thought that the principle in *Norris v. Beazley* (2)
- B prevented them from making the order. The Court of Appeal (LORD ESHER, M.R., and BOWEN and FRY, L.JJ.) allowed the appeal. It is not quite clear on what ground the Court of Appeal proceeded. One ground, which certainly was a sufficient ground and may have been the sole ground, was that Diplock, as third party, had no right to object. As BOWEN, L.J., put it (22 Q.B.D. at p. 669), if the plaintiffs had applied to have their statement of claim amended by adding
- C the new defendants, the third party could have made no valid objection. In truth, he was not directly affected by the order; he might be affected in the sense that the new defendants, when joined, were expected to take some action against him, but that would be an indirect consequence. As all the lords justices put it, he was not in the legal sense hurt or injured by the order.

- D If that was all that had been said, the case would not be material to the point which I am considering; but LORD ESHER, M.R., dealt with the object of the rule. He said (*ibid.*, at p. 666):

- "One of the chief objects of the Judicature Acts was to secure that, wherever a court can see in the transaction brought before it that the rights of one of the parties will or may be so affected that under the forms of law other actions may be brought in respect of that transaction, the court shall
- E have power to bring all the parties before it, and determine the rights of all in one proceeding. It is not necessary that the evidence in the issues raised by the new parties being brought in should be exactly the same; it is sufficient if the main evidence, and the main inquiry, will be the same, and the court then has power to bring in the new parties, and to adjudicate in one
- F proceeding upon the rights of all the parties before it. Another great object was to diminish the cost of litigation. That being so, the court ought to give the largest construction to those Acts in order to carry out as far as possible the two objects I have mentioned. Applying those general observations to this case: the transaction here is in respect of a lease and a claim for dilapidations under it. The lease has been in various hands; contracts have been made with regard to it; and it is obvious that there are
- G various persons whose rights and liabilities will be, or may be, affected by the determination of the claim for dilapidations. The plaintiffs are the original lessors; one of the defendants is an assignee of the term. The proposed new defendants are executors of the will of the original lessee. It seems to me obvious that the rights and liabilities of all those parties may be affected by what has been done with respect to the lease and the
- H dilapidations."

BOWEN, L.J., put his judgment on the other ground, but at the end of it he said (*ibid.*, at p. 669):

"I agree with what the Master of the Rolls said with respect to the objects of the Judicature Acts."

- I FRY, L.J., concurred in the judgment of BOWEN, L.J. It would perhaps be over meticulous to point out that BOWEN, L.J., while agreeing with the general statement on the objects of the Judicature Acts generally, did not expressly agree to the application of what LORD ESHER, M.R., called "those general observations" to the facts of the case.

Finally, there is the decision of EVERSHERD, J., in *Bentley Motors (1931), Ltd. v. Lagonda, Ltd.* (7). I have already set out the facts.* Counsel for the plaintiff

* See p. 278, letters G to I, ante.

has subjected this decision to careful analysis and submits that it can be justified on two grounds, neither of which are harmful to his contention. He points out that the defendants were being sued for infringement of the plaintiffs' registered trade mark and that the defendants were, in fact, using the trade mark. Their defence (apart from the issue on validity) was that they were using it with the authority of the intervener who had acquired by contract from the plaintiffs the right so to authorise them: but the learned judge expressly held that the defendants were not entitled to rely on the intervener's contract with the plaintiffs and, therefore, it was necessary to the defence that they should have the intervener in as a co-defendant, and so he was properly joined on that ground. There seems to me to be in this argument a confusion of thought. Either the authorisation given by the intervener provided the defendants with a good defence or it did not; if it did, then the defendants could surely prove the authorisation, together with the intervener's own authority to give it, without bringing the intervener in as a party; if it did not, then bringing the intervener in would not help. In other words, a defence of this character is not one which, if bad in itself, could be cured by the presence of another defendant. I think it is plain from the passage in *EVERSHED, J.*'s judgment, which I cite below, that *EVERSHED, J.*, was not being invited to consider the matter from the defendants' point of view, but was being asked to say whether the intervener had established a right to intervene. Alternatively, counsel for the plaintiff submits that the case comes within the narrower construction of the rule, because the intervener's legal rights would have been affected by the order for which the plaintiffs were asking. The intervener had a contract of employment with the defendants under which he permitted the defendants to use the trade mark; if the plaintiffs obtained an injunction restraining the defendants from using the trade mark, then the contractual relations between the intervener and the defendants would be affected. I cannot find, however, that these contractual relations were ever gone into. I prefer to have regard, in relation to *Bentley Motors (1931), Ltd. v. Lagonda, Ltd.* (7) as in relation to *Moser v. Marsden* (11), to the points that were argued at the time and to the reasons which the learned judges gave for their decisions rather than to those which the ingenuity of counsel undertaking legal post mortems may now be able to construct. The reason for the decision of *EVERSHED, J.*, is expressed as follows ([1945] 2 All E.R. at p. 212):

"The question on this summons resolves itself, therefore, into this, whether Mr. Bentley should be left to obtain, if he can, his remedy in separate proceedings, or whether he should now be joined as a party to the present action in order that he may, by counterclaim, seek therein to enforce his contract with the plaintiffs . . . In my judgment one of the main objects of the rule is to render unnecessary such multiplicity of proceedings. Nor, in my opinion, is it material, if the circumstances in other respects justify the joinder, that the plaintiff in the action should not prefer any claims against the party joined and that the practical effect of the joinder is so that the party joined may assert his case by way of counterclaim against the plaintiff."

If the dicta of LORD ESHER, M.R., represented the law, counsel for the defendants is right in his submission at least to the extent that this summons cannot be dismissed for want of jurisdiction. In my judgment, however, they cannot be reconciled with the other line of authorities interpreting the rule. If the test of the matter is that which LORD ESHER, M.R., propounds, then in at least three other cases the court was embarking on an irrelevant inquiry. In the first of LORD ESHER's cases [*Byrne v. Brown & Diplock* (12)] the subject-matter of the action was a lease and a claim for dilapidations and in the second [*Montgomery v. Foy, Morgan & Co.* (5)] a contract of affreightment. By the same test in *McCheane v. Gyles* (No. 2) (3) the subject-matter of the action was a trust or a claim for breach of trust, and it seems to me to be impossible to say

- A that another trustee was not involved in that. In *Hood Barrs v. Frampton, Knight & Clayton* (4) the subject-matter was the title to the rents of a flat and the intervener was certainly involved in a dispute about that. In both these cases the essence of the decision was, I think, that the presence of the additional party was not necessary for the proper determination of the issue on the record. In *Dollfus Mieg et Compagnie S.A. v. Bank of England* (10) the subject-matter was
- B the right to possession of gold bars, and that right was claimed by the intervener; that simple answer, if sufficient, makes unnecessary the whole of the judgment of WYNN-PARRY, J., based on the note in the ANNUAL PRACTICE (see [1950] 2 All E.R. at p. 608). It means, too, as I have already suggested, that there is virtually no limit to the jurisdiction, so that any discussion about jurisdiction is almost otiose. Then there is the decision of the Court of Appeal in *Moser v. Marsden* (11)* which appears to me to lay down very clearly the limits to the jurisdiction. This case was cited to the court in *Montgomery v. Foy, Morgan & Co.* (5) and I find it impossible to believe that, if the later court had intended to lay down a principle of construction that differed so widely from that adopted by the earlier court and, indeed, showed their decision to be wrong, the earlier case would have been read without comment. I think that LORD ESHER's wide
- D words ([1895] 2 Q.B. at p. 324) should be treated as authoritative only in so far as they govern the facts of the case, and that the interpretation of the effect of the case given by BUCKLEY, J., in *McCheane v. Gyles* (No. 2) (3) ([1902] 1 Ch. at p. 917) is the correct one. Similarly, I think that the observations of LORD ESHER in *Byrne v. Brown & Diplock* (12) (22 Q.B.D. at p. 666) on the Judicature Acts are intended to be general in character and to point out the unreasonableness
- E of the third party's objection and how undesirable it would be if it had to be acceded to; but that the ratio decidendi of that case is that the third party had no right to object. If there is any conflict between these cases and *Moser v. Marsden* (11), I think that I am entitled, and, indeed, bound to follow the decision and reasoning in *Moser v. Marsden* (11).

- If I may express with diffidence my own view of the rule, apart from the
- F authorities, I would support the narrower construction. I do not, with deference to those who have thought otherwise, agree that the main object of the rule is to prevent multiplicity of actions, though it may incidentally have that effect. The court has other ways of doing that which are amply sufficient for the purpose—by ordering consolidation, or the bringing of actions on together, or third-party proceedings, and so on. The primary object of the rule I
- G believe to be to replace the plea in abatement†. The object of that plea was to “abate” an action in which all the proper parties were not before the court. The rule is more flexible than the plea, but its object is fundamentally the same. It is not to marry a future action to an existing one, but to ensure that all the necessary parties to the existing one (using “necessary” in the broad sense of being necessary to effectual and complete adjudication in the existing action)
- H are before the court. It does incidentally keep down multiplicity of actions, because, if the necessary parties cannot get before the court in an existing action, they will naturally try to do so in another action, but that appears to me to be a desirable consequence of the rule rather than its main objective. In *Moser v. Marsden* (11) LINDLEY, L.J., said ([1892] 1 Ch. at p. 490):

- I “In order to properly understand the rule we must look at the whole of it. It begins by saying, ‘No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties’—that is the key to the whole section: if the court cannot decide the question without the presence of other parties, the cause is not to be defeated, but the parties are to be added so as to put the proper parties before the court.”

* See p. 281, letters D to F, ante.

† See R.S.C., Ord. 21, r. 20 by which the plea in abatement is forbidden; the ANNUAL PRACTICE, 1955, p. 383.

I do not think that the words which I have to construe represent any addition to the powers of the court initiated by the Judicature Acts. I do not think that the necessary parties contemplated by it are other than those who would have been considered by a court of equity to be necessary before the passing of the Judicature Acts. It had always been the practice in equity to join as parties not merely those who in strictness "ought to be joined", but also those whose presence was necessary to complete and effectual justice. The practice is stated in MITFORD'S PLEADINGS IN CHANCERY (5th Edn.) (1847), at p. 190, as follows:

"It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested in the subject ought generally to be parties to the suit, plaintiffs or defendants, however numerous they may be, so that the court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested, and that the orders of the court may be safely executed by those who are compelled to obey them, and future litigations may be prevented."

The words in the rule which I have to construe are really no more than a condensation of this statement.

Townend v. Toker (13) (1866) (1 Ch. App. 446) shows the type of case in which the old practice was applied in just the same way as the rule should be applied today. In this case the defendant made a settlement of her estate on her nephew. She then repented of it and agreed to sell the estate to the plaintiff. The plaintiff sued the defendant for specific performance of the contract of sale. If the settlement on the nephew was voluntary it would have been void against the plaintiff; if, on the other hand, it was made for value it would not. TURNER, L.J., considered that the nephew was properly joined as a party. He said (1 Ch. App. at p. 457):

"It is, no doubt, true that in ordinary cases of suits for specific performance, the vendor and purchaser are the only proper and necessary parties to the suit . . . but at all events it appears to have been the constant practice of the court to make persons interested under settlements alleged to be voluntary, parties to suits of this description, and I am not disposed to alter that practice."

At common law, I think, the old practice was only to join parties "who ought to have been joined" in the strict sense, such as joint contractors; I dare say that was because the order of a common law court rarely, if ever, affected the legal interests of any third party. The provision in the rule relating to necessary parties is, therefore, primarily designed, I think, to give effect to the old practice in equity, although, of course, it is now available in any kind of suit. It is interesting to note that the common law had meanwhile been handling in its own way the problem of a multiplicity of actions. Consolidation is a common law device as is shown by the terms of R.S.C., Ord. 49, r. 8. The practice before the Judicature Acts is set out in TIDD'S PRACTICE (9th Edn.) (1828), vol. 1, at p. 614.

It is the words of the rule that now govern the matter, whatever the object for which it was made, and it is true that the words "all the questions involved in the cause or matter" are very wide. They are so wide that no one suggests that they can be read without some limitation. The limitation is not something that is left to be settled by the court in its discretion. It is there in the earlier words of the rule. The person to be joined must be someone whose presence is necessary as a party. What makes a person a necessary party? It is not, of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has

- A thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately. That would mean that on the construction of a clause in a common form contract many parties would claim to be heard, and, if there were power to admit any, there is no principle of discretion by which some could be admitted and others refused. The court might often think it convenient or desirable that some of such persons should be heard so that the
- B court could be sure that it had found the complete answer, but no one would suggest that it is *necessary* to hear them for that purpose. The only reason which makes it *necessary* to make a person a *party* to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.
- C On the wider construction of the rule, I do not understand where the line is to be drawn between a commercial interest in the question involved in the case and a legal one. It is conceded that the line must be drawn somewhere. It is not enough that the intervener should be commercially or indirectly interested in the answer to the question; he must be directly or legally interested in the answer. A person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally—that is by curtailing his legal rights. That will not be the case unless an order may be made in the action which will operate on something in which he is legally interested. It is not enough for him to say in effect: “Here are A and B fighting about an invention. I have got a complaint against A which has to do with the same invention. I could issue a writ against him but I prefer to intervene”. It is desirable, if it can be managed, that actions about the same invention should be tried together. If Ord. 16, r. 11, were the only way in which that could be done, one might be tempted to enlarge its application; but that can be achieved just as well in a proper case by an order to consolidate. There can be very little difference in expense. Joinder will save the cost of a writ, but there will be the cost of an affidavit to support the summons, and the existing writ will have to be amended and served;
- F the counterclaim delivered by the intervener and the defence to counterclaim will be just as elaborate as the pleadings in a new action. I do not think that Ord. 16, r. 11, is designed to offer a slightly cheaper alternative to consolidation. There are three reasons for this opinion in addition to those which I have given. The first is that the intervener with a cause of action bears the character of a plaintiff. The last sentence of the rule* shows that a person joined as a defendant is intended to have the character of an ordinary defendant. It can be said that that is not pre-requisite to the application of the rule, but it is difficult to say that the rule contemplates joining as a defendant a person whose only object is to prosecute his own cause of action. The second reason is that, if designed as an alternative to consolidation, the rule works arbitrarily. If the intervener has a cause of action against the plaintiff, he can use the rule; but
- H if he has a similar cause of action against the defendant he must sue independently. That would be quite illogical if the chief object of the rule was to avoid multiplicity. The third reason is that the rule does not make provision for any formal statement of the intervener’s case before the joinder is ordered. On the narrower construction of the rule a statement of the intervener’s interest in the suit is enough to show whether he should be joined or not. But where a new cause of
- I action is to be introduced, it is essential to see how it fits in with the existing cause of action. An affidavit is not enough, for it is not a document that formulates issues. It would generally be necessary to see the counterclaim and the defence to it before deciding whether the two matters ought to be litigated as one. The procedure for consolidation allows that to be done and, indeed, normally requires it.

I may now turn back to the two dicta of WYNN-PARRY, J., in *Atid Navigation*

* See footnote p. 273, ante.

Co., Ltd. v. Fairplay Towage & Shipping Co., Ltd. (1) ([1955] 1 All E.R. at p. 699, A letter H) on which counsel for the plaintiff relied, the first being that

“ the basis of the whole jurisdiction to add defendants is that there is a cause of action by the plaintiff against not only the existing defendant but the person who would be joined if the application were successful ”

and the second (*ibid.*, letters G-H) being that the court would not make an order “ merely to enable the proposed interveners to join with the existing defendants in prosecuting a counterclaim ”. The conclusion which I have reached on the meaning of the rule brings me into substantial agreement with both these dicta. I have approached the question of jurisdiction by a different route, but it is unlikely that a person will be a necessary party, within the meaning which I have given to the phrase, to an action by a plaintiff unless that plaintiff has a cause of action against him; if there is no cause of action, the relief sought by the plaintiff is unlikely directly to affect the intervener. It will be observed that WYNN-PARRY, J., did not say that the plaintiff must be made to plead a cause of action against the intervener. Nor did he mean, I think, that the court must be satisfied of facts showing a cause of action before it orders the joinder; it is sufficient that a *prima facie* cause of action should be shown; the dictum of WYNN-PARRY, J., must be read in the light of his earlier reference to *Norbury Natzio & Co. v. Griffiths* (6) where that was decided. If it were otherwise, the operation of the rule could easily be defeated. For example, a plaintiff seeking an order against an agent or warehouseman who has the custody of goods could defeat an intervention by the owner simply by saying that he did not believe him to be the owner. Notwithstanding the difficulties on the wording of the rule felt by LORD COLERIDGE, C.J., [*Norris v. Beazley* (2) (2 C.P.D. at p. 83)] the point must now be taken to be settled by *Norbury Natzio & Co. v. Griffiths* (6).

I am also substantially in agreement with the dictum (even if, as perhaps may be the case, it compels me not to follow the decision of EVERSLED, J., in *Bentley Motors* (1931), *Ltd. v. Lagonda, Ltd.* (7)) that the court should not allow an intervention which is made for the mere purpose of prosecuting a counterclaim. I do not myself—neither, I think, did WYNN-PARRY, J.—determine the test of jurisdiction by reference to the nature of the counterclaim. But, if an intervener has to be a person legally affected by the order which the plaintiff seeks, it must follow that his purpose in seeking to be joined is to resist the order, or to be heard on its terms, or to have modified in some way the judgment which the plaintiff seeks to obtain, and, accordingly, that his purpose in coming in is not merely to counterclaim. To say, therefore, that he may not be joined merely to counterclaim is, I think, only another way of saying that he is not to be joined unless he is legally affected.

Accordingly, I hold that the learned master was, on the submissions made before him, right in his conclusion that he had no jurisdiction to make the order asked for: and I must now consider the alternative submission of counsel for the defendants that the orders for which the plaintiff is asking in his action may directly affect the legal interests of the intervener. The plaintiff's claim, as counsel for the plaintiff rightly insists, is based, not on a claim to property (except in the sense that rights under a contract are property), but on breach of contract. The breach alleged in para. 10 of the statement of claim is that the defendants disclosed or made use of confidential information; and the particulars alleged are in essence that the defendants are manufacturing the Stixit pen. Accordingly, the injunction asked for in para. 3 of the prayer, while in words it seeks to restrain the defendants from making further use of the confidential information, in effect seeks to restrain the further manufacture of the Stixit pen. The intervener's first affidavit shows that he claims to be the inventor of the Stixit pen and that he entered the defendants' employment for the purpose

A of assisting them to market it. If the evidence stopped there, I think that I should be bound, on the reasoning in *Moser v. Marsden* (11), to hold that the intervenor had shown no more than a commercial interest in the result of the action. If it was successful, the defendants could no longer exploit his invention, he might find it difficult or impossible to get other manufacturers to do so, and the defendants might (if the contract of employment permitted it) dispense with his services.

B All this would be commercially damaging to him: but the evidence (which described only in the most general terms the arrangements between the intervenor and the defendants) did not then disclose any legal interest that would be affected. In his second affidavit the intervenor exhibits two letters written in February and March, 1955, which, he says, constitute an agreement to pay him a royalty or commission (both words are used) on sales of the Stixit pen of five per cent. in

C the United Kingdom and Commonwealth, subject to a minimum of £1,000 a year, and ten per cent. in Europe. The agreement contains, the intervenor submits, an express clause requiring the defendants to undertake the manufacture and distribution of the Stixit pen in the United Kingdom and Commonwealth (except Canada).

D Now the mere fact that a man is entitled to a royalty or commission on the sale of an article is not enough to enable him to say that he is legally affected by an order forbidding its manufacture. He has, in such circumstances, a commercial interest only in the continued manufacture of the article. But counsel for the defendants relies on two additional factors. The first is that the intervenor is promised a minimum royalty. If the prohibition on manufacture

E entitled the defendants to cease paying the minimum royalty, the intervenor's legal rights would be affected. That depends on whether the defendants would be entitled to rescind the contract on the footing, for example, that the intervenor had expressly or impliedly guaranteed that he could grant the right to manufacture. What the position is about that I do not know; it is possible that the defendants took the risk. All that is said in the intervenor's affidavit is that it is

F "possible" that the minimum would cease; that is not enough.

The second fact relied on by the intervenor is that there is an express obligation to manufacture in certain territories. Counsel for the plaintiff disputes that that is the right construction of the contract and that the obligation, if it exists, amounts to anything that is of any value in law. I do not decide either of these

G points. It is, as I have already shown, sufficient in this type of case that the intervenor should have reasonable grounds for his contention, and I think that he has. If he can show that the defendants are obliged to manufacture a reasonable quantity of Stixit pens, he has a right of action against them if they do not do so. He is not then in the position of a person who draws a commission based on the quantity of articles which a manufacturer chooses to make. Mr.

H Dachinger could, therefore, ask in a subsequent action for specific performance of an agreement which, in the existing action, the court had, in effect, ordered not to be performed. Counsel for the plaintiff points out that the court is very unlikely to decree specific performance; it would give Mr. Dachinger his remedy in damages. Questions of jurisdiction under Ord. 16, r. 11, cannot depend, however, on how the court may decide to exercise its powers. In any event, the

I principle is just the same. The court should not be put in the position where it may have to order a person to pay damages for having carried out its own injunctions.

Counsel for the plaintiff next submits that the intervenor's interests cannot be affected anyway, because if the plaintiff is wrong, there will be no injunction; and if he is right, the injunction can be granted only on the basis that the duty of confidence was owed to the plaintiff and not to the intervenor. This argument, in my opinion, misconceives the point. Whenever a plaintiff seeks to restrain

a defendant from dealing with his property and an intervener claims that the property is his, the plaintiff can say: "If I am wrong I shall not get an injunction and the intervener's rights will not be affected; if I am right the intervener has no rights to be affected anyway". The point is that the intervener is entitled to be heard on the issue whether the plaintiff is right or wrong so that he may be bound by the order made. A

The final submission of counsel for the plaintiff is more far-reaching than the others. He submits that the action and the intervener's claim are concerned with rights in contract and not rights of property, and, therefore, the case does not come within the term "proprietary rights" as set out in the note in the ANNUAL PRACTICE, 1955, at p. 232.* I am not, of course, required to construe that phrase as if it were contained in a statute. If I were I should see no reason why rights under a contract should not be called proprietary rights just as much as rights to physical property. The phrase, however, is not used definitively. The three categories formulated in the note are not exhaustive. Indeed, I do not think that they should be treated as having been formulated independently. There is one common principle running through them all, and, for my part, I should prefer to apply a test based on that principle rather than to inquire whether the case to be determined falls into one or other of the three classes. There is not, for example, any real distinction between the cases which related to specific performance and those which related to proprietary rights. As WYNN-PARRY, J., said in *Dolfus Mieg et Compagnie S.A. v. Bank of England* (10) ([1950] 2 All E.R. at p. 611): B
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D

"It seems to me that the true test lies not so much in an analysis of what are the constituents of the applicants' rights, but rather in what would be the result on the subject-matter of the action if those rights could be established." E

I respectfully agree with that. I think that the test is: "May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights?"

It may be true, as counsel for the plaintiff submits, that the authorities so far have been dealing with rights to physical property, but, in my judgment, the principle applies equally to contractual rights. I think that in this case the test is satisfied, that I have jurisdiction to make the order and that it is one which, having regard to the questions involved in the action, it is proper that in the exercise of my discretion I should make. F

It must not be supposed that the test which I have employed can be applied to every sort of application under the rule, and I am not attempting to lay down, or holding that the authorities lay down, a test of universal efficacy. A plaintiff may, in the first instance, join as a defendant any person "against whom the right to any relief is alleged to exist" (Ord. 16, r. 4). If, after he has issued his writ, he wants to join another defendant, no doubt he will have to proceed under r. 11, but he will not have to show that the new defendant will be directly affected by an order in the action as it is then constituted: what he generally shows is that he cannot get effectually and completely the relief for which he asks unless the new defendant is joined, and that, in that sense, the new defendant is a necessary party to the action. Likewise, a defendant who seeks to join another defendant does not inevitably have to show that the new defendant will be directly affected by an order in the action as it is constituted. He may succeed if he can show that he cannot effectually set up a defence which he desires to set up unless the new defendant is joined with it, or unless the order made binds the new defendant. It is not that the construction of the rule differs according to circumstances. The construction of the rule is, and must be, the same in all circumstances; but the test that is appropriate to determine whether a party is necessary or not may vary according to the circumstances. G
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* See p. 276, letter B, ante.

- A The set of rules assembled in the ANNUAL PRACTICE and collected in the authorities which I have sought to follow are those which are applicable in the case of interveners whom it is sought to join against the will of the plaintiff.

Appeal allowed.

- Solicitors: *Godden, Holme & Co.* (for the defendants); *J. M. Menassé & Co.* (for the plaintiff).

[*Reported by A. P. PRINGLE, Esq., Barrister-at-Law.*]

MOSS v. MOSS.

- C [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), March 10, December 19, 1955.]

Legal Aid—Certificate—Alteration of circumstances—Failure to inform area committee—Whether such breach of regulations as justified court in discharging certificate—Legal Aid (Assessment of Resources) Regulations, 1950 (S.I. 1950 No. 1358), reg. 1 (2), Sch. 1, Part 1, para. 2 (1)—Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359), as amended by Legal Aid (General) (Amendment No. 1) Regulations, 1954 (S.I. 1954 No. 166), reg. 8 (5), reg. 11 (2A), (4).

- D On Aug. 30, 1951, the wife applied for a civil aid certificate to prosecute an application for maintenance under the Matrimonial Causes Act, 1950, s. 23. The National Assistance Board assessed her disposable income as less than £156 a year and her disposable capital as nil. On Oct. 26, 1951, the local committee granted a certificate and assessed her contribution as nil. On Dec. 6, 1951, she issued an originating summons applying for maintenance. The wife's application came before the judge who in May, 1952, referred it to the registrar for investigation as to the means of the parties. On Oct. 6, 1952, the wife began employment under contract for six months at a salary of £125 a month. On Oct. 22, 1952, she disclosed to the court in other proceedings that she was in this employment, and the husband's solicitors thereupon wrote to the area committee informing them of this disclosure by the wife. On Nov. 6 1952, the wife's solicitors wrote a letter informing the area committee in accordance with reg. 8 (5)* of the Legal Aid (General) Regulations, 1950, of the alteration of the wife's circumstances. The area committee referred the matter to the National Assistance Board to re-determine the wife's disposable income. The board were of the opinion that, since the wife's employment had begun more than twelve months after the date of her application for the certificate, it fell outside the period of computation and that they were precluded by para. 2 (1) of Part 1 of Sch. 1 to the Legal Aid (Assessment of Resources) Regulations, 1950, from taking into consideration the income from that employment; and accordingly the board did not issue a revised determination. By reg. 9 (2) of those regulations the decision of the board was final. On Dec. 20, 1954, the wife's application for maintenance was dismissed by consent. The husband now applied for the revocation by the court of the wife's certificate under reg. 11 (4)† of the Legal Aid (General) Regulations, 1950, on the ground that she had wilfully failed to comply with reg. 8 (5) of these regulations.

* The text of reg. 8 (5) was, so far as is relevant, as follows: "Whenever the circumstances upon which the [National Assistance] Board have determined the disposable income . . . of an assisted person have altered so that he has reason to believe that his disposable income has increased by an amount greater than £52 . . . he shall inform the appropriate area committee of that alteration in his circumstances, and such notice shall be deemed to be an application for an amendment of his certificate". The paragraph has been amended by the Legal Aid (General) (Amendment No. 1) Regulations, 1954, S.I. 1954 No. 166, as from Apr. 27, 1954, by substituting £26 for £52.

† The text of reg. 11 (4) is printed at p. 295, letter C, post.

Held: the wife's failure during the period between Oct. 6 and Oct. 22, 1952, to inform the area committee of the increase in her disposable income was not such a breach of reg. 8 (5) of the Legal Aid (General) Regulations, 1950, as brought into operation the court's power under reg. 11 (4) to discharge the wife's civil aid certificate on the ground that she had wilfully failed to comply with reg. 8 (5).

Per CURIAM: although the court was precluded by reg. 9 (2) of the Legal Aid (Assessment of Resources) Regulations, 1950, from interfering with the determination of the National Assistance Board not to re-assess the wife's disposable income for the purposes of the present case by reason of her having obtained employment on Oct. 6, 1952, yet the true interpretation of the regulations was that the effect of information of an assisted person's increase in means being given by that person to the area committee was the same as if it were an original application for a civil aid certificate and called for the consideration of a new period of computation beginning from the date of the increase (see p. 294, letters E and H, post).

[For the Legal Aid and Advice Act, 1949, s. 15 (1), see 18 HALSBURY'S STATUTES (2nd Edn.) 551.

For the Legal Aid (Assessment of Resources) Regulations, 1950, reg. 1 (2), reg. 9 (2), Sch. 1, Part 1, para. 2 (1), see 5 HALSBURY'S STATUTORY INSTRUMENTS 194, 196, 197.

For the Legal Aid (General) Regulations, 1950, reg. 8 (5), reg. 11 (2A), reg. 11 (4), see *ibid.*, 209, 211, 212, and SUPPLEMENT.]

Application.

In January, 1951, the wife applied for and obtained a civil aid certificate for the purpose of taking proceedings against the husband in the Chancery Division.

On Aug. 30, 1951, the wife applied for and on Oct. 26, 1951, obtained a civil aid certificate to prosecute an application for maintenance under the Matrimonial Causes Act, 1950, s. 23, and to enforce any order for costs relating thereto. The National Assistance Board assessed the wife's disposable income as less than £156 a year and her disposable capital as nil, and the local committee assessed her contribution as nil. On Dec. 6, 1951, the wife issued an originating summons alleging that the husband had wilfully neglected to provide reasonable maintenance for her and applying under s. 23 for an order for her maintenance. The wife's application came before WILLMER, J., on Jan. 28, 1952, when it was adjourned to May 26, 1952. On Apr. 12, 1952, the wife applied for and obtained a civil aid certificate to prosecute an application under the Married Women's Property Act, 1882, s. 17. On May 27, 1952, having heard the evidence of both parties, WILLMER, J., determined that the wife had *prima facie* established her case, and referred the matter to the registrar for investigation as to the means of the parties. WILLMER, J., at the same time made an interim order in favour of the wife for maintenance at the rate of £500 per annum less tax and awarded her the costs of the application to date. On July 4, 1952, Mr. Registrar COMPTON MILLER made an order for mutual discovery and inspection of documents. On Oct. 6, 1952, the wife began employment under a contract for six months at the rate of £125 a month, i.e., £1,500 a year. This fact was not then known to her legal advisers. On Oct. 22, 1952, the wife's application under s. 17 of the Married Women's Property Act, 1882, came before the master and during the hearing the wife disclosed that she had obtained this employment. The husband's solicitors informed the local committee of this fact and that committee, in due course, passed on the information to the area committee. On Nov. 6, 1952, the wife's solicitors also wrote to the local committee informing them of the wife's employment. This letter crossed a letter from the area committee asking the wife's solicitors for their comment on the information received from the husband's solicitors. The matter was referred by the area committee to the National Assistance Board to re-determine the wife's disposable income in

- A relation to all three civil aid certificates. The board, so far as the information available showed, were of the opinion that on the true construction of the Legal Aid (Assessment of Resources) Regulations, 1950, reg. 1 (2) and Sch. 1, Part 1, para. 2 (1), they were not entitled to take into consideration her increased means unless the change occurred within a year of her application for the civil aid certificate. As her employment began on Oct. 6, 1952, the board issued a
- B revised determination only in respect of the certificate of Apr. 12, 1952, but determined that the two earlier certificates were not affected. In January, 1953, the wife's employment ceased but she received her full remuneration for the six months. On June 11, 1953, the registrar ordered that the interim order made by WILLMER, J., on May 27, 1952, should be suspended owing to the wife's increased income. On Nov. 3, 1954, the registrar made his report and at the
- C request of both parties referred the matter back to the judge, directing that the costs be costs in the inquiry. On Nov. 16, 1954, the area committee considered the position in the light of reg. 11 (2A) of the Regulations of 1950 which had come into force on Apr. 27, 1954*. They considered that they had power to discharge the civil aid certificate in the present proceedings but that since they had no evidence as to the wife's increased means, as at Apr. 27, 1954, and the
- D contract of employment had expired before that date it would not be proper to discharge the certificate under that regulation. On Dec. 20, 1954, the matter came again before WILLMER, J., who, with the consent of counsel for the wife, dismissed her application under s. 23. His LORDSHIP adjourned the question of the incidence of costs incurred since May 27, 1952. This matter came before WILLMER, J., on Mar. 10, 1955, when, the wife still appearing as an assisted person,
- E the husband applied for the discharge of the wife's certificate and for an order for costs against her. The matter was adjourned for argument by the Queen's Proctor under the Matrimonial Causes Act, 1950, s. 10 (1), and to give the area committee an opportunity of being heard. At the resumed hearing the Solicitor-General appeared as *amicus curiae* on the instructions of the Treasury Solicitor, but not as representing the Queen's Proctor.

F *J. Jackson* for the husband.

H. S. Law for the wife.

The Solicitor-General (Sir Harry Hylton-Foster, Q.C.) and J. R. Cumming-Bruce as *amici curiae*.

R. J. S. Harvey for the Law Society.

WILLMER, J.: The question which comes before me today, after a number of adjournments, is what order I ought to make in relation to costs incurred in respect of a wife's summons for maintenance under s. 23 of the Matrimonial Causes Act, 1950. The question arises because the wife, who in the event has been unsuccessful in her application, comes before the court as an assisted person. The certificate which is before the court states that her disposable income is less than £156 a year, and her maximum contribution has been fixed at nil. Doubt has been expressed whether, in all the circumstances, she is entitled to appear before the court as an assisted person, or whether, on the other hand, the certificate should not be discharged.

[His LORDSHIP reviewed the facts and referred to the amendment of the Legal Aid (General) Regulations, 1950, reg. 11, by adding a new para. (2A) as from Apr. 27, 1954, and continued:] The way in which the determination in the present case arose was as follows. When the area committee became aware in 1952 of the wife's increased means, they referred the matter to the National Assistance Board for a re-determination of the wife's disposable income. The National Assistance Board apparently, though my knowledge as to their view comes only from secondhand information contained in the letter dated Feb. 2,

* See Legal Aid (General) (Amendment No. 1) Regulations, 1954; SUPPLEMENT to 5 HALSBURY'S STATUTORY INSTRUMENTS 211, 212.

1955, from the area committee, took the view that they had no power to re-determine the wife's means in the present case, having regard to the fact that her change of circumstances came after a lapse of more than twelve months from the date of her original application for a certificate. A

The view which the National Assistance Board appear to have held is based on their interpretation of para. 2 (1) of Part 1 of Sch. 1 to the Legal Aid (Assessment of Resources) Regulations, 1950, read in conjunction with the definition clause in reg. 1 (2). The latter regulation contains the definition of the "period of computation", and defines it as being a B

"period of twelve months next ensuing from the date of the application for a certificate or such other period of twelve months as in the particular circumstances of any case the board may consider to be appropriate." C

In considering para. 2 (1) of Part 1 of Sch. 1 they appear to have come to the conclusion that it was not competent for them to take into consideration any increase in earnings on the part of the wife unless it occurred within that period of computation. It was in those circumstances that they refused to deal with the re-assessment of the wife's means in relation to the certificate in the present case, and in relation to the previous certificate (applied for in January, 1951), D though they did deal with the certificate for which application was made on Apr. 12, 1952; in that case, they took the view apparently that the increase in the wife's income did occur during the period of computation and, for that reason, called for a discharge of that certificate.

By reg. 9 (2) of the Legal Aid (Assessment of Resources) Regulations, 1950, it is prescribed, in effect, that the determination of the National Assistance Board shall be final. Accordingly the area committee took the view that this determination having been arrived at by the National Assistance Board there was nothing they could do about it. I am equally precluded by that regulation from interfering in any way with the determination by the National Assistance Board of the wife's disposable income. Having said that I am precluded from interfering with it in any way, it is only right to express my own view that the result arrived at by the National Assistance Board was based on an interpretation of the material regulations which in my judgment will not bear examination. Certainly, if it is a correct interpretation, it must lead to the most surprising and startling results. One can visualise all kinds of circumstances in which a person might properly become entitled to receive legal aid, but might, after a year has elapsed from the date of application, though whilst the proceedings are still dragging on, inherit a fortune, or obtain lucrative employment, or for one reason or another completely alter his or her financial circumstances. Yet if the interpretation of that regulation by the National Assistance Board be correct, such a change of circumstances would be entirely irrelevant for consideration. If that be right, I can only say that this case has brought to light a very serious gap in the regulations. For my part, however, E I should have said that the interpretation is unsound. It seems to me that, reading the various regulations together, the effect of information being supplied by an assisted person to the area committee as to any increase of his or her means is the same as if it were an original application for a civil aid certificate. I should have thought that, in accordance with the words of the definition clause in reg. 1 (2) of the Legal Aid (Assessment of Resources) Regulations, 1950, it would call for the consideration of an entirely new period of computation, beginning from the date of the change of circumstances. That, however, was not the view which the National Assistance Board took, and, having expressed my own view, I can only reiterate that I have no power to give effect to my view by saying that the National Assistance Board were wrong. F G H I

In those circumstances I have no power to sit in judgment on the decisions of the area committee, either their decision in 1952 or their decision in 1954 under

A the new reg. 11 (2A)*. On the earlier occasion they merely gave effect, as they were bound to give effect, to the determination arrived at by the National Assistance Board. On the latter occasion, when they came to consider the new reg. 11 (2A), it was left to them to decide whether or not in the circumstances it was unreasonable for this wife to receive legal aid, and in their discretion they came to the conclusion that it was reasonable for her to receive legal aid; and

B that seems to me to be a decision into which I cannot inquire.

The only matter which remains alive today arises out of the application, made by counsel for the husband, that I should exercise the power which is undoubtedly conferred on the court by reg. 11 (4). Regulation 11 (4) provides that

C “At any time during the hearing of any proceedings to which an assisted person is a party the court may, upon application by or on behalf of any other party to the proceedings or by the Law Society, consider whether the assisted person—(a) has wilfully failed to comply with any regulation as to the information to be furnished by him . . . and on any such application the court may make an order revoking the certificate or discharging it from such date as may be appropriate and the court's decision shall be final.”

D That paragraph is additional to the similar power which the area committee have under reg. 11 (3). Notwithstanding the fact that the area committee under reg. 11 (3) have already given their verdict on this point, counsel for the husband now invites me, not by way of appeal from the area committee, but exercising my own jurisdiction, to say that under reg. 11 (4) the wife's certificate

E ought to be discharged, on the ground that she has failed to comply with reg. 8 (5)†, which requires an assisted person, whose circumstances have altered so that he or she has reason to believe that his disposable income has increased by an amount greater than £26 a year, to inform the appropriate area committee of that alteration in his circumstances, and provides that if he does so inform the area committee the notice informing the area committee is deemed to be an

F application for an amendment of the certificate.

The argument on behalf of the husband is that, as soon as the wife obtained this lucrative employment, there was an imperative duty on her part to inform the area committee forthwith under reg. 8 (5); and having failed to do so she was in breach of that provision, and therefore the court, under reg. 11 (4), has the power to consider whether her certificate should be discharged. It is an

G interesting speculation what the result would have been had the wife immediately written to the area committee. Presumably the area committee would have referred the matter to the National Assistance Board, as they subsequently did, and presumably the National Assistance Board would have arrived at the same determination as we know they later did, and in this case no doubt the decision of the area committee would have been the same. That, however, is not perhaps

H strictly relevant to the argument submitted by counsel for the husband. Counsel's complaint is that, instead of the wife voluntarily and at once making a full disclosure of this change of circumstances to the area committee, she waited until Oct. 22, when under cross-examination before the master she, almost accidentally, let fall the information that she had obtained this lucrative employment. Counsel also pointed out that the first intimation about this which came

I to the area committee was that conveyed by the solicitors for the husband, and it was not until Nov. 6, a month after the wife had started her new job, that there was any disclosure made on her behalf of this alteration in her means. In those circumstances, it is said that, because of that delay of a month, this wife was in breach of the duty laid on her under reg. 8 (5), and that in those circumstances

* See Legal Aid (General) (Amendment No. 1) Regulations, 1954; SUPPLEMENT to 5 HALSBURY'S STATUTORY INSTRUMENTS 211, 212.

† The full terms of para. (5) of the regulation and the effect of the amendment thereto by S.I. 1954 No. 166 are printed in the first footnote at p. 291, ante.

the court ought to discharge the certificate, notwithstanding the twice repeated refusal of the area committee to do so after full disclosure. That argument, not unnaturally, was strenuously resisted by counsel for the wife. It is not, I think, immaterial to point out that, if the conduct of the wife in failing to disclose this information for a period of one month amounted to such a breach of the regulations as would bring into play the court's powers to discharge the certificate, it could also amount, under s. 15 (1) of the Legal Aid and Advice Act, 1949, to a criminal offence, for which the wife could receive substantial punishment. It is perfectly true, as counsel for the husband pointed out, that that does not in any way affect the finding at which I ought to arrive. I merely point out that the finding at which I am invited to arrive on behalf of the husband is a finding of serious consequence, and one which might render the wife liable to criminal prosecution.

The point is very fine, and it turns on this delay of a month. It is suggested by counsel for the husband that, if it had not been for the intervention of the proceedings before the master, the wife's increased means might very well have been concealed for a good deal longer, and perhaps might have been concealed for ever. It is suggested that in those circumstances the truth was revealed against the will of the wife, and did not come from her in any sense as a voluntary disclosure such as she was bound to make under reg. 8 (5). The fact is, however, that, whether forced or not, she did disclose it, and that seems to me to be a fact to which I have got to give effect. She did disclose it publicly on Oct. 22, and I do not know why her legal advisers waited until Nov. 6 before communicating with the Law Society. At any rate, delay from Oct. 22 to Nov. 6 is not a delay which can be laid at the door of the wife personally. Any delay on the part of the wife herself, which could amount to such a breach of the regulations as would bring into effect the court's power to revoke the certificate, relates only to the period from Oct. 6 to Oct. 22. Regulation 8 (5), to which I am now referring, says nothing as to the period within which information as to change of circumstances must be conveyed to the area committee. In the absence of any time limit imposed by the regulation I must conclude that the assisted person, under that regulation, must have a reasonable time in which to make the disclosure; and what is a reasonable time must necessarily of course depend on all the circumstances of the particular case. What is a reasonable time for individual A will not of necessity be a reasonable time for individual B; in other words, the individual circumstances of the particular person must be taken into account in determining what is a reasonable time.

I have, therefore, to consider whether there was a failure to disclose information within a reasonable time, so that I could say that there was a breach of reg. 8 (5) on the part of the wife. Having given that matter careful consideration, I am not in all the circumstances prepared to say that the wife did commit such a breach of that regulation as would call into play the power of the court under reg. 11 (4). In those circumstances, I think that the present application on the part of the husband for an order of the court to discharge the wife's certificate fails. In the circumstances the wife must necessarily continue to enjoy her status as an assisted person.

[After discussion HIS LORDSHIP made no order in regard to costs since May 27, 1952.]

Application dismissed.

Solicitors: *M. A. Jacobs & Sons* (for the husband); *Booth & Blackwell* (for the wife); *Treasury Solicitor*; *T. G. Lund* (for the Law Society).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

NOTE.**HALL & CO., LTD. v. PEARLBERG.**

[QUEEN'S BENCH DIVISION (His Honour W. K. Carter, Q.C. (Official Referee)), December 8, 9, 19, 20, 1955, January 13, 1956.]

Damages—Measure of damages—Conversion of hay—Trespass to farm—Income and profits taxes in relation to the assessing of damages.

[As to collateral liabilities and benefits in assessing damages, see 11 HALSBURY'S LAWS (3rd Edn.) 240, para. 408; and for cases on the subject, see 17 DIGEST (Repl.) 80, 81, 27-38.]

Cases referred to:

(1) *British Transport Commission v. Gourley*, [1955] 3 All E.R. 796.

(2) *Stow Bardolph Gravel Co., Ltd. v. Poole*, [1954] 3 All E.R. 637; 3rd Digest Supp.

(3) *Wiseburgh v. Domville (Inspector of Taxes)*, [1955] 3 All E.R. 548.

Reference of issues of damages for trial.

The plaintiffs, a company carrying on the business of obtaining and selling gravel, brought an action on Feb. 21, 1955, against the defendant for possession of two farms, the Abbey Chase Farm and the Abbey Bridge Farm, of ninety-seven acres and sixty-five acres respectively, at Chertsey, of which it was alleged that she had taken possession wrongfully in or about October, 1954, and the plaintiffs also claimed damages (a) for trespass (including compensation for dispossession of the farms, for all acts of bad husbandry, and for all damage to buildings, lands and roads found to have occurred during the period of dispossession), and (b) for the conversion of hay which was alleged to have been on the farms at the time of the defendant's entry thereon. At the trial the defendant did not contest the action, and by an order dated July 18, 1955, PEARCE, J., ordered judgment to be entered for the plaintiffs for possession of the farms and that the issues as to damages should be referred to the official referee, His Honour W. K. CARTER, Q.C., for trial.

In 1954 the plaintiffs bought the two farms, which had valuable gravel deposits beneath them, for the purposes of the plaintiffs' business as gravel merchants. The farms were bought with vacant possession. On Sept. 29, 1954, after the plaintiffs had bought the farms, the defendant entered into possession of both farms. She remained in occupation of Abbey Bridge Farm until July 25, 1955, and of Abbey Chase Farm until Aug. 15, 1955. The issues as to damages may be classified as follows.

1. Damages for conversion.

Square-baled hay, valued at £10 per ton in August, 1954, and roto-baled hay, valued as at Sept. 29, 1954, at £6 per ton, were on the farms when the defendant entered. The roto-baled hay had been stacked in a field by the previous tenant and covered. In August, 1954, before the defendant took possession, the cover blew off and subsequently it was never replaced. When the roto-baled hay passed back into the plaintiffs' possession in 1955 it was worth only £2 per ton. The defendant converted to her own use and fed to her cattle forty-three tons twelve hundredweights of the square-baled hay and eighteen tons of the roto-baled hay. The damages for this conversion were assessed at £436 for the square-baled hay and £108 for the roto-baled hay, making in all £544.

2. Damages for trespass.

(a) If there had been no trespass the plaintiffs would have let the land to an incoming tenant from Sept. 29, 1954, at an annual rent of £650. As a result of the trespass they could not let the land until Sept. 29, 1955, when they let it at such an annual rent. They had, therefore, lost one year's rent, which was accordingly assessed at £650.

- (b) If there had been no trespass the incoming tenant in 1954 would have taken over a crop of kale and some wheat straw. These were eaten by the defendant's cattle. Damages were assessed at £46 3s. 4d. (for the kale) and £24 5s. (for the wheat straw). A
- (c) Manure left behind by the outgoing tenant in 1954 would have been taken over by an incoming tenant; the defendant left behind a reduced quantity and the damages for the difference in value were assessed at £39 1s. B
- (d) Apart from conversion there was no damage to the square-baled hay while it was in the defendant's possession. The roto-baled hay during that period deteriorated from a value of £6 per ton to £2 per ton, and £160 damages were awarded for this. The incoming tenant, after possession had been recovered from the defendant, paid £239 16s. for this hay which was worth £160, but His Honour made no adjustment on this account regarding the payment by the last incoming tenant as *res inter alios acta*. C
- (e) The unexhausted manurial values were found to have deteriorated so that the last incoming tenant paid only £75, whereas an incoming tenant in 1954 would have paid £200. The damages for this were assessed at £125.
- (f) £26 5s. were awarded as damages in respect of the defendant's use of a milking machine during her occupation. D
- (g) The plaintiffs had claimed damages for loss of interest on capital through the defendant's failure to pay tenant right moneys. If there had been no trespass the incoming tenant would have paid £503 3s. 4d. in respect of Abbey Chase Farm and £980 8s. in respect of Abbey Bridge Farm. The plaintiffs had to pay this money to the outgoing tenant of those farms and would recover some part of it as damages for conversion of the hay and as damages for trespass, but His Honour held that they were entitled to interest up to the date of the issue of the writ and assessed damages under this head at £30. E
- (h) The plaintiffs claimed damages for the neglect of the land by the defendant during the term of her occupation. She had failed to do necessary cultivation and to graze the land adequately. The land could, nevertheless, be let at the same rent as if it were in good condition and His Honour was satisfied that the plaintiffs could have transferred any expense of putting the land right to the next incoming tenant and had, in fact, done so. If exceptional terms of letting in this regard had been agreed with the particular tenant who had come in after the defendant, it might be that damages would have to be assessed. His Honour awarded no damages under this head but held that if his approach to the problem were wrong the damages would be £260. F
- (i) The defendant's cattle had broken fences, for repairing which the plaintiffs had spent £70. The plaintiffs also claimed £88 18s. for the defendant's failure to do the normal amount of hedging and ditching. His Honour was satisfied that the hedges and ditches had not been touched for eleven years before the defendant's entry, and that they were in the same condition when she quitted as they were in when she entered. He awarded £70 damages for repairing the broken fences, but no more. His Honour further held that if he were wrong in his approach and ought to consider what a normal tenant would have spent on hedging and ditching in a year he would assess the damages at £50 for routine hedging and ditching plus £70 for the damage done by the defendant's cattle. G H
- (k) The plaintiffs claimed £47 for the failure of the defendant to whitewash the interior of farm buildings and £13 in respect of repairs which would have been done by a normal tenant. The buildings had not been whitewashed by the outgoing tenant before the defendant entered into possession. The defendant left the buildings as she found them. His Honour awarded no damage under this head, but held that if he were wrong in his approach he would assess the damages at the sum claimed, i.e., £60 in all. I

A The defendant contended that the damages ought to be reduced (i) by taking into account the unexhausted manurial value of the manure made by the defendant's herd of cattle during her occupation, and (ii) by the value of the 1955 crop of hay made by the defendant while she was in occupation. His Honour held that compensation for the unexhausted manurial value arose only if it were proved that the cattle had been fed on concentrates, of which there was no evidence before him; he further held that the defendant had acquired no title to hay by wrongfully cutting the plaintiffs' grass during the period of her occupation, that the plaintiffs never had any dealings with that hay and that its presence on the farm conferred no benefit on them. The hay which had been sold to the incoming tenant on the defendant's giving up possession was not the 1955 crop. His Honour accordingly did not reduce on either of these grounds the damages awarded.

C The total damages awarded to the plaintiffs would have been £544 damages for conversion and £1,170 damages for trespass, but on the second day of the hearing the decision of the House of Lords in *British Transport Commission v. Gourley* ([1955] 3 All E.R. 796) became known and the case was adjourned in order that the parties should consider the position.

D *G. G. Baker, Q.C., and L. A. Blundell* for the plaintiffs.
Viscount Hailsham, Q.C., and I. S. Warren for the defendant.

Cur. adv. vult.

E Jan. 13. His Honour W. K. CARTER, Q.C. (THE OFFICIAL REFEREE), read a judgment in which, after stating the facts and assessing the damage which the plaintiffs had suffered, he continued: It appears to me that the principles of *British Transport Commission v. Gourley* (1) ([1955] 3 All E.R. 796) apply to claims for damages for trespass and conversion in the same way as they do to claims for damages for personal injuries. Two problems arise which did not arise in that case. In that case counsel had agreed that the damages recovered by the plaintiff would not be taxable in his hands, but in the present case counsel have not been so accommodating. In that case the position of an individual partner was being considered, but in the present case I have to consider a trading company, which not only is assessed to tax under Sch. D, Case I, but also is a gravel company to whom unusual rules apply (see *Stow Bardolph Gravel Co., Ltd. v. Poole* (2), [1954] 3 All E.R. 637).

G It seems to me that I must endeavour to find the answers to two questions. First, whether any sums which I award to the plaintiffs by way of damages will be subject to income tax or profits tax. Secondly, if the damages will not be so subject, whether the plaintiffs would have been liable for income tax and profits tax if they had received the sums in respect of the loss of which I award them damages. Having regard to the difficulties which face me in attempting to answer these questions, it is important to see where the onus of proof lies.

H Is it for the plaintiffs to prove that the damages awarded will be taxable or that the sums in lieu would not have been taxable, or is it for the defendant? I can find no direct statement on this matter in *British Transport Commission v. Gourley* (1), but the opinion of EARL JOWITT ([1955] 3 All E.R. at p. 802, letter F) does not indicate that there is any shifting of onus, which in matters relating to damages normally rests on a plaintiff.

I I must, therefore, with the inadequate material put before me by Mr. Higham, the plaintiffs' accountant, do my best to answer the two questions which I have propounded. I think that I must consider separately (i) the damages for conversion of the hay, (ii) the damages of £650 in lieu of rent, and (iii) the damages representing the difference between the outgoing and incoming valuations. It was a condition of the sale of the land that the plaintiffs should take and pay for the hay and the outgoing valuations. The purchase by a gravel company of potential sources of supply is treated by the revenue as a dealing

in capital, not in income (see *Stow Bardolph Gravel Co., Ltd. v. Poole* (2)). It is true that Mr. Higham did not tell me whether the sums paid out for the hay and the outgoing valuations were taken into account in arriving at their profits for the year 1954-55. I think, however, that the plaintiffs are entitled to say that, if the damages under heads (i) and (iii) above are capital receipts, so are the sums in lieu, and if the damages are income receipts they are subject to tax (see *Wiseburgh v. Domville* (*Inspector of Taxes*) (3), [1955] 3 All E.R. 548). In spite of the paucity of evidence adduced by the plaintiffs I feel that I ought to allow the damages mentioned in heads (i) and (iii) in full. All that Mr. Higham told me was that the plaintiffs intended to pay tax on such receipts as were taxable, that for the year 1954-55 they had only distributed one-seventh of their taxable profits, and that it was their policy to re-imburse tenants who have had to incur unusual expenses. His evidence gave me very little assistance. He did not even tell me the amount of the Sch. A assessment.

I feel, however, that the correct conclusion for me to reach is that the plaintiffs have satisfied me that what lies ahead of them is a battle with the revenue the result of which is very uncertain, and that so far as heads (i) and (iii) are concerned, the balance of the probabilities is that they will not obtain any tax advantage by receiving an award of damages instead of receiving the sale price of the hay and the incoming valuations in 1954.

So far as head (ii) is concerned I see no reason why this sum of £650 should be taxable in the hands of the plaintiffs. Having considered the operation of s. 175 of the Income Tax Act, 1952, I cannot see how it can be said that the plaintiffs are liable for tax in respect of this award of £650 as damages for trespass. On the other hand, if it had been received as rent it would have been taxable. As the plaintiffs have given no evidence as to the amount of the Sch. A assessment, I must assume that it is so small as to be negligible. In the result the plaintiffs will, unless I make a deduction, recover £650 tax free instead of £650 less income tax and profits tax. I propose to deduct fifty per cent. from the damages which I award in lieu of rent. I arrive at a figure of approximately fifty per cent. as follows:—

If one assumes that the plaintiffs make a profit of £1,000—

Income tax at the standard rate would be	£425
2½% profits tax on £1,000	£25
25% profits tax on £143, viz., 1/7th of the taxable profits	£35
Tax on £1,000	£485

From the damages of £650 awarded in lieu of rent I therefore deduct £325. I give judgment for the plaintiffs for £1,390.

Judgment accordingly.

Solicitors: *Wilkinson, Howlett & Moorhouse* (for the plaintiffs); *Warren & Warren* (for the defendant).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A

WISBECH ST. MARY PARISH COUNCIL v. LILLEY.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.),
January 12, 13, 1956.]

Landlord and Tenant—Tenancy—Tenancy from year to year—Denial of landlord's title—Whether sufficient to cause a termination of the tenancy.

B

In 1914 the landlords let a cottage to D. at a rent of 10s. per annum. By an agreement dated Aug. 2, 1952, D. agreed to sell to L. "all . . . the interest of [D.] in the cottage and premises . . . now or until recently occupied by [D.] for the sum of £20". The agreement further provided that D. was to be allowed to live in the cottage when he wished. D. paid his rent up to and including 1953, making his last payment in October, 1953. He died in March, 1955. The landlords claimed possession of the cottage against L. on the ground that the transaction of 1952 was a denial of the landlords' title and caused the forfeiture of D.'s tenancy. Evidence was given that D. told the solicitors who acted both for him and for L. in the transaction of August, 1952, that he had owned the cottage for some forty years and had never paid rent.

C

D

Held: the landlords' claim failed because the evidence was insufficient to prove that D. let L. into possession with the intention of enabling L. to set up a title adverse to that of the landlords and, therefore, D. had not brought his tenancy to an end.

E

Doe d. Ellerbrock v. Flynn (1834) (1 Cr. M. & R. 137) and dictum of LORD DENMAN, C.J., in *Doe d. Graves v. Wells* (1839) (10 Ad. & El. at p. 435) considered.

Appeal dismissed.

[**Editorial Note.** The Court of Appeal here accept that a repudiation of his landlord's title by a tenant can bring his tenancy to an end and, if the tenancy is from year to year, that an oral denial may suffice for this purpose. Though the principle comes down from feudal times, it is still law, but it must be cautiously applied (see p. 303, letter H, post, and p. 304, letter I, post).]

F

As to impugning landlord's title as a ground for forfeiture of a lease, see 20 HALSBURY'S LAWS (2nd Edn.) 248, para. 281; and for cases on the subject, see 31 Digest (Repl.) 520-523, 6428-6450.]

G

Cases referred to:

- (1) *Doe d. Ellerbrock v. Flynn*, (1834), 1 Cr. M. & R. 137; 3 L.J.Ex. 221; 149 E.R. 1026; 31 Digest (Repl.) 522, 6443.
- (2) *Doe d. Graves v. Wells*, (1839), 10 Ad. & El. 427; 8 L.J.Q.B. 265; 113 E.R. 162; 31 Digest (Repl.) 522, 6441.

H

Appeal.

Appeal by the landlords, Wisbech St. Mary Parish Council, from an order of His Honour DEPUTY JUDGE GARTH MOORE made at Wisbech County Court and dated Oct. 18, 1955, whereby the landlords' action for possession of a cottage was dismissed.

The facts appear in the first judgment, and are summarised in the headnote.

I

N. C. Bridge for the landlords, the parish council.
The tenant did not appear and was not represented.

SIR RAYMOND EVERSHERD, M.R.: In this appeal counsel for the Wisbech St. Mary Parish Council raised a point of interest and of an unusual character. To use his own words, counsel contended that where a tenant from year to year of a cottage has let a stranger into possession with the intention of enabling that stranger to set up an adverse title to the landlord, so that the landlord is thereby put in a worse position, then the tenant must be taken by

his act to have disclaimed and put an end to his interest as tenant. It is said by counsel that the circumstances of this case form an example of the proposition which I have stated. A

The cottage in question, known as "Folloys Drove", Guyhirn, appears to be on land awarded by an enclosure award to the predecessors of the parish council more than a hundred years ago. In the circumstances I need not examine the devolution of the title: I shall assume that in 1914 the property was vested in the parish council. They let it to a Mr. Donger. The transaction was plainly of a somewhat eleemosynary character, since the rent was no more than 10s. per annum. Mr. Donger lived there for the best part of forty years; and he eventually died in March, 1955. He had paid rent up to and including the year 1953, his last payment being in October of that year. In that year, Mr. Donger being in hospital, the parish council, who desired to obtain possession of the cottage for the purposes of its demolition, wrote asking if Mr. Donger would give up possession and return the key. Mr. Donger, however, thought fit to ignore that request altogether. After his death (and it is a fact, though it does not matter for present purposes, that he left a will), it transpired that in 1952, and shortly before his admission to hospital, Mr. Donger purported to transfer his interest in the cottage to the defendant in the action, Mr. Lilley. Mr. Lilley has thought it appropriate to abstain from any active participation in the present proceedings; and the proof of what occurred in 1952 emerged in substance from the evidence of the solicitor, Mr. Farrow. According to the judge's note, Mr. Farrow said: B C D

"July, 1952, Mr. Donger told me he had agreed to sell cottage to Mr. Lilley [the defendant]. I acted then for both. I prepared the agreement of Aug. 2, 1952, there being no deeds. About Sept. 14, 1955, defendant came to my office about ten minutes before registrar sat. [That is a reference to the hearing of the present proceedings.] I said I could not act for him after that time as he had not given me a fair chance. In writing the letter of Apr. 19, 1955, I was acting for defendant. The facts in the letter are true." E F

I have read the whole of that evidence because on it and on the last statement, "The facts in the letter are true", really hangs the whole of the parish council's case. The reason why the parish council must so link their case to that statement and the letter emerges from the terms of the agreement of Aug. 2, 1952. It provides, after setting out the names of the parties, and without any recital, by the first clause: G

"The vendor shall sell and the purchaser shall purchase all that the interest of the vendor in the cottage and premises in Folloys Drove, Guyhirn, aforesaid now or until recently occupied by the vendor for the sum of £20."

Then there is a provision that the purchaser was to allow Mr. Donger to come and live in it when he wanted to. That agreement is plainly, on its terms, equivocal as to the title, if any, which Mr. Donger was alleging that he had. H

Counsel therefore conceded that, if the matter rested on that document alone, he could not for a moment contend that it formed evidence of the tenant's letting of a stranger into possession with the intention that an adverse title to the landlords should be set up. In order to bring himself within his proposition at all, counsel prayed in aid the letter of Apr. 19, 1955, which Mr. Farrow said was true as to the facts therein stated. That letter, written to the solicitors for the parish council, said in its second paragraph: I

"We think we should point out that Donger told us that he had owned the place for some forty years and had never paid rent and we think that at any rate no rent has been paid for the last three years, for Donger was practically penniless."

- A I felt some doubt as to the admissibility of some of the evidence that Mr. Farrow gave, for he was, at relevant dates, acting as solicitor for the defendant as well as for Mr. Donger, and, if professional privilege existed, Mr. Farrow was in no position to waive it. Assuming, however, that no question of that kind arises, it is said by counsel that the statement in Mr. Farrow's letter (if true, as one must assume it is) proved this: that Mr. Donger at the date of the transaction
- B was asserting that he was the absolute owner of this cottage, and that, contrary to the facts, he had never paid any rent in respect of it: so that such assertion, plus the sale to Mr. Lilley (according to the argument) amounted to an act aimed at enabling Mr. Lilley to set up a title adverse to the council. I was myself inclined to think during the argument, assuming these facts are true, that
- C Mr. Donger was really deceiving Mr. Lilley by telling him (contrary to the fact) that no rent was paid, and that he was the owner, in order that he might extract £20 from Mr. Lilley. It may be that that uncharitable view is wrong. It may be, as ROMER, L.J., pointed out, that Mr. Donger (who was old then and in a very ailing condition) may have regarded the slight sum of 10s. a year as of no account, and may genuinely have thought that he had paid and was paying no rent in any true sense of the term. On either view, it seems to me, put at its highest,
- D by no means clear, as an inference from these facts (assuming them all to be true), that this was a transaction aimed at enabling Mr. Lilley to set up a title adverse to the true owner. It seems to me that, whatever Mr. Donger may have thought or may have tried to represent as to his position, he was not concerned to enable somebody, viz., Mr. Lilley, to challenge a title which he was not himself in any way concerned to dispute.
- E The proposition which counsel founded on was illustrated by old cases. We were referred to the decision in *Doe d. Ellerbrock v. Flynn* (1) (1834) (1 Cr. M. & R. 137). That was a case in which (as the jury found) the defendant Flynn was beyond any question claiming and intending to claim and to assert a proprietorship of the property adverse to the lessors of one Townsend, and the transaction between Townsend and Flynn was, as the jury found, and (as the court held)
- F found justly, designed to enable Flynn to oust the lessors of Townsend if he could. Thus, LORD LYNDBURST, C.B., said (*ibid.*, at p. 141):

"I think that the jury, upon the facts proved at the trial, came to a right conclusion. If the tenant sets up a title hostile to that of his landlord, it is a forfeiture of his term; and it is the same if he assists another person to set up such a claim. Whether he does the act himself, or only colludes with another to do it, it is equally a forfeiture."

- The conception of the relations of landlord and tenant has undergone many changes since that case was decided in 1834. The rule asserted was founded on the feudal law, as counsel in that case pointed out. Still, if the facts were strictly brought within the scope of the decision of *Doe d. Ellerbrock v. Flynn* (1), I do not
- H doubt that even today the court would come to the same conclusion. In a later case, however, *Doe d. Graves v. Wells* (2) (1839) (10 Ad. & El. 427) LORD DENMAN, C.J., pointed out that the rule stated in *Doe d. Ellerbrock v. Flynn* (1) must be somewhat cautiously applied. As he said in the course of his judgment (*ibid.*, at p. 435):

- I "I think *Doe d. Ellerbrock v. Flynn* (1), is distinguishable from the present case. There it was thought that the tenant had betrayed his landlord's interest by an act that might place him in a worse condition: if the case went farther than that, I should not think it maintainable. The other instances are cases either of disclaimer upon record, which admit of no doubt as to the nature of what is done, or of leases from year to year, in speaking of which the nature of the tenancy has been sometimes lost sight of, and the words 'forfeiture' and 'disclaimer' have been improperly applied. It may be fairly said, when a landlord brings an action to recover the possession from

a defendant who has been his tenant from year to year, that evidence of a disclaimer of the landlord's title by the tenant is evidence of the determination of the will of both parties, by which the duration of the tenancy, from its particular nature, was limited. But no case, I think, goes so far as the present: and I feel the danger of allowing an interest in law to be put an end to by mere words."

PATTESON, J., observed (*ibid.*, at p. 436):

"We know that mere words cannot work a disseisin, although some acts have been held to work a disseisin at the election of the party disseised, which, as against him, would not work a disseisin."

In that case the tenant had in terms stated that he was the owner, and in his declaration repudiated the title of his lessor. *Doe d. Graves v. Wells* (2), it must be pointed out, was not a case of a tenancy from year to year but of a term of years; and the passage which I have read from the judgment of LORD DENMAN, C.J., indicates that what is applicable to the one is not necessarily applicable to the other. The principle as stated by LORD DENMAN, C.J., is, I think, a sound one, viz., that it is somewhat dangerous to allow an interest at law to be put an end to by mere words; and, in effect, that, I think, would be the result if we were to accept counsel's argument in the present case. Certainly, as it seems to me, the landlords, for practical purposes, were not put in any worse position by the transaction between Mr. Donger and Mr. Lilley in 1952; and I for my part agree with the judge that in the end of all, when reliance is placed on a disclaimer, it is a question of fact how far, properly interpreted, the transaction ought to be treated as having gone. Put interrogatively, in the language of counsel's own formulation: Can it be said here that the parish council proved (and clearly proved, because they are the plaintiffs, and the onus is on them) that Mr. Donger let Mr. Lilley into possession with the intention of enabling Mr. Lilley to set up an adverse title? As the judge put it,

"It is, of course, true that a tenant's denial of his landlord's title can give rise to forfeiture, and the claim is none the less good for being rare and somewhat archaic. But the denial, though it need not be express and can be implied, must, nevertheless, be a clear denial and it must be clearly proved."

I entirely agree with those observations; and I agree, no less, with the sentence which follows: "I am far from satisfied that any such denial, express or implied, has in this case been proved".

In the result, therefore, I conclude that this appeal fails and must be dismissed.

BIRKETT, L.J.: I am entirely of the same opinion. I would point out that there are one or two rather curious and obscure features of this case, but, even if they were satisfactorily cleared up, I do not think that it would affect in the smallest degree the essential point which has been dealt with by my Lord. For example, the rates and water rates on this cottage had always been paid by the parish council. Those facts could have been ascertained at once. I agree with the judgment of my Lord, and that this appeal ought to be dismissed.

ROMER, L.J.: I also agree. As SIR RAYMOND EVERSHED, M.R., has pointed out, the law on this subject is archaic in some degree and founded on feudal principles which certainly do not loom very large in modern life. I accept, however, counsel's submission that, even now, if a tenant deliberately asserts a title in himself adverse to his landlord or if he lets a stranger into possession with the intention of enabling him to set up a title adverse to the landlord, that amounts to a repudiation of the landlord's title; and it would seem that where the tenancy in question is a yearly tenancy it is sufficient to constitute a repudiation if the assertion of title against the landlord is made orally. It is a question of fact, however, what intention underlies the words or the actions of a tenant, whether in fact he is definitely asserting a title adverse to the landlord,

- A or, as the case may be, intending to enable somebody else to set up such a title. I have no doubt but that this old gentleman, Mr. Donger, had no such intention in his mind at all when he had this talk with Mr. Farrow and with the defendant. He thought, though wrongly, that he did not pay any rent and that he had lived there for years without paying any rent. The learned judge came to the conclusion that all he had in mind was an intention to instruct the solicitor so that
- B he could take such steps as were necessary to transfer such interest as the old man had in this property to the defendant, and the learned judge said that he believed that was the intention of Mr. Donger, which fell far short of an intended and definite assertion of an adverse title which is requisite to enable the parish council to succeed. On that finding of the learned judge, with which, on the evidence, I entirely agree, it appears to me that the highly technical ground on
- C which the parish council tried to succeed is of no avail; and I think the learned judge was right and this appeal must fail.

Appeal dismissed.

Solicitors: *Metcalf, Copeman & Pettefar* (for the landlords).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

D

E PROBATE, DIVORCE AND ADMIRALTY DIVISION (PROBATE)

PRACTICE DIRECTION.

- F *Administration of Estates—Grant—To nominee of non-trust corporation—Non-contentious Probate Rules, 1954 (S.I. 1954 No. 796), r. 34 (3).*

Before a grant can be made under the Non-contentious Probate Rules, 1954, r. 34 (3),* to the nominee of a corporation (not being a trust corporation) entitled as executor it must be established that the corporation has power under its constitution to take a grant through its nominee. This will normally be evidenced by the production of a copy of the constitution.

- G A corporation or association or public or charitable or private body of persons entitled as beneficiary or creditor need be required only to provide its nominee with a copy (authenticated in accordance with the rule) of a resolution passed by the committee or other body most completely representing it.

B. LONG,

Senior Registrar.

January 2, 1956.

* For the terms of the rule, see 7 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 300.

REYNOLDS v. JOHN.

T. WALL & SONS, LTD. v. JOHN.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Stable and Ashworth, JJ.),
January 18, 19, 1956.]

Advertisement—Loudspeaker—Prohibition against loudspeaker being operated in street for purpose of advertising any trade or business—Instrument, producing sound of chimes, operated from ice cream van in street to attract attention of potential customers—Whether instrument a “loudspeaker”—Glamorgan County Council Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. li), s. 115 (1), (5).

The Glamorgan County Council Act, 1952, s. 115 (1), provides: “No person shall for the purpose of advertising any trade or business or any part of a trade or business operate or cause . . . to be operated any loudspeaker when such loudspeaker is in any street in the county”. Section 115 (5) reads: “In this section the expression ‘loudspeaker’ includes an amplifier or similar instrument.”

A company which supplied ice cream to customers direct from the company's vans conducted an advertising campaign in Penarth, in the county of Glamorgan, for the purpose of bringing to the notice of potential customers the fact that a consumer sales van would be operating in the district. The company subsequently sent a consumer sales van into certain streets in the district, and, in order to attract attention, the driver, while driving the van, operated an instrument which produced the sound of chimes. The instrument appeared to be electrically operated and the chimes could be heard nearly half a mile away. The driver of the van was convicted of operating a loudspeaker in a street for the purpose of advertising the business of an ice cream vendor, and the company was convicted of causing the loudspeaker to be operated in the street for the same purpose, contrary to s. 115 (1) of the Act of 1952. On appeal,

Held: the company and the driver of the van were rightly convicted, because (a) the instrument was a “loudspeaker” within the meaning of the section and (b) on the facts, the loudspeaker was being used in a street in the county for the purpose of advertising.

Per ASHWORTH, J.: (a) the term “loudspeaker” was not restricted to an apparatus which reproduced speech (see p. 309, letter G, post).

(b) the word “includes” in s. 115 (5) was inserted for the purpose of enlarging rather than restricting the meaning of the word “loudspeaker” (principle stated in *Dilworth v. Stamps Comrs.*, *Dilworth v. Land & Income Tax Comrs.*, [1899] A.C. at p. 105, applied).

Appeals dismissed.

[As to the construction of definition sections in statutes, see 31 HALSBURY'S LAWS (2nd Edn.) 476, para. 591.]

Case referred to:

- (1) *Dilworth v. Stamps Comrs.*, *Dilworth v. Land & Income Tax Comrs.*, [1899] A.C. 99; 79 L.T. 473; sub nom. *Dilworth v. New Zealand Stamps Comrs.*, 68 L.J.P.C. 1; 19 Digest 586, 182.

Cases Stated.

These were Cases Stated by justices for the county of Glamorgan in respect of their adjudication as a magistrates' court sitting at Penarth on July 20, 1955. On June 17, 1955, the respondent, Richard John, preferred an information against the appellant, Gordon Reynolds, charging that on Feb. 6, 1955, in a certain street at Penarth, he operated a loudspeaker for the purpose of advertising the business of an ice cream vendor contrary to s. 115 (1) of the Glamorgan County Council Act, 1952. On the same day (June 17) the respondent preferred an information against the appellant company, T. Wall & Sons, Ltd., charging that

A on Feb. 6, 1955, in a certain street at Penarth, the company caused a loud-speaker to be operated for the purpose of advertising the business of an ice cream vendor contrary to s. 115 (1).

The following facts, which were common to both cases, were found. On Feb. 6, 1955, the appellant Reynolds was employed by the appellant company as a van driver and salesman in charge of a consumer sales van. The van was one of a number of similar vans each equipped with a mechanism for producing a sound of chimes. The vans were operated by the company throughout England and Wales for the purpose of selling ice cream direct from the van to consumers in the street outside their homes. The company had been operating these vans in the county of Glamorgan for about five years before February, 1955, and Mr. Reynolds had been employed by the company as a driver of one of these vans for about one and three-quarter years. In the course of his employment Mr. Reynolds had visited Penarth each week for the purpose of selling ice cream. Before starting to operate a consumer sales van at Penarth, the company, in accordance with its usual practice, advertised its ice cream on cinema screens, on hoardings, and in the local Press, then canvassed individual residents in the area, and, from the result of the canvass, worked out the round to be followed by the vans. The company then sent out circulars advertising its ice cream to residents in the area and, after having compiled a list of potential customers in the area, notified customers that the vans would be in the areas at certain times and that the sounding of the chimes would be the method of advising customers that the vans were there. On the dashboard of Mr. Reynolds' van was printed the following notice to the driver: "Don't sound the chimes (i) when the van is stopped, (ii) near hospitals, (iii) more than once in five minutes." On Feb. 6, while Mr. Reynolds was driving the van along Redlands Avenue, Penarth, he operated the mechanism which produced the sound of chimes, and, as a result of hearing the chimes sounded, various persons came up to the van and Mr. Reynolds sold ice cream from the van to them. A police constable, who said that he heard the chimes when nearly half a mile away, came to the van and examined it while it was standing in Redlands Avenue and heard the chimes demonstrated by Mr. Reynolds. As a result of the examination and demonstration he noticed that the chimes were produced by Mr. Reynolds pressing a button on a box beside the driver's seat, from which wires ran to another box beneath the vehicle from which the sound of chimes came. The mechanism could be operated only when the ignition switch of the van was switched on. The appellants adduced no evidence how the sound was produced.

The appellants contended (a) that there was no sufficient evidence to enable the court to draw the inference that the mechanism was amplifying sound or was capable of amplifying the human voice; (b) that, even if the mechanism were amplifying sound, it was not a loudspeaker within the meaning of s. 115 of the Glamorgan County Council Act, 1952, in that, to come within that definition, the mechanism must be capable of amplifying the human voice; and (c) that the chimes were not used for the purpose of advertising any trade or business within the meaning of s. 115 (1). The justices were of the opinion (i) that the mechanism was a loudspeaker within s. 115, and that the word "loudspeaker" in the Act of 1952 was not limited to mechanism that produced only the human voice; (ii) that there was sufficient evidence for the justices to infer that the mechanism amplified sound; and (iii) that the chimes were used for the purpose of advertising the appellant company's trade or business. Accordingly, the justices found the appellant Reynolds and the appellant company each guilty of the offence charged.

F. W. Beney, Q.C., and T. H. Tilling for the appellants.

G. R. Rougier for the respondent.

LORD GODDARD, C.J.: I will ask ASHWORTH, J., to deliver the first judgment.

ASHWORTH, J.: These two appeals, which have been heard together, raise as the crucial issue the proper construction of s. 115 of the Glamorgan County Council Act, 1952. The facts, which are common to both cases, are as follows. On Feb. 6, 1955, the appellant Reynolds, who was employed by the appellant company, T. Wall & Sons, Ltd., was driving a consumer sales van. The appellant company is well known as a supplier of ice cream, and before the date in question the company had conducted in the neighbourhood of Penarth a campaign for the purpose of bringing to the notice of potential customers the fact that this consumer sales van would be operating in the district. Having conducted that campaign by notices on cinema screens, on hoardings and in the local Press, the appellant company sent out canvassers to individual residents and, as the result, worked out the rounds to be followed by the van. On the day in question Mr. Reynolds was driving in his consumer sales van, in accordance with the round which had been planned by the appellant company, and, in order to attract the attention of persons in the neighbourhood, he operated an instrument which produced the sound of chimes. On the dashboard of the van there was a notice directing the driver not to sound the chimes when the van was stopped or near hospitals or more than once in five minutes. The method by which sound is produced is not set out in complete detail in the Cases for the simple reason that the appellants, who were the persons in the best position to explain the mechanism, elected not to give any evidence about it; but a policeman, who was called on behalf of the prosecution, said that he heard the chimes when nearly half a mile away, that he came to the van and examined it and heard the chimes demonstrated by Mr. Reynolds, and that, as the result of that examination, he found that the method of producing chimes was that the driver pressed a button on a box beside the driver's seat, from which wires ran to another box beneath the vehicle from which the sound of chimes came. The mechanism could be operated only when the ignition switch of the van was switched on.

In the absence of any other evidence, it seems to me that the inference was irresistible that the method of producing the sound of chimes was by means of some electrical apparatus. Section 115 of the Glamorgan County Council Act, 1952, provides:

- “(1) No person shall for the purpose of advertising any trade or business or any part of a trade or business operate or cause or suffer to be operated any loudspeaker when such loudspeaker is in any street in the county . . .
(5) In this section the expression ‘loudspeaker’ includes an amplifier or similar instrument.”

The justices came to the conclusion that the offences charged were proved. In support of the appeals counsel for the appellants took two points: first, that it was not right for the justices to hold that the apparatus on the van was operated for the purpose of advertising; secondly, that in any event the apparatus was not a “loudspeaker” within the meaning of that word simpliciter or within the meaning of the definition in s. 115 (5) of the Act. It is true that before Feb. 6 the appellant company had conducted a campaign which one may fairly call an advertising campaign, but, in my judgment, the words “for the purpose of advertising” are not limited in the way suggested by the appellants, namely, to denoting some form of commendation or puff. The object of s. 115 (1) is to prevent advertising by means of a loudspeaker in a street; and that would include the prevention of persons calling attention, by means of a loudspeaker, to their presence in the street, or to the wares which they were about to sell. That is precisely what Mr. Reynolds was doing and what the appellant company had previously announced that he would do: he was informing the residents, in accordance with the programme of which they had been informed, that he was there to do business. I think it is almost unarguable to suggest that he was not at that moment operating his apparatus for the purpose of advertising his trade or business.

A The other point taken by counsel for the appellants is, however, more difficult. Before considering what the definition in s. 115 (5) of the Act means, it is perhaps worth citing a passage from the judgment of the Privy Council in *Dilworth v. Stamp Comrs.*, *Dilworth v. Land & Income Tax Comrs.* (1) ([1899] A.C. 99 at p. 105), dealing with definitions which incorporate the word "include":

B "Section 2 [of the New Zealand Charitable Gifts Duties Exemption Act, 1883] is, beyond all question, an interpretation clause, and must have been intended by the legislature to be taken into account in construing the expression 'charitable devise or bequest', as it occurs in s. 3. It is not said in terms that 'charitable bequest' shall mean one or other of the things which are enumerated, but that it shall 'include' them. The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include', and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions."

E In the present case the definition of "loudspeaker" in s. 115 (5) of the Act of 1952 is in the following terms: "'loudspeaker' includes an amplifier or similar instrument". In my view, it is the first of the two alternatives which I have just cited from *Dilworth v. Stamp Comrs.* (1) which should be applied in this case, and the word "includes", in s. 115 (5), was inserted for the purpose of enlarging rather than restricting the meaning which might arise from the use of the word "loudspeaker" simpliciter. I am fortified in that conclusion by F the fact that the sub-section includes the words "or similar instrument".

That brings me to the question: What is a loudspeaker? A loudspeaker is, in my view, an apparatus which is electrically driven for the purpose of reproducing sound over a wide area. It was suggested at one time in the course of the case that "loudspeaker" is, by inference, limited to an apparatus which reproduces speech, but I have no doubt that that limited construction is wrong. G At stations in London and elsewhere instruments which are admittedly loudspeakers are used for the purpose of informing passengers of the platforms from which trains will depart, and if the apparatus is not so used it is a common practice to use it for the broadcasting of music. The loudspeaker does not cease to be a loudspeaker because it is used for the reproduction of music. Applying the definition which I have suggested to the facts of this case, it is clear that H the apparatus was electrically driven, and that the result of it being operated was the reproduction and distribution of sound over a wide area. I should be content to uphold the decision of the justices on the ground that there was ample evidence before them which would justify the finding that the hearing of chimes at a distance of half a mile constituted the instrument a loudspeaker. I am not I concerned with the possibility that it might be an amplifier, but I think that it would also be open to uphold the decision of the justices on the ground that the apparatus was a "similar instrument."

Counsel for the respondent submitted that the genus involved in s. 115 (5) is an instrument, electrically driven, which makes a loud noise. For my part, I am prepared to accept that as a description of the genus. One also has in mind the object of s. 115, which was to put a stop to noisy advertisements in streets, for which purpose bye-laws had previously proved ineffective. With that in mind, it seems to me that an instrument electrically operated, as this was, which

reproduced chimes audible at a distance of half a mile, could clearly be held by the justices to be a similar instrument to a loudspeaker. On either of those grounds, therefore, I would dismiss these appeals. A

STABLE, J.: I agree. In my judgment, there was evidence before the justices which justified them in finding that the apparatus in question was a loudspeaker, "loudspeaker" being defined, in s. 115 (5) of the Act of 1952, as including "an amplifier or similar instrument". The justices found that the apparatus came within that definition. I think the question was one of fact and there was evidence before the justices which entitled them so to find. I agree that the appeals should be dismissed. B

LORD GODDARD, C.J.: I agree with the judgments which have been delivered, except that I reserve my opinion on the question whether, to bring an instrument within the definition in s. 115 (5) of the Act of 1952, it is necessary that the instrument should be electrically operated. I think that the word "amplifier" would be, possibly, enough to include a megaphone or foghorn such as is used on a ship. If such an instrument were used in the street, I do not feel by any means certain that an offence would not be committed. It is not necessary, however, in the present case to decide whether the prohibition in s. 115 (1) of the Act applies only to an instrument which is electrically operated. C

Appeals dismissed.

Solicitors: *Simpson, North, Harley & Co.* (for the appellants); *Torr & Co.*, agents for *Richard John*, Cardiff (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.] E

Re A CLAIM BY COLLBAN (*deceased*).

[CHANCERY DIVISION (Upjohn, J.), January 12, 1956.]

Enemy—German enemy property—Lease to German national—Covenant to repair—Breach of covenant—Claim for damages—Whether claim for unliquidated damages could rank as a German enemy debt—Distribution of German Enemy Property Act, 1949 (12, 13 & 14 Geo. 6 c. 85), s. 8 (1) (a). F

By a lease dated Dec. 11, 1936, the claimant demised to one B. a house for a term of seven years from Dec. 25, 1936, on terms which included a covenant by B. well and substantially to repair the house. On or before Sept. 3, 1939, B. left England and at all material times thereafter was a German national, resident in Germany. In 1940 the house was out of repair. The term having become vested in the Custodian of Enemy Property, he, by deed, surrendered the lease in 1941 to the claimant. The surrender was without prejudice to the claimant's claim for damages for breach of covenants contained in the lease. It was conceded that there was a breach of the covenant to repair at the date of the surrender. The claimant's personal representatives (hereinafter included in the term "the claimant") having subsequently claimed against the Administrator of German Enemy Property for damages for breach of the repairing covenant in the lease, the administrator rejected the claim on the ground that a claim for unliquidated damages for breach of covenant was not a claim in respect of a "German enemy debt" within s. 8 (1) (a) of the Distribution of German Enemy Property Act, 1949, which defined that term as meaning, so far as is relevant, "any sum due at the passing of this Act" in respect of certain obligations of which this obligation was one. G

Held: the claim failed because the words "any sum due" in the definition of "German enemy debt" in s. 8 (1) (a) of the Distribution of German Enemy Property Act, 1949, were not appropriate in their context to a H I

A claim for unliquidated damages for breach of covenant; and no sum was due within the meaning of the enactment in respect of a breach of covenant until the amount due had been quantified either by judgment or by agreement.

Dictum of SWINFEN EADY, L.J., in *O'Driscoll v. Manchester Insurance Committee* ([1915] 3 K.B. at p. 512) applied.

B [For the Distribution of German Enemy Property Act, 1949, s. 8 (1) (a), see 26 HALSBURY'S STATUTES (2nd Edn.) 361.

For the Distribution of German Enemy Property (No. 2) Order, 1951, art. 5, see 23 HALSBURY'S STATUTORY INSTRUMENTS 139.]

Case referred to:

C (1) *O'Driscoll v. Manchester Insurance Committee*, [1915] 3 K.B. 499; 85 L.J.K.B. 83; 113 L.T. 683; 79 J.P. 553; 2 Digest 634, 2612.

Case Stated.

The Administrator of German Enemy Property stated a Case, pursuant to art. 7 (2) of the Distribution of German Enemy Property (No. 2) Order, 1951 (S.I. 1951 No. 1899), on the request of the claimant. The claimant claimed to be entitled to participate in the distribution of German enemy property under the order in respect to £307 14s. 6d., being damages for breach of a repairing covenant contained in a lease of a house at Wimbledon, in the County of Surrey, let in 1936 to a German national who on and after Sept. 3, 1939, was resident in Germany. Judgment had never been recovered against the lessee and the repairs had not been carried out. On Nov. 11, 1954, the administrator determined that the claimant's claim had not been established because no sum was due on Dec. 16, 1949 (the date of the passing of the Distribution of German Enemy Property Act, 1949) in respect of the application for repairs incurred before Sept. 3, 1939, and that therefore there was no German enemy debt as defined under s. 8 (1) of that Act. The question of law for the opinion of the court was whether the administrator was right in so holding.

F The facts appear in the judgment.

P. H. R. Bristow for the claimant.

Denys B. Buckley and *N. C. H. Browne-Wilkinson* for the Administrator of German Enemy Property.

G UPJOHN, J.: This appeal from the Administrator of German Enemy Property raises a short but interesting question whether a claim for unliquidated damages will rank with other claims to receive the benefits of the collection and distribution of property pursuant to the Distribution of German Enemy Property Act, 1949.

H The matter arises under a lease dated Dec. 11, 1936, made between the late Caroline Catherine Begent Collbran of the one part and Theodore Boettiger of the other part. Mrs. Collbran has died, and the claimants in this case are her executors; I will, however, refer to her and them indifferently as the claimant. By the lease the claimant demised a house in Wimbledon to Mr. Boettiger for a term of seven years from Dec. 25, 1936, on terms and conditions which included a covenant by the lessee well and substantially to repair the house. Mr. Boettiger left England either on or shortly before Sept. 3, 1939, and from that date onwards I he was at all material times a German national resident in Germany. By a deed of surrender dated Oct. 13, 1941, the Custodian of Enemy Property surrendered the lease to the claimant on certain conditions, one of which was that the surrender should be without prejudice to the claimant's claim for damages for breach of the covenants in the lease. The claimant claims that when Mr. Boettiger left he was in breach of his covenant to repair the house. It is admitted, however, that it is unnecessary to show any breach before Sept. 3, 1939, and it is sufficient if there be a breach at the date of surrender. The claimant asked certain agents to make an inspection of the property, and they prepared a schedule

of dilapidations in 1940 which showed that in their view some £300* would be required to put the house into a proper state of repair. It is not suggested that their estimate can turn an unliquidated sum into a liquidated sum. I only mention that fact to show that at all events the claimant had a prima facie good claim for damages for breach of covenant for failure to repair the house. That claim was duly submitted to the Administrator of German Enemy Property, and he rejected it on the short ground that it was a claim for unliquidated damages for breach of covenant and that such a claim did not rank under the provisions of the Act. A B

I turn to s. 1 (1) of the Distribution of German Enemy Property Act, 1949, which is in these terms:

"His Majesty may by Order in Council make provision for the collection and realisation of German enemy property and for the distribution of the proceeds thereof, to such extent as may be prescribed by the order, to persons who establish claims in respect of German enemy debts." C

Section 8 (1), which defines the meaning of "German enemy debts", is in these terms:

"In this Act the following expressions have the meanings hereby respectively assigned to them, that is to say—'German enemy debt' means—(a) any sum due at the passing of this Act in respect of an obligation incurred before Sept. 3, 1939, which on that day was an obligation of any of the following persons [including] (ii) any individual who on that day was a German national resident in Germany . . .", D

as Mr. Boettiger clearly was. Orders in Council have been made pursuant to the powers conferred by the Act. At this stage I need refer only to one article of the Distribution of German Enemy Property (No. 2) Order, 1951 (S.I. 1951 No. 1899), Part 4 of which is headed "Amount for which claims permitted to rank". Article 5 (1) provides: E

"The amount for which claims which are not excluded under Part 2 of this order may be admitted for payment shall be ascertained by the administrator in accordance with the following provisions of this article." F

The next four paragraphs deal with claims arising out of bonds, or credits, or advances, or other indebtedness under the German Credit Agreement of 1939, and claims arising out of other loans and claims arising out of trade debts. Article 5 (6) is in these terms: G

"In respect of any claims arising out of any obligation not mentioned in any of the preceding paragraphs of this article, the amount shall be the sum due at the passing of this Act."

I must return to s. 8 of the Act, for the question is entirely a question of construction of that section. There are certain matters which are common ground. First, a German enemy debt must be H

"any sum due at the passing of this Act [Dec. 16, 1949] in respect of an obligation incurred before Sept. 3, 1939".

It is conceded that in this case the "obligation" for the purposes of the Act was the obligation to repair contained in the lease of December, 1936, and that was an obligation arising before Sept. 3, 1939. It is for that reason that it is now common ground that the question whether there was an actual breach of covenant on or before Sept. 3, 1939, is immaterial. The case proceeds on the footing that there was undoubtedly a breach of some sort by the time the lease was surrendered. The whole question, therefore, is whether this claim for a I

* The assessed cost of effecting repairs according to a schedule of dilapidations dated in July, 1940, was £299 8s. 6d.; further expenditure of £8 6s. would have been required to put the house in proper condition, making a total of £307 14s. 6d.

A breach of covenant to repair can properly be described as a "sum due at the passing of this Act".

Counsel for the claimant submits that there was a breach of covenant. He admits that the sum due by way of damages for that breach has not yet been conclusively ascertained or quantified, but he contends that there is a sum due and was a sum due at the passing of the Act, and that all which remains is for the administrator to quantify that sum. I need not refer in detail to the provisions of the order which plainly empower the administrator to call for information, documents, and so forth, to enable him to establish the quantum which is due. It is said by counsel for the administrator that it would be very difficult, if not impossible, for the administrator to ascertain what was the proper sum quantifying the damages. That was one reason why he submitted that a claim such as this was not intended to be brought within the ambit of the Act. I do not accept that argument. The administrator has ample powers to have placed before him the proper information on which he can make his decision as to quantum, and his difficulty is not greater than that of a trustee in bankruptcy or the liquidator of a company who may frequently have to deal with claims of this nature. That, however, is not an end of the matter, for counsel for the administrator submits that it cannot properly be said that any sum is due until one of two things has happened, either until the claim for damages for breach of covenant has been litigated and the liability has been established, the amount due has been quantified and turned into a judgment debt which then becomes a sum due, or until the parties have either compromised the litigation or have otherwise agreed that some sum is due.

E I think one must analyse what is the true nature of the claim such as the one put forward in this case. It is a claim for damages for breach of contract. That is in essence a chose in action. It may be a valuable right, but it is not a debt. I think that that is plain from *O'Driscoll v. Manchester Insurance Committee* (1), where SWINFEN EADY, L.J., said this ([1915] 3 K.B. at p. 512):

F "It is contended, however, that there cannot be a 'debt' until the amount has been ascertained, and in support of this contention cases have been cited to us where it was attempted to attach unliquidated damages. But in such cases there is no debt at all until the verdict of the jury is pronounced assessing the damages and judgment is given".

Therefore, it is plain that there was no debt as such due at the passing of the Act. That again, however, does not conclude the matter because the words are "any sum due", not "a debt due". On the other hand, in s. 1 of the Act, which I have already read, the reference is to "German enemy debts", and s. 8 (1) starts with this: "'German enemy debt' means—(a) any sum due . . ." Therefore, one approaches the construction of s. 8 with the view that the draftsman has at any rate primarily in his mind debts or something in the nature of debts. It comes ultimately down to a very short point of construction: is the phrase "any sum due at the passing of this Act" appropriate to describe a claim for unliquidated damages for breach of covenant or is it not? I have come to the conclusion on the whole that it is not so. No sum is due until two things have happened: first, until it is established that there is in fact a breach of covenant, and, that breach being established, secondly, the amount due in respect of such breach has been quantified by judgment. Until that has happened, or until the parties have agreed on the payment of a liquidated sum, it cannot be said that any sum is due. In my judgment a mere claim for damages does not fall within the terms of s. 8 (1). Accordingly, I have come to the conclusion that the decision of the administrator was right.

Declaration accordingly.

Solicitors: *Withers & Co.* (for the claimant); *Treasury Solicitor.*

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

GILMOUR CATERERS, LTD. v. GOVERNORS OF ST. BARTHOLOMEW'S HOSPITAL.

[COURT OF APPEAL (Denning, Morris and Parker, L.JJ.), January 16, 1956.]

Landlord and Tenant—New tenancy—Grounds for landlords' opposition—Intention to demolish or reconstruct the premises—Intention to grant building lease providing for demolition and reconstruction—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 30 (1) (f).

On the expiry of a lease of business premises, the tenants applied for a new lease under s. 24 (1) of the Landlord and Tenant Act, 1954. Under s. 30 (1) (f)* the landlords opposed the application on the ground that they intended to demolish and reconstruct the premises. They proposed to enter into an agreement under which a building lessee would undertake to demolish and reconstruct the premises in conformity with specific requirements to the satisfaction of the landlords' surveyor and would be granted a lease on the completion of the work.

Held: the landlords' opposition to the new tenancy prevailed because they had shown that they intended to demolish and reconstruct the premises within the meaning of s. 30 (1) (f) of the Act of 1954, notwithstanding that they intended that the demolition and reconstruction should be done by a building lessee.

Appeal dismissed.

[For the Landlord and Tenant Act, 1954, s. 30 (1), see 34 HALSBURY'S STATUTES (2nd Edn.) 414.]

Appeal.

The plaintiffs, the tenants, were assignees of a lease of business premises at No. 307, High Holborn, London, W.C.1, which was due to expire on Sept. 28, 1955. They applied for a new lease under s. 24 (1) of the Landlord and Tenant Act, 1954. The defendants, the landlords, opposed the application on the ground that they required possession of the premises in order to demolish and reconstruct them under s. 30 (1) (f) of the Act. They proposed to have the work carried out by granting a building lease to a tenant who would undertake to do it, receiving a lease on completion of the work. The tenants contended that this did not constitute an intention to demolish or reconstruct the premises within the meaning of the enactment, which contemplated only demolition or reconstruction by the landlords themselves, or their servants or agents such as building contractors. On Nov. 18, 1955, His Honour JUDGE DALE in Westminster County Court held that the landlords intended to demolish and reconstruct the premises within the meaning of the enactment and dismissed the application. The tenants appealed.

H. Heathcote-Williams, Q.C., and L. I. Stranger-Jones for the tenants.

H. J. Phillimore, Q.C., and R. H. W. Dunn for the landlords.

DENNING, L.J.: Gilmour Caterers, Ltd. were tenants of No. 307, High Holborn, which is just off the top of Chancery Lane. They took an assignment of those premises in 1950. The lease was due to expire on Sept. 28, 1955. The landlords are St. Bartholomew's Hospital. The tenants claim that they should have a new lease under the Landlord and Tenant Act, 1954. The landlords oppose that on the ground that they intend to demolish or reconstruct the premises. That is a ground of opposition given by s. 30 (1) (f) of the Act.

* Section 30 (1) (f) establishes the following ground of opposition to a new tenancy:—

"(f) that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding;"

A The condition of the premises is so bad that they ought obviously to be demolished and reconstructed in the very near future. They suffered severe war damage, and have not been rebuilt since that damage. The next door building is a shell. The whole place calls aloud for immediate demolition and reconstruction. That is what the landlords intend to do. They have considered the various ways of doing it, and they have decided not to employ building contractors to do the work for them but to agree to grant a building lease for forty-eight years. The agreement for a building lease is in the usual terms. The lessee is to hold as a tenant at will until the new building is completed, and, when he has completed the new building, he is to be granted a lease for forty-eight years as from the beginning. Under the terms of the agreement, the landlords have full control over the work that has to be done. Everything has to be done to their approval and is under their inspection, and if anything untoward happens they can immediately re-enter.

C The argument before us is that the landlords have not made good their ground of opposition. It is said that in s. 30 (1) (f) the words "the landlord intends to demolish or reconstruct the premises" mean that the landlord must intend to do it himself or by his immediate servants and agents, and that that excludes a case of this kind where the landlords intend to get it done under the terms of a building lease.

D In my judgment that is much too narrow an interpretation of s. 30 (1) (f). The landlords intend to demolish or reconstruct the premises even though they do it through the hands of a building lessee. In a way, the grant of a building lease is a means of paying for the work. Just as when a building contractor is employed he is paid in money, so a building lessee is paid by granting him a period of years of occupation. Whether the work is done directly by a building contractor or less directly through a building lessee, the landlords intend to demolish or reconstruct the premises. They intend to have them demolished and reconstructed, and that is sufficient. The judge so held, and I see no reason to interfere with his decision.

F Counsel for the tenants mentioned that the Landlord and Tenant Act, 1927, and the Leasehold Property (Temporary Provisions) Act, 1951, made the position much clearer in favour of the landlord in such circumstances as these. Although the language in this Act is not so explicit as in those, I think that it is sufficient to cover the landlords in this case. I would dismiss the appeal.

G **MORRIS, L.J.:** I entirely agree with the judgment of my Lord and of the learned county court judge. The case involves construing the wording of s. 30 (1) (f) of the Act. Counsel for the tenants referred us to s. 5 (3) and (4) of the Landlord and Tenant Act, 1927, and s. 12 (3) (c) of the Leasehold Property (Temporary Provisions) Act, 1951. He invited us to say that there is significance in the change of language, that the earlier provisions were impersonal in their expression and that the present language is different. Although it has been helpful to be referred to those sections, nevertheless it is to the language of the present section that we must devote our attention.

H The landlords wanted (to use a neutral expression) to get possession of the premises now used by the tenants, which form the mere shell of a former building. They wanted to have new premises erected on the site. The question is whether they intend to demolish or reconstruct the premises. If they do they must have possession, because they could not reasonably do the demolition and reconstruction without it. Counsel for the tenants says they have not shown that they intend to demolish or reconstruct.

I In my judgment, the words of s. 30 (1) (f) cannot mean that the landlords must themselves personally demolish or reconstruct. Landlords might be a limited company, who could only act through agents or servants. The same really applies to nearly every other landlord. In reality a landlord must employ people if he wishes to demolish and reconstruct. Counsel for the tenants concedes

that, if the landlords in the present case had employed building contractors to demolish and reconstruct and had then granted a lease, the provisions of the Act would have been satisfied. In my judgment the effect is exactly the same under the arrangement that the landlords have in fact made. Clause 2 (a) of the proposed agreement provides:

"The lessee will at his own expense and with all reasonable speed demolish and clear away as necessary the war damaged buildings now standing or existing or being on or under the land coloured pink and red on the said plan and erect in a substantial and workmanlike manner and as one hereditament in conformity in every respect with the plans elevations sections and specifications already approved of and signed by the surveyor for the time being of the lessors and under the inspection and to the satisfaction of such surveyor a new building on the said land such new building to be completely finished on or before Dec. 25, 1956, or within such extended period as the lessors may hereafter in writing agree."

Clause 12 provides:

"The said lease shall be granted and the lessee shall accept the same and execute a counterpart thereof when and so soon as the said new building shall have been completely finished and the said new building made fit for occupation in accordance with the stipulations hereinbefore contained and a certificate to that effect signed by the said surveyor shall have been produced to the lessors such lease and counterpart to be prepared by the solicitor of the lessors and the lessee shall not require any abstract or evidence of the title of the lessors."

The scheme, therefore, is that there will be a lease when the building is completed, though that lease is to be dated from Sept. 29, 1955, and there is a provision for a rent in money to take the place of a peppercorn rent, which is to apply for the earlier period. On those facts, the landlords are intending to demolish and reconstruct the premises. They need possession in order to do so. Their intention will be carried out just as effectively by this agreement as it would be by an agreement in some other form, such as one made with building contractors. In my judgment the landlords are shown to intend to demolish and reconstruct the premises comprised in the holding. I agree that the appeal fails.

PARKER, L.J.: I agree. Counsel for the tenants concedes that the expression in sub-para. (f) "the landlord intends to demolish or reconstruct the premises" does not and cannot mean that the landlord must do it with his own hands. He says, however, that it must be done either by the landlord himself, or by his servants or agents. Taking that strictly it would exclude the very ordinary and common case of a landlord employing building contractors to do the work. It seems to me that the true construction of sub-para. (f) is that the landlord must show that he intends to cause the demolition or reconstruction of the premises, whether by a building contractor or in some other way. Viewed in that light, I cannot see that the arrangement made in this case, under which the landlords had complete control of the nature and design of the reconstruction and the way it was carried out, does not equally bring them within the words as if they had employed a building contractor. I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Henry S. L. Polak & Co.* (for the tenants); *Wilde, Sapte & Co.* (for the landlords).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

A

LAMB v. JEFFRIES.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Stable and Ashworth, JJ.),
January 18, 1956.]

*Local Authority—Disqualification for membership—Assistant schoolmaster—
Local Government Act, 1933 (23 & 24 Geo. 5 c. 51), s. 59 (1) (a).*

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L. was an assistant master at Lowestoft secondary grammar school. He also acted as a member of the Town Council of the Borough of Lowestoft. In the borough of Lowestoft, which was an excepted borough for the purposes of Part 3 of Sch. 1 to the Education Act, 1944, assistant masters at county secondary schools (of which the grammar school was one) were appointed to the service of the local education authority (the East Suffolk County Council) by the schools' governors in consultation with the head master; and the appointments were subject to the confirmation of the town council. L. had been so appointed. Funds for the payment of salaries of assistant masters were furnished by the county council to the town council. An information was preferred against L. under s. 84 of the Local Government Act, 1933, for having acted as a member of the town council while disqualified for so acting because he held a "paid office . . . in the gift or disposal" of the town council within s. 59 (1) (a) of the Act of 1933.* On appeal by L. from conviction,

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Held (STABLE, J., dissenting): L. was disqualified for being a member of the town council, because his post as assistant master was a paid office "in the gift or disposal" of the town council, as his appointment to the post had required the confirmation of the town council.

Appeal dismissed.

[For the Local Government Act, 1933, s. 59, s. 84, see 14 HALSBURY'S STATUTES (2nd Edn.) 386, 399.

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For the Education Act, 1944, Sch. 1, paras. 4 and 5, see 8 HALSBURY'S STATUTES (2nd Edn.) 248.]

Case Stated.

This was a Case Stated by the justices for the borough of Lowestoft in respect of their adjudication as a magistrates' court sitting at Lowestoft. The appellant was an assistant master at Lowestoft Secondary Grammar School, a county secondary school within the borough. An information was preferred against him by the respondent that he on or about June 8, 1955, at Lowestoft, acted as a member of the Town Council of the Borough of Lowestoft, he being at the time disqualified for so acting, contrary to s. 84 of the Local Government Act, 1933. The borough of Lowestoft was a borough excepted by direction of the Minister of Education under para. 4 of Part 3 of Sch. 1 to the Education Act, 1944, from any scheme of divisional administration made by the local education authority, the East Suffolk County Council. The town council had made a scheme of divisional administration, called the Borough of Lowestoft Scheme of Divisional Administration, 1945, which was approved by the Minister of Education and which came into force on Dec. 6, 1945. Pursuant to the scheme the county council had made an Instrument and Articles of Government for County Secondary Schools relating to county secondary schools within the borough. The appellant was appointed under para. 7 of these articles. The justices found that the post of assistant master was a paid office or other place of profit for the purposes of s. 59 (1) (a) of the Local Government Act, 1933, and that the appellant acted as a member of the town council on June 8, 1955. It was contended for the appellant that he was the servant of the county council [as opposed to the town council] and that on a proper construction of the scheme of divisional administration and of the articles of government the post of assistant master

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* The terms of s. 59 (1) (a) are printed at p. 319, letter C, post.

was not a paid office or other place of profit "in the gift or disposal" of the town council or of any sub-committee of the town council within the meaning of s. 59 (1) (a) of the Local Government Act, 1933. The justices convicted the appellant, imposed a fine of £5 and ordered him to pay ten guineas costs. A

The relevant provisions of the Borough of Lowestoft Scheme of Divisional Administration and of the instrument and articles of government are set out in the judgment. B

M. C. Parker for the appellant.

A. G. F. Rippon for the respondent.

LORD GODDARD, C.J.: This is a Case Stated by justices for the borough of Lowestoft, before whom an information was preferred by the respondent against the appellant that on or about June 8, 1955, he C

"acted as a member of the Lowestoft Town Council, he being at that time disqualified for so acting, contrary to s. 84 of the Local Government Act, 1933."

Under s. 84 of the Local Government Act, 1933, proceedings may be instituted either in the High Court or in a court of summary jurisdiction against persons acting as members of local authorities on the ground of their disqualification.* D

The case which we have to decide is difficult. I regret that the justices thought it necessary to impose a fine of £5 in addition to ordering the appellant to pay the costs in this case in which it is quite obvious that the appellant had no intention of breaking or evading the law or acting otherwise than in good faith. A question of considerable difficulty is raised here whether the appellant offended against s. 59 of the Local Government Act, 1933, and I should have thought that it would have been quite sufficient if the justices had decided against him and imposed a nominal penalty of 1s., merely to mark the fact that they thought a breach had been committed. E

The circumstances are these. The borough of Lowestoft is what is called for the purposes of the Education Act, 1944, an excepted district† and, in an excepted district, education is not directly administered by the county council, who are the local education authority. A scheme of divisional administration was prepared which was approved by the Ministry. This is a long and, to some extent, difficult document to follow, but it makes the town council a divisional executive. The county council made an instrument and articles of government for county secondary schools in the borough of Lowestoft. The articles of government deal with the appointment of head masters and assistant masters, and both in the scheme of divisional administration and in the articles of government there are provisions for the divisional executive approving the appointment of assistant masters. In the scheme of divisional administration, para. 18, it is provided: F

"In the case of the appointment of assistant masters and assistant mistresses in county controlled and special agreement secondary schools, appointments shall be made within the financial limits of the approved estimates by the governors of the said schools in consultation with the head master or head mistress as the case may be. Any appointment so made shall be subject to confirmation by the divisional executive. The procedure in relation to the notification of vacancies, transfers of staff and advertisements shall follow the procedure prescribed by para. 17 (1) hereof with the substitution of the term 'governors' for the term 'managers'." G

In the articles of government one finds very much the same provision. In para. 7 of the articles it is provided: I

"(a) On the occurrence of a vacancy for an assistant master, the governors

* The procedure for such applications in the High Court is prescribed by R.S.C., Ord. 59, rr. 12, 13.

† I.e., excepted by direction of the Minister of Education under para. 4 of Part 3 of Sch. 1 to the Education Act, 1944.

A shall notify the committee, who shall, if they think fit, advertise the post.
(b) Assistant masters shall be appointed to the service of the local education authority by the governors in consultation with the head master within the limits of the establishment of staff laid down for the current year by the committee and such appointments shall be subject to confirmation by the divisional executive."

B It seems clear both from the scheme of divisional administration and from the articles of government that an assistant master is chosen in the first place by the governors in consultation with the head master, but his appointment is not effective until confirmed by the divisional executive, which is the town council.

C The Local Government Act, 1933, s. 59, which is made penal by s. 84, provides by sub-s. (1):

"Subject to the provisions of this section, a person shall be disqualified for being elected or being a member of a local authority if he—(a) holds any paid office or other place of profit (other than that of mayor, chairman or sheriff) in the gift or disposal of the local authority or of any committee thereof . . ."

D Whether it was intended that the section should reach out so far as to affect the schoolmaster who is appointed in consequence of these various and very elaborate provisions which depend on an Education Act passed eleven years after the Local Government Act, 1933, may be at least open to question. We have, however,
E simply to construe the words of s. 59 (1) and to determine the question whether this appointment of an assistant master at this school is "in the gift or disposal of" the town council? First of all, as the words in s. 59 (1) (a) are "gift or disposal", it would seem that the intention of Parliament was to make the term
F wide and to include something which cannot be described as a gift. If an appointment is to be made of an assistant master, the governors have to consult the head master and, after consultation with him, they have to decide to
G whom the post should be offered, but that will not be effective. The person chosen by the governors in consultation with the head master will not be able to exercise the office of a teacher in a school unless the appointment has been confirmed by the town council. The town council can either assent to or dissent from the appointment and, for that reason, it seems to me that the office is at their disposal: until they have confirmed it the appointment is not effective.

I have come to this conclusion after considerable hesitation and with some regret, but my duty is simply to construe the words of this statute. I regret particularly that this matter has been brought in the form it has been because a point of this sort is of great importance to assistant masters. It would have been much better if it could have been fought out in a High Court action. The
H justices came to a right decision in point of law.

STABLE, J.: I agree that this case raises a question of great difficulty and of public importance. After very considerable hesitation, I have come to the conclusion that the appellant was not disqualified for election to membership of the council of the borough of Lowestoft (herein called the "town council"). I will give my
I reasons in a very few words. The Local Government Act, 1933, s. 59 (1), provides that, subject to certain provisions, a person shall be disqualified for being elected or being a member of the local authority if he holds any paid office or other place of profit in the gift or disposal of the local authority or any committee thereof. At the time when the appellant was elected to the town council, he was an assistant master in the excepted district of the borough of Lowestoft, and education in that district is carried on under the machinery of a scheme of divisional administration which forms part of the Case. The post which the appellant occupied

of assistant master and the terms of his contract were determined by the county council not by the town council. The money was provided by the county council and they alone were the body who had the power to determine what his emoluments were to be. I need not elaborate the provisions of the scheme so far as the appointment is concerned; they appear in cl. 16, cl. 18 and cl. 19. The governors were to appoint on a vacancy, i.e., it was their business to nominate after consultation with the head master, and their nomination was to be submitted to the town council. The only control which the town council had over the matter was to refuse to put forward the nominee of the governors. The conditions relating to dismissal appear in cl. 19 (1) of the scheme, and a perusal of that clause shows that the powers of the town council in relation to dismissal were purely advisory. In those circumstances the question which we have to consider is: Was this an office in the gift or disposal of the town council? In my view, it was not. It certainly was not in their gift, and the mere fact that they had a right of veto and virtually nothing else would not, in my view, make that an office of which they had the disposal. A

I should like to associate myself with what LORD GODDARD, C.J., has said in regard to the fine imposed by the justices. It completely passes my understanding why a perfectly bona fide mistake in a matter of great difficulty should have called for a fine of £5. It appears to me to be a matter of very grave public importance because the effect of this decision is that a very large number of schoolmasters will be debarred from taking part in many branches of local government. When I look at the scheme I observe that under para. 3 (2) (b) it says: D

“So far as may be reasonably practicable the persons appointed as members of the committee shall be persons having experience in education or knowledge of the educational requirements of the excepted district . . .” E

Having regard to that paragraph it does seem to me to be a matter which calls for very careful consideration that the whole body of schoolmasters should be excluded from serving on local authorities. In my opinion, the justices came to a wrong decision and I would allow the appeal. F

ASHWORTH, J.: I agree fully with the judgment delivered by the Lord Chief Justice, and I cannot usefully add anything to it.

LORD GODDARD, C.J.: The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *K. Wormald* (for the appellant); *Butt & Bowyer*, agents for *Daynes, Keefe & Co.*, Norwich (for the respondent).

[*Reported by A. P. PRINGLE, Esq., Barrister-at-Law.*]

A

BRITISH TRANSPORT COMMISSION v. WESTMORLAND COUNTY COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Stable and Ashworth, JJ.), January 12, 13, 16, 23, 1956.]

B

BRITISH TRANSPORT COMMISSION v. WORCESTERSHIRE COUNTY COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Stable and Ashworth, JJ.), January 16, 23, 1956.]

C

Highway—Dedication—Footpaths over and under railway—Presumption of dedication—Whether dedication incompatible with objects of statutory corporation.

A bridge over a railway and a bridge under a railway were constructed by statutory railway undertakers at about the time of the construction of the railways. The bridges afforded accommodation crossings over and under the railways and were constructed under statutory obligation for the convenience of the owners whose lands were severed by the railways, but there were no public or private rights of way at the crossings when they were constructed. Subsequently, members of the public so used the crossings and paths leading thereto and therefrom as to justify the inference of dedication of public rights of way if the railway undertakers and their successors in title had capacity to dedicate.

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Held: a statutory corporation, such as railway undertakers, could validly dedicate to the public a right of way over its land if the dedication were not inconsistent with the statutory purposes for which the corporation was constituted; and, in the present cases, such a dedication was not incompatible with those purposes.

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R. v. Inhabitants of Leake, (1833), 5 B. & Ad. 469, followed; *Ayr Harbour Trustees v. Oswald*, (1883), 8 App. Cas. 623, considered.

[As to the capacity of statutory corporations to dedicate the surface of land vested in them for use as a highway, see 16 HALSBURY'S LAWS (2nd Edn.) 222, para. 268; and for cases on the subject, see 26 DIGEST 290-292, 225-243.]

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Cases referred to:

(1) *Birkdale District Electric Supply Co., Ltd. v. Southport Corpn.*, [1926] A.C. 355; 95 L.J.Ch. 587; 134 L.T. 673; 90 J.P. 77; Digest Supp.

(2) *R. v. Leake (Inhabitants)*, (1833), 5 B. & Ad. 469 (110 E.R. 863); 2 Nev. & M.K.B. 583; 26 Digest 290, 225.

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(3) *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.*, [1896] 2 Q.B. 439; 65 L.J.Q.B. 625; 75 L.T. 239; 11 Digest (Repl.) 139, 210.

(4) *South Eastern Ry. Co. v. Cooper*, [1924] 1 Ch. 211; 93 L.J.Ch. 292; 130 L.T. 273; 88 J.P. 37; 19 Digest 108, 687.

(5) *A.-G. v. London & South Western Ry. Co.*, (1905), 69 J.P. 110; 26 Digest 292, 239.

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(6) *Ayr Harbour Trustees v. Oswald*, (1883), 8 App. Cas. 623; 11 Digest (Repl.) 103, 5.

(7) *Taff Vale Ry. Co. v. Pontypridd Urban District Council*, (1905), 93 L.T. 126; 69 J.P. 351; 26 Digest 291, 228.

(8) *Ashbury Railway Carriage & Iron Co., Ltd. v. Riche*, (1875), L.R. 7 H.L. 653; 44 L.J.Ex. 185; 33 L.T. 450; 13 Digest 354, 922.

(9) *A.-G. v. Great Eastern Ry. Co.*, (1880), 5 App. Cas. 473; 49 L.J.Ch. 545; 42 L.T. 810; 44 J.P. 648; 13 Digest 367, 998.

BRITISH TRANSPORT COMMISSION *v.* WESTMORLAND COUNTY COUNCIL.

A

Case Stated.

This was a Case Stated by justices for the County of Westmorland in respect of their adjudication as an appeal committee of quarter sessions sitting at Kendal on Apr. 5, 1955.

On Nov. 12, 1954, the appellants, the British Transport Commission, made an application pursuant to the National Parks and Access to the Countryside Act, 1949, s. 31, for a declaration that, on Aug. 1, 1952, no public right of way existed over a bridge spanning certain lines of railway owned and occupied by the appellants in the Borough of Kendal, Westmorland, and crossed by a footpath numbered 29 on a provisional map prepared by the respondents pursuant to the Act. The following facts were found. The lines of railway were constructed in or about 1847 by the appellants' predecessors in title under powers contained in the Kendal and Windermere Railway Act, 1845. At the date of the construction of the railway, no public right of way existed on or near to the line of the footpath. The bridge was constructed by the appellants' predecessors in title at or about the time of the construction of the railway in order to facilitate access between the land on either side of the railway which was severed by the construction of the railway. The bridge was constructed solely as a private accommodation crossing for the benefit of the owners and occupiers of the lands so severed, and no express dedication to the public of the way thereover had been made at any time. Since the construction of the railway, members of the public had used the footpath and the bridge in such manner and for such period as to give rise to a presumption that there had been dedication as a highway if the owner of the soil were capable of such dedication. The owners from time to time of the soil of the footpath, other than the appellants and their predecessors in title as owners of the railway, had at no time been under such a disability as would render them incapable of dedicating the footpath as a highway, and had made no application to quarter sessions for such a declaration as was now sought by the appellants, nor had such an application been made by any lessee or occupier (other than the appellants) of the soil of the footpath. If, and when, the appellants ceased to be bound to maintain the bridge for the benefit and convenience of the owners and occupiers of the land severed by the railway for whose benefit and convenience it was originally constructed by reason of the owners' and occupiers' rights having been released by agreement, or abandoned, or having otherwise ceased to be exercisable, the appellants would demolish and discontinue the bridge, it being their practice so to deal with accommodation works as opportunity arose. There was no likelihood of the appellants wishing to construct additional lines of rails under the bridge or its approaches unless substantial new development took place in the area served by the railway. The continued existence of the bridge would not cause any danger to the running of the appellants' trains and the operation of the railway. The bridge was a strong and durable edifice, likely to last indefinitely with comparatively small repairs. The cost of demolishing it would be at the very least £700. It had not been repaired for at least eight years and, if it was to remain, it would require repairs within the next two or three years at an estimated cost of £250, and thereafter would require maintenance at an estimated cost of £150 in every ten years. Accordingly, the annual cost of maintenance capitalised would be appreciably less than the cost of demolition. In every case the costs referred to were calculated at present-day prices. In so far as it was a matter of fact, the expenditure involved in the maintenance of the bridge was quite compatible with the present and future execution of the purposes for which the land was vested in the appellants.

It was contended on behalf of the appellants that the dedication of a public right of way over the bridge would be incompatible with the purposes of their railway undertaking in that (1) it would commit them in perpetuity to all such

- A expense in the maintenance of the bridge as might from time to time be necessary, which expense could be avoided if the bridge were demolished; (ii) it would fetter their powers to expand their railway undertaking by the construction of additional lines of rails if and when they might require to do so; and (iii) it would deprive them of their statutory powers to discontinue the bridge and crossing, pursuant to the Railways Clauses Consolidation Act, 1845, s. 16. It was
- B contended on behalf of the respondent that, there having been user of the footpath and the bridge in such manner and for such period as to give rise to a presumption that they had been dedicated as a highway if the owner of the soil were capable of dedication, dedication ought to be presumed to have taken place. The user of the bridge by the public as a public footpath was not inconsistent with the operation of the railway and the execution of the purposes for which the
- C bridge and adjoining railway is and was vested in the appellants and their predecessors. The dedication of a public right of way over the bridge would only be incompatible with the execution of the functions of the appellants and their predecessors if it were to involve the appellants in a material increase in expenditure and, on the facts, the appellants would not be involved in any increase in expenditure whatever. The Railways Clauses Consolidation Act,
- D 1845, s. 16, did not have the effect contended for it by the appellants otherwise its effect would be that railway undertakers, as a matter of law, could in no circumstances dedicate a right of way across any part of their railways. This proposition was not supported in any decided case.

- The justices refused to make the declaration sought and dismissed the application, and the question for the opinion of the court was whether, on the facts, a
- E dedication of the alleged public right of way was incompatible with the appellants' statutory objects.

BRITISH TRANSPORT COMMISSION v. WORCESTERSHIRE COUNTY COUNCIL.

Case Stated.

- F This was a Case Stated by justices for the County of Worcester in their adjudication as an appeal committee of quarter sessions sitting at Worcester on Mar. 14 and 23, 1955.

- On Dec. 13, 1954, the appellants, the British Transport Commission, made an application pursuant to the National Parks and Access to the Countryside Act, 1949, s. 31, for a declaration that, on Nov. 1, 1954, no public right of way existed
- G under certain lines of railway owned and occupied by the appellants in the Urban District of Malvern, Worcestershire, and crossed by a footpath numbered 158 on a provisional map prepared by the respondents pursuant to the Act. The point at which the footpath crossed the lines of railway is hereinafter called "the point of intersection". The following facts were found. The lines of railway were constructed in or about 1853 by the appellants' predecessors in title
- H under powers contained in the Worcester and Hereford Railway Act, 1853. At the date of the construction of the railway, no public right of way existed at or about the point of intersection. At that point, the railway was carried on an embankment and, on its construction, an underbridge was built in the embankment by the appellants' predecessors in title. The underbridge was so constructed as an accommodation way for the benefit of the owners and occupiers
- I of the lands lying on either side of the embankment which had been severed by the construction of the railway. These lands were then, and still were, in common ownership. For upwards of twenty years prior to Nov. 1, 1952, the footpath, including the way through the underbridge, was used by members of the public to such an extent and in such manner as to raise a presumption that they had been dedicated as a public right of way if the owner, or respective owners, of the soil were capable in law of making such a dedication. It was the appellants' settled policy to fill in and discontinue a bridge of the type in question as soon as the private rights which it was intended to serve had determined or been

extinguished. Within the last four years, at least six such bridges had been discontinued and filled in by the appellants in the Western Region alone of their railway undertaking, the object of this policy being to relieve the appellants of the cost of future maintenance of such bridges and the liability involved in the continued existence of such structures. The appellants would wish so to fill in the bridge in question on the extinguishment of the rights of adjoining landowners so existing therein. These rights could only be extinguished either by severance or by agreement with the owners and, if extinguished by agreement with the owners, some sum would be payable by the appellants by way of compensation. The cost to the appellants, estimated at present-day prices, of filling in the bridge would be £710. If the bridge was not filled in, the appellants would incur expenses estimated as amounting to £300 in repairing it within the next five years. If it was repaired to that extent, it was estimated that it would (if not later filled in and discontinued) need further repairs at intervals of approximately seventeen years during the remainder of its life at a cost estimated at present-day prices of approximately £400 on each occasion on which such recurring repairs were undertaken. These estimates took no account of any emergencies which could not be foreseen. A capital sum of £425 invested at four per cent. compound interest would produce income of £400 in any period of seventeen years.

It was contended on behalf of the appellants that the dedication of a public right of way through the bridge would be incompatible with the purposes of the appellants' railway undertaking, in that it would commit them in perpetuity to all such expense in maintaining the bridge as might from time to time be necessary, which expense could be avoided if the bridge were filled in. It was contended on behalf of the respondents that, there having been user of the alleged right of way by members of the public for upwards of twenty years prior to Nov. 1, 1952, *nec vi nec clam nec precario*, dedication ought to be presumed to have taken place. The difference between the cost of filling in the bridge, namely, £710, and the cost of maintaining it, and thereby the right of way, namely, £725 (being £300 to be spent in the next five years, plus £425 required to produce £400 every seventeen years) was so small that it did not prevent the dedication of the right of way as being incompatible with the purposes of the appellants' railway undertaking.

The justices refused to make the declaration sought and dismissed the application, and the question for the opinion of the court was whether, on the facts, a dedication of the alleged public right of way was incompatible with the appellants' statutory objects.

Sir Frank Soskice, Q.C., and J. P. Widgery for the appellants.

Michael Rowe, Q.C., and E. S. Temple for the respondents.

Cur. adv. vult.

Jan. 16. LORD GODDARD, C.J., read the following judgment of the court, in which he stated the facts in *British Transport Commission v. Westmorland County Council*, and continued: The justices gave an estimate of the cost of demolition and of the probable cost of maintenance, and found that the expenditure involved in maintaining the bridge is quite compatible with the present and future execution of the purposes for which the land is vested in the appellants. It is unnecessary to deal in any detail with this question of expenditure, for, even if the bridge were not needed for accommodation purposes, its retention could not be said to put either on the appellants or on their predecessors such a burden as would make it a misuse of their funds to maintain it.

Counsel for the appellants submitted that: (i) a statutory body empowered to take land for public purposes cannot use its powers so as to impose on itself an additional burden which is unnecessary for the performance of its functions, and (ii) a statutory corporation to which the statute gives special powers to be exercised for the common good cannot deprive itself of those powers.

A great many cases were cited to us, but we do not propose to go through them seriatim for they are all conveniently summarised by LORD SUMNER in his speech

- A in *Birkdale District Electric Supply Co., Ltd. v. Southport Corpn.* (1) ([1926] A.C. at p. 368). The locus classicus on this subject, and from which all the subsequent cases stem, is *R. v. Inhabitants of Leake* (2) (1833) (5 B. & Ad. 469), in which LORD WENSLEYDALE (then PARKE, J.) said (*ibid.*, at p. 478):
- B "If the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power."
- C That case has, as LORD SUMNER showed, been followed again and again, and such cases as *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.* (3) ([1896] 2 Q.B. 439), *South Eastern Ry. Co. v. Cooper* (4) ([1924] 1 Ch. 211), and *A.-G. v. London & South Western Ry. Co.* (5) (1905) (69 J.P. 110), to take a few instances, show conclusively that a railway company can grant an easement of a way or dedicate a path to public use over its land, provided that the grant or dedication is not inconsistent with the statutory purposes for which it was acquired. Whether the word used is "inconsistent", as in *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.* (3), or "incompatible", as in *R. v. Inhabitants of Leake* (2), *Birkdale District Electric Supply Co., Ltd. v. Southport Corpn.* (1) and *South Eastern Ry. Co. v. Cooper* (4) show that is the test which has been universally applied. This must be a question of fact in every case and the justices have so treated it
- E in the present case. No one could possibly say that allowing a path to cross the land at this particular place by means of a bridge was inconsistent with the use as a railway of the land which it crossed. We will deal with *Ayr Harbour Trustees v. Oswald* (6) (1883) (8 App. Cas. 623), on which counsel mainly relied, after considering his second main submission, as we understood him to rely on that case for both heads of his argument.
- F The bridge in question was put up for the accommodation of the land owner through whose land the railway passed. Section 68 of the Railways Clauses Consolidation Act, 1845, requires the company to provide such gates, bridges, arches, culverts, and passages over, under, or by the side of or leading to or from the railway, as may be necessary for the accommodation of the owners or occupiers. Section 16 sets out the various works which a railway company may
- G execute, and the section applies both to works for the construction of the railway and to accommodation works. It contains a clause enacting that the company may from time to time alter, repair or discontinue the works and substitute others, and it is contended that, if this passage over the bridge were dedicated, the effect would be to deprive the appellants of a statutory right to remove it should it no longer be required as an accommodation work. If this contention be right, it is
- H indeed strange that it has never before been the subject of a decision or even mentioned in any of the judgments on the subject. There does seem to be a trace of an argument on this point in *A.-G. v. London & South Western Ry. Co.* (5), but it can hardly have been pressed, as the judgment of FARWELL, J., does not refer to it. If the point had been taken in *Taff Vale Ry. Co. v. Pontypridd Urban District Council* (7) (1905) (93 L.T. 126), it would have afforded a short and complete answer. Wherever there is dedication, a burden is placed on the land
- I just as it is where an easement is granted, though the former may impose a heavier burden. It is, no doubt, true that a statutory company has only the powers that are given to it by the statute creating it (*Ashbury Railway Carriage & Iron Co., Ltd. v. Riche* (8) (1875), L.R. 7 H.L. 653), but of that case, LORD SELBORNE, L.C., said, in *A.-G. v. Great Eastern Ry. Co.* (9) (1880) (5 App. Cas. at p. 478):

"I assume that your Lordships will not now recede from anything that was determined in *Ashbury Ry. Co. v. Riche* (8); It appears to me to be

important that the doctrine of ultra vires, as it was explained in that case, should be maintained. But I agree with JAMES, L.J., that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires."

If, in the absence of a dedication, the appellants desired to remove this bridge it would, in our opinion, be wholly immaterial whether they did so in the exercise of an express power or of a power incidental to, or consequential on, the things the legislature has authorised, namely, the running and management of the railway.

It remains only to deal with the case of *Ayr Harbour Trustees v. Oswald* (6), so much relied on by the appellants. In our opinion, that case has no application to the present case. The harbour trustees were empowered by statute to acquire compulsorily an area of land for the purpose of their undertaking on payment of compensation to the owner of the land acquired. They sought to reduce the amount of compensation by offering to enter into a covenant with the dispossessed owner restricting themselves from building on, or using, a considerable portion of the land which the Act permitted them to take. To this the owner objected, and claimed that he was entitled to be compensated for what he had lost, and that the company had no power to sterilise the land, to use a convenient expression, and to covenant not to use that which the statute authorised them to acquire. It was held, to use LORD SUMNER's expression in *Birkdale District Electric Supply Co., Ltd. v. Southport Corpn.* (1), that the company could not thus dispose of their statutory birthright. Here the dedication does not prevent the use of the land by the railway though it burdens it, as must always be the case where there is dedication. None of the cases suggest that dedication or the creation of an easement is ultra vires, so long as it is not inconsistent with the statutory purpose for which the company was incorporated. That is the test, and we think may be said to be the only test, which determines whether the dedication is intra or ultra vires.

For these reasons, in our opinion the justices came to a correct decision and this appeal is dismissed.

We understand that *British Transport Commission v. Worcestershire County Council* is covered by this case, and will be dismissed also.

Appeals dismissed.

Solicitors: *M. H. B. Gilmour* (for the appellants); *Sharpe, Pritchard & Co.*, agents for *K. S. Himsworth*, Kendal, and *W. R. Scurfield*, Worcester (for the respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A

STRINGER v. AUTOMATIC WOODTURNING CO., LTD.

[COURT OF APPEAL (Singleton, Jenkins and Hodson, L.JJ.), January 11, 12, 1956.]

B

Factory—Dangerous machinery—Circular saw—Fenced in compliance with Woodworking Machinery Regulations, 1922, reg. 10—Operator injured in course of ancillary operation—Liability to fence under Factories Act, 1937, s. 14 (1) modified by regulations—Woodworking Machinery Regulations, 1922 (S.R. & O. 1922 No. 1196), reg. 10—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 14 (1).

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The plaintiff, who was eighteen years old, was employed by the defendants in their factory to operate a circular saw which was used for cutting pieces of timber to required lengths. On one side teeth of the saw were exposed and unguarded. While the saw was running and the plaintiff was removing the sawn-off ends of timber from the table of the saw her hand came into contact with the exposed teeth of the saw and she suffered injuries. She brought an action for damages for breach by the defendants of their duty at common law not to expose her to unnecessary risk and for breach of statutory duty by failure to comply with the Woodworking Machinery Regulations, 1922, reg. 10 (c)* and s. 14 (1) of the Factories Act, 1937†. At the trial she abandoned her claim under the regulations, admitting that there had been compliance with them. No decision was reached on the issue of breach of duty at common law, but in relation to the ancillary operation of removing the sawn-off ends of timber the defendants were found to have been in breach of a general duty to fence dangerous machinery imposed by s. 14 (1) of the Factories Act, 1937. On appeal,

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Held: breach of duty under s. 14 (1) of the Factories Act, 1937, could not be established because the special obligations under the Woodworking Machinery Regulations, 1922, reg. 10 (c) were substituted for the general obligation to fence dangerous machinery imposed by s. 14 (1) and it had been admitted that there had been compliance with the regulations.

Miller v. William Boothman & Sons, Ltd. ([1944] 1 All E.R. 333) and *John Summers & Sons, Ltd. v. Frost* ([1955] 1 All E.R. 870) applied.

Dickson v. Flack ([1953] 2 All E.R. 840) considered.

Appeal allowed.

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[**Editorial Note.** The decision in the present case may be compared with that in *Nicholls v. Austin (Leyton), Ltd.* ([1944] 2 All E.R. 485) where it was held that when there had been compliance with reg. 10 (c) of the Woodworking Machinery Regulations, 1922, there was no residual duty under s. 14 (1) of the Factories Act, 1937, to fence against the danger of material on which the saw was operating flying outwards; (cf., however, [1946] 2 All E.R. 92).

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For the Factories Act, 1937, s. 14 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 1009.

For the Woodworking Machinery Regulations, 1922, reg. 10 (c), see 8 HALSBURY'S STATUTORY INSTRUMENTS 117.]

* The text of reg. 10 (c) of the Woodworking Machinery Regulations, 1922 (S.I. 1922 No. 1196), is as follows:

"The top of the saw shall be covered by a strong and easily adjustable guard, with a flange at the side of the saw farthest from the fence. The guard shall be kept so adjusted that the said flange shall extend below the roots of the teeth of the saw. The guard shall extend from the top of the riving knife to a point as low as practicable at the cutting edge of the saw."

† The Factories Act, 1937, s. 14 (1), so far as is material, provides:

"Every dangerous part of any machinery . . . shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced . . ."

Cases referred to:

A

- (1) *Miller v. Boothman (William) & Sons, Ltd.*, [1944] 1 All E.R. 333; [1944] K.B. 337; 113 L.J.K.B. 206; 170 L.T. 187; 2nd Digest Supp.
- (2) *John Summers & Sons, Ltd. v. Frost*, [1955] 1 All E.R. 870; [1955] A.C. 740.
- (3) *Dickson v. Flack*, [1953] 2 All E.R. 840; [1953] 2 Q.B. 464; 3rd Digest Supp.
- (4) *Benn v. Kamm & Co., Ltd.*, [1952] 1 All E.R. 56; *reversd.* C.A., [1952] 1 All E.R. 833; [1952] 2 Q.B. 127; 3rd Digest Supp.
- (5) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; 2nd Digest Supp.

B

Appeal.

The defendants appealed from an order of OLIVER, J., at Liverpool Assizes dated June 20, 1955, whereby he held that they were in breach of their statutory duty under s. 14 (1) of the Factories Act, 1937, and were liable in damages.

The plaintiff, a girl of eighteen years of age, was employed by the defendants in their factory to operate a circular saw which was used for the purpose of cutting pieces of timber to required lengths. There was little evidence describing the saw; the plaintiff herself had given evidence concerning it, there were three photographs, and the defendants' foreman had been called but had not really described the machine. It appeared that the saw was surrounded by a table on which the operator held the piece of timber against the jig and so fed it into the saw; that on the side of the saw where the operator stood to feed the timber into the machine, the near-side, there was a rectangular strip of wood at the edge of the table some two feet away from the saw which was intended to prevent the operator's hand from coming into contact with the saw; and that on the off-side of the saw there were some ten or twelve teeth of the saw exposed and unguarded. It was part of the operator's duty to remove from the table on that side, the sawn-off ends, known as off-cuts, by means of a stick some twelve inches long, called a push-stick, and in order to do so it was necessary for her to move round to the off-side. When the saw had originally been demonstrated to the plaintiff by the foreman he had used a push-stick to remove the off-cuts and she had always done so. While she removed the off-cuts the machine was always left running. On Jan. 7, 1954, when the plaintiff had been operating the saw for some six months, she caught her fingers in the exposed teeth on the off-side of the saw while she was removing off-cuts. In an action for damages for personal injuries, the plaintiff, suing by her father and next friend, alleged that the defendants were in breach of s. 14 (1) of the Factories Act, 1937, and reg. 10 (c) of the Woodworking Machinery Regulations, 1922, and were in breach of their duty at common law. At the trial the plaintiff by her counsel withdrew the claim of breach of statutory duty under reg. 10 (c) of the Woodworking Machinery Regulations, 1922, admitting that there had been compliance with the regulation. OLIVER, J., held that it was the defendants' duty to comply with s. 14 (1) of the Factories Act, 1937, in relation to the ancillary operation of removing the sawn-off ends of timber, notwithstanding that the defendants had complied with the regulations, and that they were in breach of that statutory duty.

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H. I. Nelson, Q.C., and *J. M. Davies* for the defendants.

G. G. Blackledge, Q.C., and *J. M. Kennan* for the plaintiff.

I

SINGLETON, L.J., stated the facts and after considering the available descriptions and photographs of the circular saw, said that in such a case it would be better if there were evidence called as to compliance with regulations and that he had not sufficient evidence before him himself to form a definite view. HIS LORDSHIP continued: The plaintiff and her advisers having abandoned any claim for breach of the regulation, I do not think that this court ought to go behind that, and it is right to say that we have not been asked to do

A so. Counsel for the plaintiff preferred to put her claim as one of negligence under the common law.

The case for the defendants is that once it is admitted that there was compliance by them with the Woodworking Machinery Regulations, 1922, reg. 10 (c), no question can arise under s. 14 of the Factories Act, 1937. That submission was based on the decision of this court in *Miller v. William Boothman & Sons, Ltd.* (1) ([1944] 1 All E.R. 333). The Factories Act, 1937, s. 14 (1), enacts that:
 B "Every dangerous part of any machinery . . . shall be securely fenced . . .". Regulation 10 of the Woodworking Machinery Regulations, 1922, prescribes a certain form of fencing for circular saws. The plaintiff was injured in operating a circular saw belonging to his employers, the defendants. The fencing of the saw did not comply with the sub-section, but did comply with the regulation.
 C It was held that the regulation which was deemed to be made under the Act modified s. 14 (1) and, accordingly, that the defendants had not committed a breach of a statutory obligation, and were not liable to the plaintiff. The judgment of this court was given by GODDARD, L.J., who said ([1944] 1 All E.R. at p. 335):

D "By the proviso to s. 159 (1) of the [Act of 1937] these regulations continue in force notwithstanding the repeal of the earlier Act and have effect as though made under the present Act, that is, under s. 60. They contain detailed provisions in regs. 10-16 for the guarding of circular saws, band saws and planing machines. In our opinion, these regulations must be regarded as modifying the provisions of s. 14 in respect of these machines and of substituting the prescribed guarding and fencing for the absolutely
 E secure fencing which the section would otherwise require. It is difficult indeed to see what other object these regulations could have. They clearly contemplate the use of these saws; if saws are securely fenced as required by s. 14, they could not be dangerous to life or limb, and, indeed, could not be used at all. The use in s. 60 of the words 'as appear to him to be reasonably practicable and to meet the necessity of the case', we think clearly
 F show that it is intended to give the Secretary of State power to modify the otherwise absolute obligation so as to allow the use of the machine, provided that reasonable though not absolute provision for safety is made."

That decision was approved in the House of Lords in *John Summers & Sons, Ltd. v. Frost* (2) ([1955] 1 All E.R. 870). Counsel for the plaintiff claims that s. 14 of the Act does not apply in the circumstances of this case. OLIVER, J., took a
 G different view. Having found that this saw was properly set up within the Woodworking Machinery Regulations, 1922, reg. 10, the learned judge said:

"If this young woman had been injured while she was sawing timber, nothing more would be said about it—she would be quite clearly within the ruling of *Miller v. William Boothman & Sons, Ltd.* (1); but she was not
 H sawing wood. It seems to me that this case is exactly the same as if she had left the saw running and some other employee had come in contact with it unfenced; I do not see any difference. It is quite true that the moving of off-cuts is directly ancillary to the job of sawing, but it is not the job of sawing. I find no difficulty in saying that a saw may be correctly fenced for the purpose of operation as a saw, but not correctly fenced for some
 I other purpose. I find full support for that proposition in two cases, *Dickson v. Flack* (3) ([1953] 2 All E.R. 840) and *Benn v. Kamm & Co., Ltd.* (4) ([1952] 1 All E.R. 833)."

The learned judge held that the defendants were in breach of s. 14 of the Act of 1937, and that the plaintiff was entitled to damages subject to the question of contributory negligence.

The decision in *Benn v. Kamm & Co., Ltd.* (4) was that although special regulations made by the Secretary of State under s. 60 of the Factories Act, 1937,

with respect to the fencing of specified parts of a particular machine may modify the duties imposed by s. 14 of the Act on the occupier of the factory. with respect to the fencing of those parts, they do not affect his duty to comply with the provisions of that section as regards the fencing of other dangerous parts of the machine with which the special regulations do not purport to deal. The plaintiff in that case was injured by a dangerous and unfenced part of a machine, to which the Horizontal Milling Machines Regulations, 1928, applied. Regulation 3 contained provisions concerning the fencing of the cutters of the machine, but made no reference to the fencing of the dangerous part by which the plaintiff was injured. It was held that reg. 3 did not define exhaustively the duty of the occupier of the factory to fence horizontal machines and the defendants were in breach of s. 14 of the Act and the plaintiff was entitled to recover. *Miller v. William Boothman & Sons, Ltd.* (1) was distinguished. In the course of his judgment SOMERVELL, L.J., said ([1952] 1 All E.R. at p. 836):

"Counsel for the plaintiff submits that if, as here, there is on a milling machine a dangerous part other than the cutter, that is a subject-matter with which the regulations do not purport to deal and the general duty under s. 14 (1) is applicable. I have come to the conclusion that that is right."

DENNING, L.J., said (*ibid.*):

"I am confirmed in the view that we should allow this appeal because PARKER, J., would have himself decided in favour of the plaintiff, but for the fact that he felt himself bound by authority. He said ([1952] 1 All E.R. at p. 57): '... it seems ... an extraordinary proposition that, because the regulations have said that dangerous part A shall be guarded in a particular way, there is no obligation to guard dangerous parts B, C, D and E'. Now that we have had the benefit of full argument on the cases, I think that proposition is no part of the law. It seems to me that when the regulations say that a particular dangerous part is to be guarded in a particular way, the occupier satisfies his statutory obligations in regard to that part by guarding it in that way, but he remains under his ordinary statutory obligations in regard to other dangerous parts."

In the present case we are dealing with a circular saw, and with nothing else; but for the Woodworking Machinery Regulations, 1922, s. 14 of the Act would have applied. If the regulations apply to the saw they modify the obligation of the employers. The employers fulfilled their duty in regard to the circular saw if they provided that which they had to provide under the regulations as a guard for the circular saw, and under the decision in *Miller v. William Boothman & Sons, Ltd.* (1), s. 14 of the Act did not apply. It appears to me that the learned judge was not right in saying that on the facts of this case s. 14 of the Act still applied although the defendants had complied with reg. 10 (c) of the regulations. It follows that the point of counsel for the defendants is sound and that there ought not to have been a decision in favour of the plaintiff on an alleged breach of s. 14 of the Act once it was found or admitted that there had been full compliance with the regulation.

That, however, is not an end of the case. The plaintiff claimed in respect of breach of duty or negligence under the common law. She was engaged on a dangerous occupation; there is no doubt as to that. The duty of employers in such circumstances is to take reasonable steps to guard their employees from having to undergo unnecessary risk. Photograph No. 3 before us shows that on the off-side of the circular saw where the off-cuts fell on to the table a considerable part of the saw is exposed. It was part of the plaintiff's duty to clear the table of the off-cuts from time to time, and in so doing her hand must have come fairly near the saw which revolved at speed. It appears to me that if that photograph gives a true picture that process which the plaintiff was asked to

A carry out was highly dangerous. She was accepted by the learned judge as an honest witness. When she was cross-examined by counsel she was asked to describe her work:

“ Q.—Did Mr. Wilson [the foreman] take you to the machine and give you a demonstration of how it worked, cutting off pieces, and then ask if you could do it? A.—He was operating the machine and I was taking them off him and stacking them, and he said: ‘Do you think you could manage this?’ Q.—He was showing you how to do it? A.—He was not showing me; he was just doing it. Q.—I am suggesting that before Mr. Wilson allowed you to go on to the machine, he gave you a demonstration and then stood by and watched you try? A.—Yes. Q.—And then there was a push-stick there? A.—We just used any piece which was lying around.”

C The push-stick, which the plaintiff used to clear away the off-cuts was, according to her, about twelve inches long. She was asked how her hand came to be cut and she said she did not know. She was moving the off-cuts with the push-stick, as the learned judge found, and two of her fingers came in contact with the circular saw which at that point was unguarded. How the accident happened D she was unable to say.

If it be accepted (as, in view of the admission of counsel, I think it must be) that the defendants had complied with their duty under reg. 10 (c), even so it appears to me that they were under a duty at common law which is not ousted by the regulation. They employed the girl on dangerous work. How much instruction she had, it is not easy to say from the evidence of the foreman and E the plaintiff herself. In dealing with the facts, the learned judge said in his judgment:

“The man who had instructed her was an excellent type of workman named Wilson, and he habitually did it that way himself. He formed the opinion that if a push-stick was used there was no danger. One has only F to look at photograph No. 2 to realise what the danger was. That sharp saw was exposed for three and a half inches, because when the last cut was made, the jig had travelled beyond the saw teeth, and the position was as shown in photograph No. 2; and that three and a half inches of sharp buzzing teeth was absolutely unfenced.”

G The learned judge does not seem to have examined photograph No. 3; it was not mentioned during the evidence, so far as the transcript shows. It would appear to show that the exposed part is much more than the three and a half inches shown in photograph No. 2. However, there was a considerable danger, as the judge found. He went on to say that the girl in her evidence had said that she had been told by Mr. Wilson to use the push-stick to remove the off-cuts and that she always did so; and this evidence was accepted by the judge. I know of H no reason why there should not have been some sort of guard over at least some part of the exposed portion shown on the off-side of the saw in photograph No. 3. In the course of his judgment OLIVER, J., said that he was a little surprised that a girl so young as the plaintiff should have been put in charge of a machine as dangerous as a circular saw, but that no evidence was given that she was too young, and he did not base anything on that. He also accepted that she had been I perfectly properly instructed, so in his view the question narrowed itself down to the question whether there was a breach of s. 14 of the Act.

Counsel for the defendants told us that the learned judge had indicated that he was not impressed by the plaintiff's claim for negligence under the common law, and counsel for the plaintiff said that he had formed the impression from what the judge said that he was against him on that issue. There is, however, no finding in regard to breach of duty at common law. I agree with his expression of surprise that a girl so young as this should be put in charge of a machine of this kind. I believe that if employers do put a young girl in charge of such a

machine, they are under a duty of giving special instructions to her. Furthermore, if it can be said that they have complied with the regulations in the guard that they provided, and if that guard is correctly shown by photograph No. 3, they ought in compliance with their duty at common law to have taken some additional means to protect a young girl such as this. It would have been quite easy to put some further guard on the off-side of the saw. OLIVER, J.,

"I should have thought that every time it was necessary to move these off-cuts, the blade should be stopped to make it completely safe, so that it should only run when it was completely fenced."

The learned judge added:

"With regard to damages, I cannot understand how this girl got her fingers involved in a saw if she was using proper care, and she could not explain it either. All one can say is that she must have been doing something extremely careless to get her fingers into it at all. Many cases turn upon the fact that an operator has carelessly or by misadventure put her hand through a hole into some machine which was revolving, and suffered injury. This was a danger which was absolutely open, and everyone who has worked a circular saw, one would have thought, would be alive to the danger from such a dreadful snarling thing if one comes into the least contact with it. I cannot understand anyone being careless about putting their fingers near that, but this girl must have done it."

That passage shows the learned judge's description of this danger, which was a real danger. I feel that if he had not been satisfied that the plaintiff was entitled to succeed under s. 14 of the Act, he would probably have considered the question of breach of common law duty in the case of a girl of this type brought face to face with unnecessary danger time and time again during the day. I do not think that in such circumstances the employers were fulfilling the duty which they owed to their workers.

There is one other point. OLIVER, J., found that the plaintiff was fifty per cent. to blame for the accident. She did not know how it came about. Whether she slipped or whether she got a little too close by accident or misadventure, we do not know. It has been said in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (5) ([1939] 3 All E.R. 722) that a workman ought not to be regarded as negligent in respect of every careless act which he may do when working in a factory. I should have doubted whether it was right to say that the girl was fifty per cent. to blame merely because her fingers reached the circular saw, without her knowing how, when she had to work in close proximity to it.

There are features of this case which are, in a sense, unsatisfactory. I am satisfied that the correct way for this court to deal with it is to direct that there be a new trial on the issue as to negligence at the common law. It appears to me from the words used by the learned judge himself that this is a case well worthy of consideration on that head. I think further that as the case should go back for that purpose, it should be open to the judge on trial, when he has evidence from both sides, to consider to what extent (if any) it can be said that the plaintiff herself brought about this accident. In view of the admission by the plaintiff that the regulations were complied with by the defendants, I do not think that the plaintiff ought to be at liberty to go into that question again; but for the purpose of ascertaining the true position between the parties, the whole of the facts should be open to the judge on the new trial. I would allow the appeal accordingly and direct a new trial.

JENKINS, L.J.: I agree that there should be a new trial in this case on the issue of breach of common law duty. Like my Lord I have had great difficulty in relating the requirements of reg. 10 (c) of the Woodworking Machinery

- A Regulations, 1922, to the physical characteristics of the circular saw with which this case is concerned, so far as those characteristics can be discerned and appreciated merely by inspecting certain photographs with such assistance as counsel have been able to give. However, the case proceeded below on an admission by the plaintiff that the fencing and guarding of this circular saw did comply with reg. 10 (c). It was not sought to retract this admission before us, and I think that the plaintiff must be regarded as bound by it. On the footing that as to fencing and guarding the saw did comply with the requirements of reg. 10 (c), I think it follows from the principle stated in *Miller v. William Boothman & Sons, Ltd.* (1) and approved by the House of Lords in *John Summers & Sons, Ltd. v. Frost* (2) that the plaintiff cannot succeed on the ground of breach by the defendants of their statutory obligation to fence under s. 14 of the Factories Act, 1937. These cases seem to me to provide clear authority for the proposition that the obligation of a special regulation, such as reg. 10 (c) of the Woodworking Machinery Regulations in the present case, where such special regulation has been duly complied with, is substituted for the more general obligation under the Act, in this case the obligation as to fencing contained in s. 14. I need say no more about the authorities, to which my Lord has fully referred, except to mention, with regard to *Dickson v. Flack* (3), that the observations attributed to SINGLETON and DENNING, L.J.J., in the headnote ([1953] 2 Q.B. 465) might appear to go rather further than *Benn v. Kamm & Co., Ltd.* (4) and to be not altogether easy to reconcile with the principle of *Miller v. William Boothman & Sons, Ltd.* (1). When the judgments are looked into, however, it seems to be clear that neither of their Lordships was really doing any more than applying the principle in *Benn v. Kamm & Co., Ltd.* (4) which is in no way inconsistent with the principle stated in *Miller v. William Boothman & Sons, Ltd.* (1), but merely says that compliance with a special regulation as regards the fencing of some specific dangerous part of a machine does not absolve the employer from taking proper steps under s. 14 of the Act to fence some other part of the machine for which no provision is made in the special regulation. Accordingly, in my view, if this case rested only on alleged breach of statutory duty, the learned judge's decision could not stand, and the defendants would be entitled to succeed in this appeal.

- The case turns, however, not only on breach of statutory duty (as to which the plaintiff's case must fail) but also on the defendants' common law duty to the plaintiff and their other employees not to expose them to unnecessary risk, and to take all such steps as are reasonably practicable for their safety. That ground, that is to say the alleged breach of the common law duty, formed in the course that the case took below the main, and at one stage the only, basis of the plaintiff's claim. The learned judge never, so far as one can tell from the judgment, in terms adjudicated on it. We were told that in the course of the argument he made some observation from which it was inferred that he did not consider that that basis of claim could succeed. The question was somewhat obscured by the introduction into the case of the claim under s. 14 of the Factories Act which ultimately succeeded. In the result there is nothing in the learned judge's reasons for his judgment to show that he reached a final decision one way or the other on the issue of common law negligence. There are passages in the judgment to which my Lord has already referred which show clearly that the learned judge was fully alive to the danger of the operation which the plaintiff was expected to perform. He expressed surprise that in order to obviate the danger it had not been the practice to switch off the power and stop the saw before attempting to flick or push away the sawn ends of timber from the table. When he said: "I accept that she had been perfectly properly instructed", and went on to observe that the question was, therefore, narrowed down to the argument on the exclusion of s. 14 of the Act by reg. 10, I do not think that he can be regarded as negating the claim based on negligence. The girl was properly instructed in that she was instructed to do what Mr. Wilson, the foreman, regarded as the proper

thing, namely, to flick away the sawn-off ends of the timber, always using the push-stick. She was instructed to do that, and understood it to be what she was supposed to do. It by no means follows, however, that the method that she was told to adopt was a safe or a proper method in the circumstances. It involved her placing her hand holding the push-stick, on a level with the exposed portion of the circular saw, and the guard designed for protection during the sawing operation (and reasonably adequate for that purpose) provided no protection at all to her in performing this operation of pushing or flicking away the sawn-off ends. It was suggested that so long as she used the push-stick (and there is no doubt that Mr. Wilson told her always to use it) there was no danger at all of her hand coming into contact with the circular saw. That was Mr. Wilson's view; but as the learned judge pointed out, there must have been a danger because in fact her hand did come into contact with it. The employer's duty is not to expose the employee to unnecessary risk. Here one has reached the stage that an employee was expected and instructed to pursue a course in the operation of a circular saw which was fraught with danger in that she had to work with her hand close to an exposed part of the revolving blade of a circular saw. The questions then arise, was it not reasonably practicable to provide some safer method of performing this operation, and could not the defendants have been reasonably expected to foresee the danger of the method which they did adopt, and to provide some safer method? A B C D

On these questions, the evidence as it stands provides no guidance; and it is not for us to speculate what the result may be when all these matters and the whole of the material relevant to the issue of negligence are before the court. But it is not difficult to think of expedients which might or might not be valuable and practical as safety precautions in relation to this particular operation. The learned judge mentioned the possibility of stopping the saw, and one may add to that the possibility of providing a brake to enable the saw to be stopped promptly. Other possibilities which may or may not have substance in them might be the provision, instead of a plain stick, of a rather longer implement ending either with a cross-piece by means of which the sawn-off ends could be pushed, or with a rake-like head by means of which the sawn-off ends could be raked towards the operator. Again there might be some special form of guard which could be lowered without stopping the saw before the table was to be cleared of sawn-off ends. One need not multiply possibilities, but it is obvious to my mind that the learned judge did not give adequate consideration to this aspect of the case, no doubt because the view which he formed on the application of s. 14 of the Factories Act made it unnecessary to go into it for the purpose of his decision. E F G

In the result I agree with my Lord that there should be a new trial on the issue of negligence at common law at which, while the plaintiff must be considered as bound by the admission made as regards compliance with reg. 10 (c) it should be open to the parties to call all such evidence relevant to the issue of negligence at common law as they may be advised. H

HODSON, L.J.: I agree that there should be a new trial on the question of common law negligence. The case was presented in part on that footing, and the common law claim was never abandoned. Although in the course of speeches of counsel he made an observation which discouraged the plaintiff's counsel from pursuing the argument based on the common law claim, the learned judge in his judgment never dealt expressly with this claim, having made up his mind that he could find in favour of the plaintiff on another ground. I agree with my Lords that in so far as the learned judge found himself able so to do—namely, to find in favour of the plaintiff on the ground of breach of statutory duty under s. 14 of the Factories Act, 1937—he was in error. The first regulation which he had to consider was reg. 10 (c) of the Woodworking Machinery Regulations. These regulations, and the sections of the Factories Act generally, when I

- A they deal with fences, deal with fences which are designed to protect the workman from danger. That is true of s. 14 of the Factories Act which requires that dangerous machinery shall be securely fenced. Regulation 10 begins with the words: "Every circular saw shall be fenced as follows". One finds, however, that it is possible that the word "fence" in reg. 10 (c) is used in a different sense; indeed the plaintiff through her counsel accepted that the word "fence"
- B in reg. 10 (c) did not mean something to protect the workmen from danger, but referred to a standard part of a circular saw table which in this case was a rectangular piece of wood or metal which was at a distance of some two feet from the saw itself and was there not for protection but as a guide for the purpose of holding the wood. Reading the regulation in that sense, which the plaintiff admitted against herself, her counsel very naturally and properly, as I see it, at the conclusion of the plaintiff's evidence came to the conclusion that no breach of reg. 10 (c) could be established because the circular saw in question was guarded in accordance with the regulation on what I will call the near-side of the circular saw—that is to say, the side from which the wood was fed to the machine—and on that reading of the regulation that is all that is required. That leaves the off-side of the saw exposed, and, so far as the regulation goes, there is no
- D necessity for a flange protection on the off-side. It may be that when the operator has to work only on the near-side of the saw, compliance with this regulation will be sufficient to protect the operator from danger. When, as in this case, however, one finds that part of the operator's duty is to go round to the off-side (that is, the unprotected side of the saw) to remove the off-cuts from the table, no sufficient protection is provided by the regulation. It would seem,
- E therefore, that there is a gap to be filled in that regulation, and that some amendment of it would be desirable.

The position of this court I think is this: Although in many cases where dangerous operations are covered by regulations, compliance with the regulations would absolve an employer from liability in the case of accident, yet the common law is not helpless to fill up gaps, because the duty of the employer remains.

- F The duty is not to expose his employees to unnecessary risk, and that duty is not ousted by regulations. The plaintiff, having accepted that there was no breach of reg. 10 (c) of the Woodworking Machinery Regulations, 1922, was thrown back on her common law claim became reg. 10 (c), so far as the fencing of the saw is concerned, is exhaustive and ousts the provisions of s. 14 of the Factories Act, 1937. That was explained by GODDARD, L.J., in *Miller v. William Boothman & Sons, Ltd.* (1), in the passage which was expressly approved by the House of Lords in *John Summers & Sons, Ltd. v. Frost* (2). I disagree with the learned judge in distinguishing *Miller v. William Boothman & Sons, Ltd.* (1) on the ground that the plaintiff was not actually engaged in the operation of sawing, but of clearing the off-cuts from the table which was ancillary to the sawing. I see no valid distinction there, but I do appreciate the way in which the learned
- H judge may well have been misled by the headnote in *Dickson v. Flack* (3) ([1953] 2 Q.B. 465), to which JENKINS, L.J., referred, because the headnote in that case certainly seems to suggest that both SINGLETON and DENNING, L.J.J., in purporting to follow the decision in *Benn v. Kamm & Co., Ltd.* (4) nevertheless went in the face of *Miller v. William Boothman & Sons, Ltd.* (1) in saying that in certain circumstances the regulations might not be exhaustive, and the court
- I might be thrown back on considering the duty to fence securely imposed by s. 14 (1) of the Act of 1937. That this is not so, however, is quite clear on reference to the judgments of both learned lords justices who say in terms that they were dealing only with the situation where the regulation did not cover all the dangerous parts. In *Dickson v. Flack* (3) SINGLETON, L.J., said ([1953] 2 All E.R. at p. 846):

"Unless the regulation covers all those parts . . . s. 14 (1) comes into play . . ."

DENNING, L.J., said (*ibid.*, at p. 849):

"The dangerous part provided for by reg. 17 is the part of the table where the man's hand is likely to come into contact with the cutters while he is doing his work. The regulation does not provide for the gap in the machine above the cutter where it may fly out and thus cause danger. That is another dangerous part. It falls within s. 14 (1) and must be securely fenced."

So that when one looks at the judgments in that case, one finds no support for the proposition that one can fall back, as it were, on s. 14 in such a case as this, because the protection of the circular saw itself is covered by the woodworking regulation which does modify the Act, as was recognised as being perfectly feasible in *Miller v. William Boothman & Sons, Ltd.* (1). For these reasons, therefore, I agree with counsel's submission for the defendants that the learned judge was wrong in finding himself able, on the amended claim, to find the defendants guilty of breach of statutory duty by reference to s. 14 (1) of the Factories Act, 1937. Regulation 10 (c) was complied with, according to the admission made by the plaintiff, and, so far as the regulations are concerned, I think that the defendants are entitled to succeed. The question of common law liability I need not elaborate because I agree entirely with what has been already said on the subject. In several places in his judgment the learned judge used expressions which show that he was at least well aware of, and very much alive to, the danger of this circular saw working as it did with that part of it exposed with buzzing teeth. [His LORDSHIP referred to matters possibly to be investigated on the issue of negligence on the part of the defendants and continued:] I have nothing to add to what my Lords have said about contributory negligence. The learned judge, who has vast experience in these matters, was no doubt well aware of what was said by the House of Lords in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (5) about work-people who work long hours not lightly being found to be guilty of contributory negligence when they have done something in a moment of inadvertence when tired. This plaintiff was a young girl who had been working long hours, and that is a matter which I think is open for consideration on the issue of contributory negligence at the new trial, and which will have to be determined at the same time as the plaintiff's claim. I agree, therefore, that the appeal should be allowed and with the order proposed.

Appeal allowed and new trial ordered.

Solicitors: *J. W. Davies* (for the defendants); *Vizard, Oldham, Crowder & Cash* (for the plaintiff).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

A

MUMFORD v. HARDY AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Stable and Ashworth, JJ.),
January 18, 1956.]

B

Insurance—Motor insurance—Insurance against third-party risks—Disqualification—Driver under age of sixteen—Licence obtained by false pretences—Motor car driven with owner's permission—Insurers willing to admit liability, under misapprehension of legal effect of policy—Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 7 (4), s. 9 (1), (2), (5), s. 35 (1).

C

The first respondent, while under sixteen years of age, obtained a provisional licence to drive motor cars by falsely representing that he was over the age of seventeen, and, with the permission of his father, the second respondent, drove on the public highway a car belonging to the second respondent. The second respondent had insured the car under a policy which contained a provision whereby the insurance company agreed to indemnify any person driving the car with the second respondent's permission, provided that such a person held a licence to drive such a car or had held and was not disqualified for holding or obtaining such a licence.

D

The first respondent was charged with driving a car without a policy of insurance against third-party risks being in force, contrary to s. 35 (1) of the Road Traffic Act, 1930, and the second respondent was charged with permitting the first respondent to drive the car while uninsured, contrary to s. 35 (1). It was stated on behalf of the insurance company, in the belief that the decision in *Edwards v. Griffiths* ([1953] 2 All E.R. 874) applied to the case, that the company considered itself liable and at risk under the policy in respect of the driving of the car by the first respondent, but the prosecution contended that the insurance policy did not extend to the first respondent having regard to s. 9 (5) and s. 7 (4) of the Road Traffic Act, 1930*, under which the provisional licence was of no effect.

E

F

Held: the policy did not extend to the first respondent when driving the motor car because, by s. 7 (4) of the Road Traffic Act, 1930, his licence was of no effect, and accordingly the respondents were guilty of the offences with which they were charged.

Edwards v. Griffiths ([1953] 2 All E.R. 874) distinguished.

Appeal allowed.

G

[For the Road Traffic Act, 1930, s. 7 (4), s. 9, s. 35 (1), see 24 HALSBURY'S STATUTES (2nd Edn.) 580, 583, 602.]

Case referred to:

(1) *Edwards v. Griffiths*, [1953] 2 All E.R. 874; 117 J.P. 514; 3rd Digest Supp.

H

Case Stated.

I

This was a Case Stated by the justices for the petty sessional division of Chelmsford in the county of Essex in respect of their adjudication as a magistrates' court sitting at Chelmsford on Aug. 4, 1955. On July 30, 1955, the appellant, John Arthur Cyril Mumford, preferred two informations against the first respondent, William Charles Hardy, and one information against the second respondent, William Cullum Hardy. The first respondent was charged that he on Apr. 23, 1955, and on June 1, 1955, used a motor car, index No. VX6292, on certain roads in the county of Essex without there being in force in relation to the user of the car by him such a policy of insurance or such a security in respect of third-party risks as complied with the requirements of Part 2 of the Road Traffic Act, 1930, contrary to s. 35 (1) of the Act. The second respondent was charged with permitting the first respondent to use the car on June 1,

* The terms of the sub-sections are set out at p. 338, letter H, p. 339, letter E, post.

1955, without a policy of insurance being in force, contrary to s. 35 (1) of the Act. A

The following facts were found. The second respondent was the owner of the car, which was insured with the General Accident, Fire and Life Assurance Corporation, Ltd., under a policy which expired on July 3, 1955. By the policy the insurance company agreed to indemnify any person driving the car on the second respondent's order or with his permission, provided that such a person held a licence to drive such a car or had held and was not disqualified for holding or obtaining such a licence. The first respondent, who was born on June 7, 1939, falsely stated to the Essex County Council that he was born on Jan. 22, 1938, and on Apr. 13, 1955, the Essex County Council issued to him a provisional driving licence for such vehicles as included the car in question, the licence to expire on July 12, 1955. The first respondent drove the car on Apr. 23 and on June 1, 1955, along certain roads in the county of Essex and on the second occasion he drove with the knowledge and permission of the second respondent, who sat in a passenger seat by the side of the first respondent. The insurance company considered itself liable and at risk under the policy on the occasions when the first respondent drove the car. It was contended by the appellant that the effect of s. 9 (5) and s. 7 (4) of the Act of 1930 was that the licence issued to the first respondent was of no effect, and that, accordingly, the insurance policy issued to the second respondent did not cover the user of the car by the first respondent. The justices were of the opinion that the first respondent, when driving the car on Apr. 23, 1955, and June 1, 1955, held a licence within the meaning of the insurance policy issued to the second respondent, although the first respondent was under the age of sixteen on those days and had obtained the licence by making a false statement as to his age; and that, therefore, the first respondent was insured in relation to his use of the car on those two days in respect of third-party risks, as required by s. 35 (1) of the Act. Accordingly, the justices dismissed the informations. C

W. M. Howard for the appellant. E

The respondents did not appear. F

LORD GODDARD, C.J.: This is a Case Stated by justices for the petty sessional division of Chelmsford, before whom the first respondent was charged with using on two occasions a motor car on a road when there was no policy of insurance in force. The second respondent, his father, was charged with permitting the vehicle to be so used on one occasion. G

This case raises a point of some little importance. The first respondent was under age for obtaining a licence; but, as a matter of fact, he did obtain one by false pretences.

The Road Traffic Act, 1930, s. 9*, provides that a person under the appropriate age is prohibited from driving and is disqualified for holding or obtaining a licence to drive. Section 7 (4) of the Act provides: H

"If any person who under the provisions of this Part of this Act is disqualified for holding or obtaining a licence applies for or obtains a licence while he is so disqualified . . ."

the licence "shall be of no effect": in other words, it shall be void.

At the hearing of the informations a representative of the insurance company, the General Accident, Fire and Life Assurance Corporation, Ltd., told the justices that, if an accident had happened in this case, the corporation would have I

* By s. 9 (1) a person under sixteen years of age shall not drive any motor vehicle on a road; by s. 9 (2) a person under seventeen years of age shall not drive any motor vehicle other than a motor cycle or an invalid carriage on a road. By s. 9 (5), the terms of which are set out in full at p. 339, letter E, post, a person prohibited by reason of his age from driving a motor vehicle shall be deemed to be disqualified for holding or obtaining a licence.

- A considered themselves liable by reason of the decision of the court in *Edwards v. Griffiths* (1) ([1953] 2 All E.R. 874). I inquired, therefore, when this case was opened, if the police authorities had communicated with the insurance company to find out whether this was a case in which liability would have been assumed. The reason for my inquiry is shown in the first paragraph of my judgment in *Edwards v. Griffiths* (1) ([1953] 2 All E.R. at p. 875), where I referred
- B to an arrangement which had been approved by the Home Office. Counsel for the appellant told us that the reason why this Case was stated is because it is desirable to have a decision how far the decision in *Edwards v. Griffiths* (1) goes. It is one thing for an insurance company to say that the company would not insist on the clause in the policy that the driver must be a licensed driver, if it were a mere matter of his having forgotten to take out a licence; it is quite
- C another thing if he is disqualified by an order of the court from driving. At the time when this case came before the justices the driver had not been disqualified by an order of the court. In *Edwards v. Griffiths* (1), this court decided that the words "disqualified for holding or obtaining . . . a licence", in a provision in a policy that a driver must hold a licence to drive the vehicle or that he must have held one and not be disqualified for holding or obtaining
- D such a licence, meant disqualified by an order of the court. There, however, we were not considering the case which we have to consider today, namely, that of a person under age. We were considering a case where a man was not disqualified but was merely refused a licence on the grounds of health. We held that that made all the difference.

- E Counsel for the appellant called our attention to the fact that s. 9 (5) of the Road Traffic Act, 1930, provides:

- "A person prohibited by this section by reason of his age from driving a motor vehicle or a motor vehicle of any class, shall, for the purposes of this Part of this Act, be deemed to be disqualified under the provisions of this Part of this Act for holding or obtaining any licence other than a licence to drive such motor vehicles, if any, as he is not by this section
- F forbidden to drive."

- Section 7 (4) provides* that if a licence is obtained by a person who is disqualified, as the first respondent was, the licence is void. Therefore the considerations which apply in this case are quite different from those which applied in *Edwards v. Griffiths* (1). It is evident that, when the manager of the insurance company said that the company would have considered itself on risk,
- G he thought that *Edwards v. Griffiths* (1) applied to this case, and it does not. In my opinion the case must go back to the justices with a direction that an offence was proved on each of the three informations.

STABLE, J.: I agree.

- H ASHWORTH, J.: I also agree.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *D. Emrys Morgan*, Chelmsford (for the appellant).

[Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.]

* The material terms of the sub-section are set out at p. 338, letter H, ante.

NOTE.**R. v. BRYANT.**

[COURTS-MARTIAL APPEAL COURT (Lord Goddard, C.J., Hilbery and Stable, JJ.),
January 23, 1956.]

Court-Martial—Charge—Larceny by person subject to military law—Offence within provisions of Army Act, s. 18—Charge to be laid under that Act—Army Act, s. 18, s. 41—Larceny Act, 1916 (6 & 7 Geo. 5 c. 50), s. 2—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), Sch. 1. Criminal Law—Larceny—Charge—Form—Effect of the Larceny Act, 1916 (6 & 7 Geo. 5 c. 50), s. 2—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), Sch. 1.

[For the Army Act, s. 18 and s. 41, see 22 HALSBURY'S STATUTES (2nd Edn.) 271 and 284; for the Larceny Act, 1916, s. 2, see 5 HALSBURY'S STATUTES (2nd Edn.) 1015; and for the Magistrates' Courts Act, 1952, Sch. 1, see 32 HALSBURY'S STATUTES (2nd Edn.) 524.]

Appeal against conviction by court-martial.

The appellant, Sergeant John William Bryant, of the Royal Army Service Corps, appealed against his conviction before a regimental court-martial on a charge of stealing two Egyptian pounds, the property of the regimental institute of a Royal Army Service Corps unit. He contended that the charge was laid against him under the Army Act, s. 41 and not under s. 18, which deals specifically with the offence of larceny of military property by a person subject to military law and limits the punishment therefor to two years' imprisonment "or such less punishment as is in this Act mentioned". The charge sheet alleged that he had committed a civil offence of larceny "contrary to the Larceny Act, 1916, s. 2", for which the maximum sentence is five years' imprisonment. In dismissing the appeal LORD GODDARD, C.J., who delivered the judgment of the court, said that charges of larceny made against a person subject to military law which came within the provisions of the Army Act, s. 18, should be preferred under that section and not under the common law, but in cases where a charge at common law was preferred no reference to the Larceny Act, 1916, s. 2, should be included as that section did not create an offence. The appeal is reported in [1955] 2 All E.R. 406 and the passage in the judgment to which LORD GODDARD, C.J., refers below appears at p. 408.

W. P. Grieve for the appellant.

E. Garth Moore for the Army Council.

LORD GODDARD, C.J.: Before we start the list today, I desire to refer briefly to the case of *R. v. Bryant* heard before the Courts-Martial Appeal Court on May 9, 1955, when HALLETT, J., and BYRNE, J., were sitting with me. We understand the decision has caused some difficulty to clerks to justices and those who have to prepare charges and indictments and we desire to give a short explanation of the decision which we think will clear up any difficulty that may be felt.

The argument for the appellant in that case was that as the Army Act, s. 18, provided a special punishment for the stealing of military property the accused could not be charged, as he was, with stealing contrary to the Larceny Act, 1916, s. 2. We pointed out that s. 2 deals with punishment and does not create the offence of larceny which is, and always has been, a crime at common law, though the punishment has varied from time to time. The effect of the section is that for any larceny for which no special punishment is provided the maximum sentence is five years' imprisonment. If a person is charged merely with larceny he cannot receive a heavier sentence, but if charged or indicted with larceny from the person or from a dwelling-house, to take two instances, he is liable to heavier punishment. We did not say, nor did we intend to say, that in civilian

A courts the addition of the words "contrary to s. 2 of the Larceny Act" is improper, though if all that is intended is to charge a simple and not a compound or aggravated larceny these words are in truth surplusage. That this was the opinion of that great authority on the criminal law, SIR JAMES FITZJAMES STEPHEN, is clear from his HISTORY OF THE CRIMINAL LAW, Vol. III at p. 147, where he said that the expression "simple larceny" which first appeared in s. 2 and s. 4 of the Larceny Act, 1861, obscured those provisions and had no definite meaning.

B At the same time it is unobjectionable and indeed convenient to refer to the Larceny Act, 1916, s. 2, where a simple charge of larceny is preferred, as it serves to direct the attention of the court to the fact that the charge is not one of compound or aggravated larceny and to the punishment which the offence charged carries. The reference to the section does not make the indictment bad, and equally, if the indictment charged larceny contrary to the common law, it would be good but the sentence could not exceed five years even if the evidence disclosed a compound larceny. It is true that the Magistrates' Courts Act, 1952, Sch. 1, which enumerates the indictable offences which can be tried summarily, refers, among others, to offences under s. 2, but that must be taken to mean that a D judgment for which no special punishment is provided is one of the offences which can be dealt with summarily. If then for the words in the last sentence of the judgment ([1955] 2 All E.R. at p. 408) "as it is proper to charge him in this country" are substituted "as he might have been charged in this country", we think that any difficulty or misunderstanding will be dispelled. I make this statement with the concurrence of HALLETT, J., and BYRNE, J., the members E of the court who are sitting today, and HAVERS, J., and ASHWORTH, J., who would have been sitting if the court of five judges fixed for today had become effective.

Solicitors: *Registrar, Courts-Martial Appeal Court* (for the appellant); *Director of Army Legal Services* (for the Army Council).

[Reported by T. J. KELLY, Esq., Barrister-at-Law.]

LAZARUS ESTATES, LTD. v. BEASLEY.

[COURT OF APPEAL (Denning, Morris and Parker, L.JJ.), January 12, 13, 24, 1956.]

G *Rent Restriction—Repairs increase—Landlord's declaration of having carried out repairs—No application by tenant to county court to determine if carried out—Whether entitled to defend action for increased rent on ground that declaration was fraudulent—Housing Repairs and Rents Act, 1954 (2 & 3 Eliz. 2 c. 53), s. 23 (1), s. 25 (1), Sch. 2, para. 4 (1), para. 5.*

H Landlords of a flat to which the Rent Restrictions Acts applied served on the statutory tenant a notice of a repairs increase of rent under the Housing Repairs and Rents Act, 1954, s. 25 (1). The notice was in error addressed to the statutory tenant's deceased husband as the "tenant" but the statutory tenant received it and understood it to be intended for her. The notice was accompanied by a declaration that the conditions justifying an increase were fulfilled and that within four years of the service of the notice works of repair had been carried out on the block of flats or solely for the benefit I of the flat or of the block of flats to the necessary value, £324. The repairs specified in the schedule to the declaration as having been done were decorative repairs £266 and other repairs for the benefit of the flats £300. The tenant did not apply to the county court within the twenty-eight days allowed by para. 4 (1) of Sch. 2 to the Act to determine whether the work of repair had been carried out. In an action by the landlords for the recovery of the increase of rent, the tenant alleged that the declaration was false and fraudulent in that the repairs for the benefit of the flats of £300 to the knowledge of the landlords had never been carried out, and she

also objected to the validity of the notice of increase on the ground that it was not addressed to the tenant. The landlords contended that the tenant could not raise the defence of fraud as she had not applied within the twenty-eight days allowed to her and, by para. 5 of Sch. 2 to the Act of 1954*, service of the declaration was to be treated in such circumstances as satisfactory evidence that the work of repair had been carried out.

Held: (i) (per DENNING and PARKER, L.J.J., MORRIS, L.J., dissenting): notwithstanding para. 5 of Sch. 2 to the Act of 1954, the tenant was entitled to raise the defence that the declaration was fraudulent: and, if she succeeded, the declaration would be void and the increase of rent to which it related would not be recoverable.

(ii) the tenant, having received the notice and the declaration, could not maintain an objection to their validity on the ground that they were wrongly addressed to her deceased husband.

Appeal allowed and new trial ordered.

[Editorial Note.] Two subsidiary matters of practical interest which arose on the notice of increase or accompanying documents are referred to by DENNING, L.J., at p. 343, letter I, to p. 344, letter B, post. One is that the notice of increase and documents accompanying it were not signed on behalf of the landlords, a limited company, but were stamped with a rubber stamp. Although such stamping may amount to signature by an individual, yet it is not an appropriate method of authenticating documents on behalf of a company; compare 8 HALSBURY'S LAWS (3rd Edn.) 105, para. 183, note (c). The other point was that the schedule to the declaration, by referring merely to, e.g., external and internal decorative repairs and stating the aggregate sum expended on them, did not sufficiently describe the work done.

For the Housing Repairs and Rents Act, 1954, s. 23 (1), s. 25 (1) and paras. 4 and 5 of Sch. 2, see 34 HALSBURY'S STATUTES (2nd Edn.) 346, 350, 378.]

Cases referred to:

(1) *Goodman v. Eban (J.), Ltd.*, [1954] 1 All E.R. 763; [1954] 1 Q.B. 550; 3rd Digest Supp.

(2) *Collins v. Blantern*, (1767), 2 Wils. K.B. 342; 95 E.R. 847; 1 Digest 41, 325.

(3) *Kingston's (Duchess) Case*, (1776), 1 Leach 146 (168 E.R. 175); 20 St. Tr. 355; 15 Digest 744, 803A.

(4) *Master v. Miller*, (1791), 4 Term Rep. 320; 100 E.R. 1042; *affd.* 5 Term Rep. 367; 101 E.R. 205; 1 Digest 78, 631.

(5) *Woollett v. Minister of Agriculture & Fisheries*, [1954] 3 All E.R. 529; [1955] 1 Q.B. 103.

(6) *Smith v. East Elloe Rural District Council*, [1955] 2 All E.R. 19.

Appeal.

The plaintiffs were the landlords of a block of flats called The Palatinate, New Kent Road, London, which were subject to the Rent Restrictions Acts. They brought an action in Lambeth County Court to recover from the defendant, the tenant of one of the flats, a sum representing an increase of rent in respect of repairs under the Housing Repairs and Rents Act, 1954. The tenant contended that the amount of the increase was not recoverable on the ground that the declaration of the carrying out of the repairs made by the landlords under s. 25 (1) was false and fraudulent since to the knowledge of the landlords certain repairs stated therein to have been done had not been carried out. At the hearing on July 12, 1955, the landlords took the preliminary point that the tenant had not applied under para. 4 (1) of Sch. 2 to the Act to the county court, within twenty-eight days of service on her of the notice of increase of rent and of the declaration, to determine whether repairs to the required value had

*The terms of para. 5 are printed at p. 347, letter D, post.

A been carried out. They submitted, therefore, that under para. 5 of Sch. 2, the service of the declaration constituted the satisfactory evidence that the repair work had been carried out required to be given by s. 23 (1), and that the tenant was prohibited from questioning the validity of the declaration on the ground that the value of the work of repair stated in the declaration to have been carried out was less than that required. His Honour JUDGE CLOTHIER
 B upheld this preliminary submission and, without hearing evidence as to the alleged fraud, gave judgment for the landlords. The tenant appealed.

R. G. Freeman for the tenant.

H. Heathcote-Williams, Q.C., and *G. Dobry* for the landlords.

Cur. adv. vult.

C Jan. 24. The following judgments were read.

D DENNING, L.J.: Lazarus Estates, Ltd., the landlords, own a block of flats called The Palatinate in the New Kent Road. Some years ago they let flat No. 13 to Mr. E. C. Beasley. He died and his widow, Mrs. Violet Beasley, remained in the flat as statutory tenant at a rent of 18s. 8d. a week. In October, 1954, the landlords desired to increase the rent under the Housing Repairs and Rents Act, 1954. They served three documents each dated Oct. 9, 1954. The first was a notice of election under s. 30 (3) of the Act by which they disclaimed any responsibility for keeping the interior of the premises in good decorative repair. The second was a declaration, in which they declared: (i) that the conditions justifying an increase were fulfilled (namely, that the premises were in good repair and reasonably fit for occupation), and (ii) that they had done
 E work of repair so as to qualify them for an increase. The third was a notice of repairs increase, by which they said that the existing rent of 18s. 8d. a week would be increased by 4s. 1d. a week as from Nov. 20, 1954. The tenant has not paid the 4s. 1d. increase of rent. The landlords seek in this action to recover it from her.

F Two technical objections were taken to the validity of the documents. The first objection was that the documents did not give the correct name of the tenant. They were addressed to "Mr. E. G. Brasley, tenant of 13, The Palatinate, S.E.1", whereas they should have been addressed to "Mrs. Violet Beasley". This misnomer was an obvious mistake which does not affect the validity of the documents. The documents were addressed to "the tenant",
 G Mrs. Beasley knew that she was the tenant, and she was not misled in any way. Indeed, she admitted in her defence that she was served with the documents. In these circumstances she cannot complain of the misdescription.

H The second objection was that the prescribed six weeks' notice was not given for the increase to operate. The documents were served by post. They bore date Oct. 9, 1954, a Saturday. If they were posted on that day they would not reach the tenant till Oct. 11 (a Monday), and the increase was to operate from Nov. 20, 1954 (a Saturday), and would thus be two days short of six weeks. The landlords' agent said, however, that the documents were posted on Wednesday, Oct. 6, 1954, not Oct. 9, and his evidence was not challenged. If this is correct the documents would be delivered on Oct. 7, 1954, which would give the necessary six weeks. That objection, therefore, also failed.

I No other objections were taken in the county court to the documents, but I do not wish it to be assumed that this court approves of them. The statutory forms require the documents to be "signed" by the landlord, but the only signature on these documents (if such it can be called) was a rubber stamp "Lazarus Estates, Ltd.", without anything to verify it. There was no signature of a secretary or of any person at all on behalf of the company. There was nothing to indicate who affixed the rubber stamp. It has been held in this court that a private person can sign a document by impressing a rubber stamp with his own facsimile signature on it: see *Goodman v. J. Eban, Ltd.* (1) ([1954]

1 All E.R. 763), but it has not yet been held that a company can sign by its printed name affixed with a rubber stamp. Another point which is very material is that the declaration failed to specify any of the works of repair which had been done. The statutory form requires that a schedule to the declaration should contain a general description of the work done under each heading. The schedule in this case gave no such description. The headings "External decorative repairs" and "Internal decorative repairs" were bracketed together and put at £266 6s. 2d., with nothing to say what was done. The heading "Other repairs wholly for the benefit of dwelling-houses comprised in the building" was put at £300 without a word to say what those repairs were. No objection was taken in the county court that the declaration was invalid on this ground. We cannot, therefore, go into it, and must approach the case on the footing that that declaration in matters of form complied with the statutory requirements. A B C

I turn, therefore, to the substance of the case. The tenant seeks to say that the declaration was false and fraudulent. She says that it was quite untrue for the landlords to say that they had spent £300 on "other repairs wholly for the benefit of dwelling-houses comprised in the building". She alleges that no such works were carried out at all. The judge has held, however, that she cannot go into that matter at all. She had twenty-eight days, he says, in which to do it after the notice was served. As she did not challenge the declaration within that time, he says she cannot now challenge it at all. The tenant appeals to this court. D

In order to justify an increase, the Act requires the landlord to produce "satisfactory evidence" that he has done work of repair to the required value during the appropriate period: see s. 23 (1) (b); and he must produce it "in accordance with Sch. 2". Inasmuch as the tenant is the person who is to pay the increase, the landlord must, I think, produce the evidence to the tenant. Apart from Sch. 2 (which I will consider in a moment) the evidence, in order to be satisfactory, ought, I think, to be such as to satisfy the tenant that the required work has been done; or, if he takes unreasonable objection to it, it ought to be such as would satisfy a reasonable tenant. I do not think it would be satisfactory for the landlord to rely simply on his own word, uncorroborated and not on oath, as evidence that he had done the required work. The tenant could reasonably require the landlord to produce his contemporaneous records, builders' accounts, duly receipted, and so forth. E F

This brings me to Sch. 2. This shows that the tenant can insist on satisfactory evidence, at any rate, if he acts within twenty-eight days. Paragraph 4 provides that within twenty-eight days the tenant can apply to the court to determine whether the required work of repair has been carried out. The landlord must then produce evidence to satisfy the county court that work of repair was done so as to justify the increase, and unless he does so the notice of increase will be of no effect. The county court would, I imagine, insist in most cases on the production of records, receipts, and so forth, before it was satisfied. Suppose, however, that the tenant lets the twenty-eight days slip by without applying to the county court. That is what happened in this case. The tenant did not apply within the twenty-eight days. Schedule 2, para. 5, then provides that, in that case, the service of the declaration is itself to be treated as the production of satisfactory evidence that the work specified in it has been done. This means that the landlord can rely on his own word (as contained in the declaration) as satisfactory evidence without supporting it with any records, receipts, or so forth. But does it mean that his word cannot be challenged at all, and that it is conclusive for all purposes? I do not think so. Paragraph 5 goes on to state one particular ground on which the declaration cannot be challenged, namely, that the value of the work stated in it was insufficient to justify the increase. That seems to import that it is open to the tenant to challenge the declaration on any other ground. G H I

- A We are in this case concerned only with this point: Can the declaration be challenged on the ground that it was false and fraudulent? It can clearly be challenged in the criminal courts. The landlord can be taken before the magistrate and fined £30 (see Sch. 2, para. 6) or he can be prosecuted on indictment, and (if he is an individual) sent to prison (see s. 5 of the Perjury Act, 1911). The landlords argued before us that the declaration could not be challenged
- B in the civil courts at all, even though it was false and fraudulent, and that the landlords can recover and keep the increased rent even though it was obtained by fraud. If this argument is correct, the landlords would profit greatly from their fraud. The increase in rent would pay the fine many times over. I cannot accede to this argument for a moment. No court in this land will allow a person to keep an advantage which he has obtained by fraud. No
- C judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever; see, as to deeds, *Collins v. Blantern* (2) (1767) (2 Wils. K.B. 342), as to judgments, *Duchess of Kingston's Case* (3) (1776) (1 Leach 146), and, as to contracts, *Master v. Miller* (4) (1791) (4 Term Rep. 320). So here I am of opinion that, if this declaration is proved to have been false and fraudulent, it is a nullity and void and the landlords cannot recover any increase of rent by virtue of it.

I would therefore allow this appeal and permit the tenant to raise the defence of fraud. I would just add this. We were told that fifty-five of the tenants in this block of flats applied within twenty-eight days to the county court, and, although there was no hearing in court, the landlords have not insisted on the increase in those cases, but that they seek to insist on the increase as against the other tenants who did not apply within twenty-eight days. This failure on the part of the tenants may have been due to ignorance or mistake or some other reasonable excuse. The landlords say that, whatever the reason

F may be, once the twenty-eight days have expired, the tenants are without remedy, and that there is no power in the court to extend the time. It is easy to think of cases where strict insistence on the twenty-eight days may work hardship and injustice to tenants. If it be correct that there is no power in the court to extend the time, the sooner the attention of the legislature is directed to it the better.

- G **MORRIS, L.J.:** A notice, which purported to be a notice in the prescribed form, of the intention of the landlords to increase the rent pursuant to the provisions of the Housing Repairs and Rents Act, 1954, was served on the tenant. The notice was addressed to Mr. E. G. Brasley as the tenant of No. 13, The Palatinate. The tenant was, however, Mrs. Violet Beasley. She had become
- H the tenant after the death of her husband, Mr. E. C. Beasley, by the operation of s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The facts were fully known to her, and the fact that the notice referred to the "tenant" as being Mr. E. G. Brasley, whereas she was the tenant as the successor to her late husband, Mr. E. C. Beasley, did not in any way mislead her. She appreciated that a name had been wrongly inserted and wrongly spelt,
- I and she must have understood that notice was being given to her as the tenant of No. 13, The Palatinate that the rent was being increased. Accompanying the notice of increase were: (a) a declaration that the conditions justifying an increase of rent were fulfilled, and (b) a declaration in the prescribed form such as is mentioned in Sch. 2 to the Housing Repairs and Rents Act, 1954. There was also a notice of election relating to internal decorative repairs made pursuant to s. 30 (3) of the Housing Repairs and Rents Act, 1954.

Under Sch. 2, the "relevant date" is the date of service of the notice of

increase accompanying the declaration mentioned in s. 25 (1) (b) of the Act. A
It is provided by para. 4 of Sch. 2 as follows:

"(1) Within twenty-eight days after the relevant date the tenant may
apply to the county court to determine whether work of repair has been
carried out on the dwelling-house during the period specified in the declara- B
tion to a value not less than that so specified and whether that value is at
least the value required by the foregoing provisions of this schedule; and
if on such an application the court is not satisfied that work of repair has
been carried out as aforesaid and that the value specified in the declaration
is at least the value required as aforesaid, the court shall certify accordingly
and thereupon the notice of increase shall be, and be deemed always to
have been, of no effect.

"(2) Where, on such an application as aforesaid, it is necessary for the C
court to determine the extent to which the landlord is or was responsible
for the repair of the dwelling-house—(a) s. 32 of this Act shall apply to that
determination, and (b) notwithstanding anything in s. 23 (5) of this Act,
the determination shall have effect (so far as relevant) for the purposes of
that section."

There may, therefore, within twenty-eight days, be an application to the D
county court (a) to determine whether work of repair has been carried out on the
dwelling-house during the period specified in the declaration to a value not
less than that so specified, and (b) to determine whether that value is at least
the value required by the provisions in paras. 1 and 2 of the schedule (as reduced E
in consequence of the service of the notice under s. 30 (3)). If, on such an
application by the tenant, the court is not satisfied both (a) that work of repair
has been carried out on the dwelling-house during the period specified in the
declaration to a value not less than that so specified, and also (b) that the value
specified in the declaration is at least the value required by the provisions of
paras. 1 and 2 of Sch. 2, then the court must certify accordingly. The con-
sequential result of so certifying is that the notice of increase is of no effect and F
is deemed always to have been of no effect.

In the present case the landlords elected (pursuant to para. 7 (3) of Sch. 2)
that the value of the work carried out on each of the dwellings contained in the
building, which is a block of flats, should be determined by reference to the
aggregate value of the work of repair carried out either on the building as a
whole or so as to enure solely for the benefit of premises comprised in the building. G
The declaration of the landlords which bore date Oct. 9, 1954, contained the
following:

"During the period of three years ending on Sept. 30, 1953, being a period
falling within the four years ending with the date of service of the notice
of increase, work of repair of the general description specified in the schedule
to this declaration has been carried out on the building comprising the H
premises or solely for the benefit of the premises or of other dwelling-houses
comprised in the building to the value of £566 6s. 2d. being a value not less
than four times the aggregate of the amounts of the statutory repairs
deductions for all the dwelling-houses comprised in the building, namely,
£324."

In the schedule it was shown that the £566 6s. 2d. was made up by "External I
decorative repairs, £266 6s. 2d.", and "Other repairs wholly for the benefit
of dwelling-houses comprised in the building, £300". The way in which the
value of the work carried out on a particular dwelling-house comprised in the
block of flats was to be determined from these figures was the way laid down
by para. 7 (3) (b) of Sch. 2, which is in these terms:

"the value of the work of repair carried out during that period on any
of the dwelling-houses comprised in the building shall be taken to be an

- A amount which bears to the amount of the statutory repairs deduction for that dwelling-house the same proportion as the aggregate value mentioned in the last foregoing sub-paragraph bears to the aggregate of the amounts of the statutory repairs deductions for all the dwelling-houses comprised in the building."
- B When the tenant received the declaration it was open to her, as the notes on the declaration stated, to make application within twenty-eight days to the county court. She could have challenged the assertion that work of repair had been carried out on the building comprising the premises or solely for the benefit of the premises or of other dwelling-houses comprised in the building. She could have challenged that the work was carried out during the period specified. She could have challenged that the value of the work was £566 6s. 2d. She could have challenged that the sum of £324 was four times the aggregate of the amounts of the statutory repairs deductions for all the dwelling-houses comprised in the building.
- C

Where there has been service of a notice of increase, and of such a declaration as required by Sch. 2, the provisions of para. 5 of Sch. 2 become applicable.

- D They are as follows:

"Subject to the provisions of the last foregoing paragraph, the service with a notice of increase of such a declaration as is required by this schedule shall be treated for the purposes of s. 23 (1) of this Act as the production of satisfactory evidence that work has been carried out as mentioned in para. (b) of that sub-section: and subject as aforesaid the validity of a declaration shall not be questioned on the ground that the value of the work of repair stated in the declaration to have been carried out on the dwelling-house is less than that required by the foregoing provisions of this schedule."

E

- Where, therefore, there has been service with a notice of increase of a declaration as required by Sch. 2, and where there has been no application to the county court by the tenant within twenty-eight days which has made the notice of increase to be of no effect, two consequences follow:—(i) such service shall be treated for the purposes of s. 23 (1) as the production of satisfactory evidence that work has been carried out as mentioned in para. (b) of that sub-section, and (ii) the validity of the declaration is not to be questioned on the ground that the value of the work of repair stated in the declaration is less than is made requisite by the schedule.
- F
- G

In order to see the effect of these provisions reference must be made to s. 23 (1) and to s. 25 (1). Section 23 (1) is as follows:

- "Where a dwelling-house is let under a controlled tenancy or occupied by a statutory tenant, and the landlord is responsible, wholly or in part, for the repair of the dwelling-house, then, subject to the provisions of this Part of this Act—(a) if and so long as the following conditions (hereinafter referred to as 'the conditions justifying an increase of rent') are fulfilled, that is to say—(i) that the dwelling-house is in good repair; and (ii) that it is reasonably suitable for occupation having regard to the matters specified in paras. (b) to (h) of s. 9 (1) of this Act; and (b) if in accordance with Sch. 2 to this Act the landlord has produced satisfactory evidence that work of repair to the value specified in that schedule has been carried out on the dwelling-house during the period so specified, the rent recoverable from the tenant shall be increased by virtue of this sub-section so as to exceed by the amount hereinafter mentioned the rent which apart from this sub-section would be recoverable from the tenant under the terms of the tenancy or statutory tenancy and having regard to the provisions of any enactment."
- H
- I

Section 25 (1) provides:

"No sum shall be recoverable by way of repairs increase unless the landlord has served on the tenant or a former tenant of the dwelling-house a notice in the prescribed form of his intention to increase the rent (hereinafter referred to as a 'notice of increase'), accompanied by—(a) a declaration in the prescribed form that at the date of service of the notice the conditions justifying an increase of rent were fulfilled; and (b) a declaration in the prescribed form such as is mentioned in Sch. 2 to this Act; and no such sum shall be recoverable before, or in respect of any period before, such date as may be specified in the notice."

In the present case there was a service of a notice of increase. It was accompanied by two declarations purporting to comply respectively with paras. (a) and (b) of s. 25 (1). No question has been raised as to the adequacy and correctness of the declaration that at the date of service of the notice the conditions justifying an increase of rent were fulfilled. Neither has it been questioned that there was a declaration in the prescribed form as required by Sch. 2. It is possible that it might have been. It may be that the sufficiency of the general description of the work of repair could have been challenged in the action. It may be that the sufficiency as a signature, of having the mere name of a limited company imposed by a rubber stamp, might have been challenged in the action. But as these questions were not raised I express no opinion in regard to them. The only objection that was raised in regard to the form of the notice of increase and the declarations was that which I have mentioned, namely, that the name of the tenant's late husband, misspelt, was on the notice. That objection I consider in the circumstances to be insubstantial and not to invalidate. A point was raised in the action (under s. 25 (2) of the Act) that the date specified in the notice of increase was earlier than six weeks after the service of the notice: but the finding of fact of the learned judge as to the date of service disposed of this point.

There being no availing point as to the service of the notice and declarations, and no availing point as to the form of the notice and declarations, and there having been no application to the county court within para. 4 of Sch. 2, the result is that "satisfactory evidence" was produced that work of repair to the value specified in Sch. 2 was carried out on the dwelling-house during the specified period. The phrase "satisfactory evidence" is one that by itself might merely denote admissible evidence from which a conclusion might be drawn but which might be rebutted or out-balanced by some other evidence. But s. 23 (1) lays it down that, on the production of the "satisfactory evidence" stipulated, the result is to be that "the rent recoverable from the tenant shall be increased". The wording is compelling, just as is the wording of para. 5 of Sch. 2, which provides that, unless the procedure of para. 4 is put into operation successfully, the service with the notice of increase of a declaration as required "shall be treated as the production of "satisfactory evidence".

The wording of the second part of para. 5 is complementary to that in the first part; and both follow the provisions of para. 4. As I have mentioned, para. 4 provides for an application to the county court on two matters. The first is whether work of repair has been carried out on the dwelling-house during the period specified in the declaration to a value not less than that so specified. The first part of para. 5 then deals with the position when there has been no application. The position is that the service with the notice of increase of a declaration as required

"shall be treated for the purposes of s. 23 (1) of this Act as the production of satisfactory evidence that work has been carried out as mentioned in para. (b) of that sub-section."

The other matter that may be the subject of an application to the county

A court under para. 4 is whether the value of the work carried out is at least the value required by the provisions in paras. 1 and 2 of the schedule. The second part of para. 5 deals with the position where there has been no such application and the provision is that

B “the validity of a declaration shall not be questioned on the ground that the value of the work of repair stated in the declaration to have been carried out on the dwelling-house is less than that required by the foregoing provisions of this schedule.”

C In the present case the tenant by her defence does not assert that no work of repair was done; she says that the sum of £566 is wrong: she does not challenge one of the two items which compose that figure, the item of £266, but she challenges the other, the item of £300. She asserts that the work which that figure is said to represent was never done, and she further asserts that the landlords knew this and fraudulently presented a figure and an item for which they knew there was no warrant at all. Accordingly she asserts that the notice of increase was not valid because the declaration was false and fraudulent. D But the tenant's remedy was to have applied to the county court within twenty-eight days of the service of the documents on her. If she had the pithy case that one out of two items of suggested work was not only erroneous but was erroneous for the reason that the item had never existed and had been fraudulently invented, her task might have been simpler than that ordinarily undertaken by tenants. But whether she would have had an easy task or not, it seems to me that it is just as much too late for her now to attack one figure E in the declaration, even though she alleges that the figure was fraudulently inserted, as it would be for her to attack a figure on the ground that it was excessive or was erroneously or mistakenly or carelessly overstated.

F The matter depends entirely, in my judgment, on the language of the Act. There was a declaration which in form is not impeached. It cannot, in my view, be said that the declaration is a nullity because one part of its content is assailed. What is said is that one of two items was fraudulently added, and that without the tainted item the remaining figure would be insufficient. But by statute the service of the declaration must, unless the tenant avails himself of his statutory opportunities of putting his landlord to proof, be treated as the production of satisfactory evidence: the words are “shall be treated”. On such production G of satisfactory evidence, the rent recoverable from the tenant “shall” be increased. The language appears to me to be compelling. No reason has been given why the tenant did not make application to the county court within the prescribed time, and there is no suggestion that she could not have done so, or could not have made any inquiry that she wished. It seems to me that H Parliament has imposed a time limit and has not made exceptions to cover any special cases.

I We were referred to the provision contained in para. 16 of Sch. 1 to the Acquisition of Land (Authorisation Procedure) Act, 1946, and to the decisions in *Woollett v. Minister of Agriculture & Fisheries* (5) ([1954] 3 All E.R. 529), and in *Smith v. East Elloe Rural District Council* (6) ([1955] 2 All E.R. 19). The language of the provisions now under consideration is, however, different, and, in my judgment, the decision in the present case depends solely on the construction of the language used in the Act of 1954. For these reasons I agree with the conclusions of the learned judge and I would dismiss the appeal.

PARKER, L.J.: By s. 23 (1) of the Housing Repairs and Rents Act, 1954, where a dwelling-house is occupied by a statutory tenant and the landlord is responsible, wholly or in part, for repairs, then, subject to the provisions of Part 2 of the Act and to the existence of certain conditions (which are immaterial

for the purposes of this case) the rent recoverable from the tenant shall be increased A

"if in accordance with Sch. 2 to this Act the landlord has produced satisfactory evidence that work of repair to the value specified in that schedule has been carried out on the dwelling-house during the period so specified . . ."

By s. 25 (1) it is provided as follows: B

"No sum shall be recoverable by way of repairs increase unless the landlord has served on the tenant or a former tenant of the dwelling-house a notice in the prescribed form of his intention to increase the rent (hereinafter referred to as a 'notice of increase'), accompanied by—(a) a declaration in the prescribed form that at the date of service of the notice the conditions justifying an increase of rent were fulfilled; and (b) a declaration in the prescribed form such as is mentioned in Sch. 2 to this Act; and no such sum shall be recoverable before, or in respect of any period before, such date as may be specified in the notice." C

Paragraphs 1 and 2 of Sch. 2 lay down the value of the repairs and the period during which they were carried out which the declaration must show if an increase in rent is to be obtained; and by para. 4 (1) it is provided that: D

"Within twenty-eight days after the relevant date the tenant may apply to the county court to determine whether work of repair has been carried out on the dwelling-house during the period specified in the declaration to a value not less than that so specified and whether that value is at least the value required by the foregoing provisions of this schedule; and if on such an application the court is not satisfied that work of repair has been carried out as aforesaid and that the value specified in the declaration is at least the value required as aforesaid, the court shall certify accordingly and thereupon the notice of increase shall be, and be deemed always to have been, of no effect." E

Finally, para. 5 provides that: F

"Subject to the provisions of the last foregoing paragraph, the service with a notice of increase of such a declaration as is required by this schedule shall be treated for the purposes of s. 23 (1) of this Act as the production of satisfactory evidence that work has been carried out as mentioned in para. (b) of that sub-section; and subject as aforesaid the validity of a declaration shall not be questioned on the ground that the value of the work of repair stated in the declaration to have been carried out on the dwelling-house is less than that required by the foregoing provisions of this schedule." G

In the present case a notice of increase and a declaration were served in October, 1954. The latter declared that during the three years ending on Sept. 30, 1953, being within four years ending with the date of service of the notice of increase, work of repair had been carried out to the value of £566 6s. 2d. being as to £266 6s. 2d. decorative repairs, and as to £300 repairs wholly for the benefit of the dwelling-houses comprised in the building. Since £324 was the aggregate of the amounts of the statutory repairs deductions, an increase of rent was recoverable assuming repairs to that value had been done. The tenant, however, did not apply to the county court within twenty-eight days to determine whether such work of repair had been carried out. She did nothing, but when sued in these proceedings for the increase of rent she sought to dispute the declaration on the ground that the alleged repairs to the value of £300 had never been executed, and that the declaration to that extent was false, and false to the landlords' knowledge. The answer put forward by the landlords was that, by reason of para. 5 of Sch. 2, a declaration unchallenged within the twenty-eight days becomes "satisfactory evidence" that the work of repair to the value specified in the declaration has been carried out, and that, accordingly, the I

A increase of rent under s. 23 (1) automatically followed and could not be disputed.

For my part I am unable to accept this contention at any rate in its widest form. The declaration to be valid does not merely have to show that the work of repair has been done within the specified period, and that its value is at least the value required in order that the increase in rent should operate. The declaration must also be in the prescribed form; and it must be served on the tenant; and the date specified in the notice of increase must not be earlier than six clear weeks after the service of the notice: cf. s. 25 (1), (2) and (3). Quite clearly the tenant must be entitled to challenge the validity of the declaration on the ground that one or more of these conditions have not been fulfilled. He cannot do this on an application to the county court under para. 4 of Sch. 2, and it seems to me that the time to raise such a challenge to validity is when sued for the increase in rent.

Accordingly, the question here is whether the tenant is seeking to challenge the validity on some ground other than that repairs had not been carried out during the period specified to a value not less than that specified. That the tenant is seeking to challenge the validity on that ground is clear, but is she also seeking to challenge it on another ground? The contention on her behalf is that, should she succeed in proving fraud on the part of the landlords, the declaration would be a nullity, whereas mere proof that repairs had not been done to the value specified would not make the declaration a nullity but would merely make it cease to have effect. Therefore, it is said, the tenant is seeking to do something more than challenge the validity of the declaration on the ground that repairs had not been done to the value specified.

I think that this contention is correct. No doubt it can be said that the real question in any case is whether repairs to the value specified have in fact been done, and that proof of fraud in the making of the declaration is merely proof of the quality of the act or its motive. Nevertheless, that quality, if proved, vitiates all transactions known to the law of however high a degree of solemnity. Suppose that on an application under para. 4 of Sch. 2 the landlord by fraud persuades the county court to uphold a declaration and that months later the tenant discovers this and is in a position to prove that fraud. Surely the tenant could refuse to pay the increase in rent, and, when sued, could allege that the decision of the county court was obtained by fraud. If that be the true position, why cannot a tenant who has not adopted the procedure of para. 4 equally claim that, on proof of fraud, the declaration is not satisfactory evidence for the purposes of s. 23?

Reference was made on behalf of the landlords to the cases of *Woollett v. Minister of Agriculture & Fisheries* (5), and *Smith v. East Elloe Rural District Council* (6) in support of the view that the words in para. 5 of Sch. 2 were sufficient to exclude a challenge of the declaration on the ground of fraud. It is enough to say that the provisions excluding challenge in those cases were in much wider language, and I do not think that those cases assist in the determination of this case.

Finally, the tenant asserted that the declaration was invalid in that it was sent by post addressed to Mr. E. G. Brasley and not to the tenant, Mrs. Violet Beasley. It, however, reached the tenant, and was understood by her to be intended for her. Indeed, she applied for and obtained a certificate of disrepair. I am satisfied that the misdescription in no way affects the validity of the declaration in this case.

On the first ground, however, I would allow the appeal.

Appeal allowed. Judgment below set aside and new trial ordered. Leave to appeal to the House of Lords refused.

Solicitors: *Robert K. George* (for the tenant); *Chandler & Creeke* (for the landlords).

[Reported by F. A. AMES, Esq., Barrister-at-Law.]

TAYLOR v. THOMPSON.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Stable, JJ.),
January 26, 1956.]

*Street Traffic—Licence—Goods vehicle—Carriage of goods for trade or business—
Estate car delivery van used for carrying photographic equipment in connection
with business of photographer—Vehicles (Excise) Act, 1949 (12, 13 &
14 Geo. 6 c. 89), s. 13 (1), s. 27 (1)—Finance Act, 1952 (15 & 16 Geo. 6 &
1 Eliz. 2 c. 33), s. 7 (2).*

The respondent was the owner of an estate car delivery van (a shooting brake) which was constructed in such a manner that it could be used for the carriage of goods. He was a director of a company carrying on business as photographers. On a day in March, 1955, he used the car for the conveyance of two press cameras, a tripod and other photographic equipment in connection with the company's business. He was charged under s. 13 (1) of the Vehicles (Excise) Act, 1949, with using the car as a goods vehicle without having paid the higher rate of duty chargeable for a goods vehicle by virtue of s. 5 of and Sch. 4 to the Act of 1949. On the question whether the car was a goods vehicle within the definition in s. 27 (1) of the Act of 1949 as modified by s. 7 (2) of the Finance Act, 1952,

Held: the car was a goods vehicle within s. 27 (1) of the Vehicles (Excise) Act, 1949, since it was constructed for use and was being used for the conveyance of goods in the course of trade; moreover, it was not excepted by the Finance Act, 1952, s. 7 (2), from being a goods vehicle, because it was used for the conveyance of goods in connection with a trade or business; accordingly, the respondent should be convicted of the offence charged.

[For the Vehicles (Excise) Act, 1949, s. 13 and s. 27, see 21 HALSBURY'S STATUTES (2nd Edn.) 1444, 1454; and for the Finance Act, 1952, s. 7, see 32 HALSBURY'S STATUTES (2nd Edn.) 679.]

Case Stated.

This was a Case Stated by justices for the County of Lancaster in respect of their adjudication as a magistrates' court sitting at Strangeways, Manchester, on Aug. 16 and 25, 1955. On July 6 and 24, 1955, the appellant, James Taylor, preferred informations against the respondent, William George Thompson, charging that, on Mar. 23, 1955, on Chester Road at Old Trafford he unlawfully used a motor vehicle (i) for the carriage of goods except under a licence granted under the Road and Rail Traffic Act, 1933, Part 1, contrary to s. 1 of that Act; (ii) when there was not in force in relation to the user of the vehicle such a policy of insurance or such security in respect of third-party risks as complied with the Road Traffic Act, 1930, Part 2, contrary to s. 35 of that Act, and (iii) while there was in force in respect thereof a certain licence for a mechanically propelled vehicle at a certain rate under the Vehicles (Excise) Act, 1949, for a purpose for which a higher rate of duty was chargeable such higher rate not having been paid before the vehicle was so used, contrary to s. 13 of that Act. The following facts were found. The respondent was at all material times the owner of a Standard Vanguard shooting brake, correctly described by him as an estate car delivery van. In relation to use for the carriage of goods, the vehicle had double doors fitted at the rear and the seats in the rear were capable of being folded forward. At the time and place referred to in the informations, the respondent was using the vehicle for the conveyance of two press cameras, a tripod, a box of flashlight bulbs and a box containing miscellaneous photographic equipment. These articles were being carried for or in connection with the business of a company of photographic printers and free lance photographers, of which the respondent was a director. At no material time had duty been paid in respect of the vehicle at the rate appropriate to a goods vehicle of its weight, nor was there in force in respect of the vehicle any licence granted under the

A Road and Rail Traffic Act, 1933, Part 1, nor a policy of insurance affording cover against third-party risks in respect of user of the vehicle for the carriage of goods in connection with any trade or business, though there was an insurance policy covering its user for social, domestic or pleasure purposes.

B It was contended on behalf of the appellant that the cameras, bulbs and photographic equipment constituted goods and that the vehicle was constructed for use for the carriage of goods. It was contended on behalf of the respondent that there was no evidence that the vehicle was constructed for carrying goods, no part of it had been adapted, altered or removed for any purpose and, therefore, it was not a "goods vehicle" within the meaning of the Road and Rail Traffic Act, 1933, s. 1, or the Vehicles (Excise) Act, 1949, s. 27 (1) and Sch. 4.

C The justices were of the opinion that the vehicle was neither essentially constructed nor adapted for use for the carriage of goods, and that, if the test was the nature of the "goods", irrespective of the type of vehicle, then the carriage of a doctor's professional instruments or a lawyer's text-books in a private car might result in these offences, and they dismissed the informations. The appellant now appealed.

D *Rodger Winn* for the appellant.

The respondent did not appear and was not represented.

E LORD GODDARD, C.J., stated the facts and continued: The case has been put forward to us as a test case for the guidance of justices and their clerks. It is not suggested that there was a wilful (in the sense of a deliberate) intention of evading any duty, but it is desirable that uniform decisions should be given in different parts of the country. Everyone knows that, at the present time, these dual purpose vans, as they are sometimes called, or shooting brakes, are in very common use. Under the Vehicles (Excise) Act, 1949, s. 27 (1), a "goods vehicle" is defined as

F "a mechanically propelled vehicle . . . constructed or adapted for use and used for the conveyance of goods or burden of any description, whether in the course of trade or otherwise."

G All that we have to find is not whether it is constructed solely, but whether it is constructed or adapted for use and used, for the conveyance of goods. It is impossible to argue, and it never has been argued in these cases, that these estate car delivery vans are not constructed or adapted for use for the conveyance of goods.

The section creating the offence is s. 13 (1) of the Vehicles (Excise) Act, 1949, which provides:

H ". . . where a licence has been taken out in respect of a mechanically propelled vehicle at any rate under this Act and the vehicle is at any time while the licence is in force used in an altered condition or in a manner or for a purpose which brings it within, or which if it was used solely in that condition or in that manner or for that purpose would bring it within, a class or description of vehicle to which a higher rate of duty is applicable under this Act, duty at that higher rate shall become chargeable in respect of the licence for the vehicle . . ."

I That shows that, if a person has one of these vehicles, licenses it and pays the duty for a private vehicle, and then uses it for a purpose which brings it within the description of a goods vehicle, he has to take out another licence.

The hardship which was caused, or the difficulty which might be caused, was mitigated by the Finance Act, 1952, which provides, in s. 7 (2):

"From the beginning of the year 1953 a vehicle which is constructed or adapted for use for the conveyance of goods or burden, but is not used for the conveyance thereof for hire or reward or for or in connection with a

trade or business . . . shall not be treated for the purposes of the Vehicles (Excise) Act, 1949, as a goods vehicle . . . A

Therefore, the position is quite clear. These estate car delivery vans are constructed in such a manner that they can be goods vehicles. Being goods vehicles, they would attract the higher rate of duty if they are either used for the conveyance of goods or burden for hire or reward or if they are used for the carrying of goods in connection with a trade or business. If a person has one of these vans and he carries in it nothing except his own luggage, or his own farm produce for his own use, and nothing which has to do with his trade or business, he is committing no offence if he licenses it and keeps it licensed at what one may call the private car rate. However, if he does carry goods, that is to say, as it seems to me, anything in connection with his trade or business, at once it becomes a goods vehicle and has to bear the higher rate. B C

The justices here said that, if that is so, it means that, if a doctor has one of these vans and he drives about the country carrying with him his bag of instruments, that would make him liable to the higher rate of duty. It is not necessary for us to say whether or not a doctor would be liable. We should have to consider whether or not he was carrying on a trade or business within the meaning of s. 7 (2), and the same thing would apply in the case of a lawyer's books and a lawyer's professional robes. I am far from saying that it may not be so. We need not decide that for the purposes of this case. D

What we are deciding is that a press photographer, who is a director of a business which deals with photographic matters, which is his business, and who carries in one of these vans his photographic apparatus, does come within s. 27 (1) of the Act of 1949, and cannot bring himself within the exemption which has been granted by the Finance Act, 1952, because, to bring himself within that exemption, what he is carrying must have no connection with his trade or business. E

For these reasons, we think that the justices' decision cannot be supported. We are not asked to send back more than the third of the summonses, that is to say, the one in respect of the Vehicles (Excise) Act, 1949, the others being consequential summonses. We will send back that summons and say that there must be a conviction under the Vehicles (Excise) Act, 1949, the justices being at liberty to exercise their statutory powers to mitigate the penalty if they think fit. F

HILBERY, J.: I agree.

STABLE, J.: I agree.

Case remitted in part.

Solicitor: *Treasury Solicitor.*

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

A

Re RAINE (deceased).

WALTON v. ATTORNEY-GENERAL AND ANOTHER.

[CHANCERY DIVISION (Vaisey, J.), January 17, 24, 1956.]

*Charity—Cy-près doctrine—Gift of residue—Particular charitable purpose
Surplus after satisfying prescribed purpose—Direction of scheme.*

B

By her will the testatrix gave her real and personal property on trust for sale, and subject to a life interest, gave specific and pecuniary legacies including a legacy of £400 for a "stained glass window to be inserted in [R.] church". She directed that the remainder of her property "be sold and the proceeds taken for the continuation of the seating of the church" at R. After the seating in the church had been completed, so that it could not be extended further without impairing the beauty of the church, there would be a surplus of the residuary estate. On the question whether such surplus should be applied cy-près or devolved as on intestacy,

C

Held: the will showed an intention that the whole of the residue should be applied to a particular charitable purpose, viz., the provision of seating in the church, and as the gift of residue was a gift of more than was required for that purpose, the surplus would be applied cy-près.

D

Re King ([1923] 1 Ch. 243) and *Re Royce* ([1940] 2 All E.R. 291) followed.

Re Connolly (1914) (110 L.T. 688) and *Re Stanford* ([1924] 1 Ch. 73) distinguished.

[As to cy-près doctrine and its application where a surplus remains after satisfying the particular and immediate object, see 4 HALSBURY'S LAWS (3rd Edn.) 323, para. 661: and for cases on the subject, see 8 DIGEST (Repl.) 467, 1673-1685.]

E

Cases referred to:

(1) *Re Connolly*, (1914), 110 L.T. 688; 8 Digest (Repl.) 421, 1115.

(2) *Re Stanford*, [1924] 1 Ch. 73; 93 L.J.Ch. 109; 130 L.T. 309; 8 Digest (Repl.) 468, 1701.

F

(3) *Re King*, [1923] 1 Ch. 243; 92 L.J.Ch. 292; 128 L.T. 790; 8 Digest (Repl.) 315, 10.

(4) *Re Royce*, [1940] 2 All E.R. 291; [1940] Ch. 514; 109 L.J.Ch. 327; 163 L.T. 172; 8 Digest (Repl.) 341, 232.

Adjourned Summons.

G

The plaintiff, Robert Walton, as the executor and trustee of the will of Sarah Raine deceased, applied to the court by originating summons for the determination of the question whether the residuary estate of the testatrix remaining after expending thereout the sum of £411 in the continuation of the seating of the church at Romaldkirk, and any costs incurred with such expenditure, ought to be applied cy-près, or devolved as on the partial intestacy of the testatrix.

H

H. A. Rose for the plaintiff, the executor and trustee.

N. C. H. Browne-Wilkinson for the first defendant, H.M. Attorney-General.

J. A. Brightman for the second defendant, representing next of kin.

I

VAISEY, J.: This summons raises a question of construction on the will of Miss Sarah Raine. [His LORDSHIP referred to the question in the summons and continued:] The will is dated June 7, 1944, and the testatrix died on Jan. 28, 1953. The will is short and simple. The testatrix appoints two executors, one of whom survives, and is the plaintiff on this summons. She gives the whole of her property, whether real or personal, to her executors as trustees on trust for sale. The first trust was a trust to pay the income during his life to her brother who died in her lifetime. By the next trust, which is expressed to take effect on the brother's death and which, in the result, took effect on her death, she bequeathed certain legacies specific and pecuniary. One of the

pecuniary legacies is a bequest of £400 for a stained glass window "to be inserted in Romaldkirk Church in memory of" her brother and herself. Finally, she directed that the remainder of her property should be sold and the proceeds "taken for the continuation of the seating of the church at Romaldkirk". There was a codicil which throws no further light on this question.

The will was proved on Apr. 14, 1953, at Durham by the plaintiff, Mr. Robert Walton, of Romaldkirk, the other executor having renounced probate. The defendants are, first, the Attorney-General, and, secondly, Mrs. Walton, who is one of the testatrix's next of kin. Romaldkirk is a village in Teesdale, and the church is one of great interest and beauty. At the date of the death of the testatrix the seating in the church had been fairly recently installed and consisted of oak pews of good design and workmanship; but there were about fifty chairs, so that the seating was only partly of a permanent character. That explains the expression in the will that the residuary proceeds of the testatrix's estate were to be taken for the "continuation of the seating . . ."

The £400 which was given for the purposes of the stained glass window is obviously not enough to provide a suitable window, but, after having set aside that sum to abide the result of these proceedings and paying £411 for completing the seating of the church, about £2,000 remains.

The evidence shows that the seating in the church as it existed at the death of the testatrix, and as it has now been completed and enlarged, is not only sufficient for the ordinary congregation assembled in the church, but also could not be added to without encroaching on the nave and the aisles and so detracting from the beauty and dignity of the building. The rector of Romaldkirk and the churchwardens and the parochial church council would like to have this £2,000, and they suggest that part of it should be put towards augmenting the sum bequeathed for the window, and that the bulk of it should be used for the future maintenance of the seating and of the church itself. If what is called the *cy-près* doctrine applies in this case, the money will have to be devoted to charity. If that doctrine is not applicable, then the surplus money, the sum of approximately £2,000, goes as on an intestacy to a class of next of kin represented by the second defendant.

It has been said as a general proposition that, unless there is a general charitable intent, the *cy-près* doctrine cannot be applied, or ought not to be applied. As a general proposition, that is well-founded and well-established. It is well exemplified by such cases as *Re Connolly* (1) (1914) (110 L.T. 688) and *Re Stanford* (2) ([1924] 1 Ch. 73). It is to be observed that in both those cases the court was dealing with a pecuniary legacy. In each of those cases the surplus was claimed by those who were interested under a residuary gift. Different considerations arise where the gift itself is residuary. In *TYSSEN'S CHARITABLE BEQUESTS* (2nd Edn.), at p. 184, the author gives as one of the cases in which the doctrine of *cy-près* is applicable the case in which there is a general intention to devote the whole of the subject of the gift to charity, and there is more than is required for the purposes of the defined charity, with the result that there is a surplus. In the present case, I think, there is not a general charitable intent in the wider and vaguer significance of that expression, but there is a general and comprehensive intention expressed by the testatrix that the whole subject of her gift, i.e., the whole of her residuary money, is to be devoted to a charitable purpose. Inasmuch as here there is a surplus, I think that the matter has to be approached in a very different way from that appropriate where there is a pecuniary legacy, because the general intention is that the whole of the residuary estate should go and be applied for a charitable purpose. The gift is itself residuary, and the whole of the residue is in the testatrix's contemplation to be devoted to a charitable purpose. There is more money available than is required for the limited charitable purpose within the particulars mentioned in the will,

A i.e., the seating of the church. It is obvious that the testatrix wanted everything that she had, apart from the subject-matter of the legacies, to be devoted to Romaldkirk Church, and I think that there is shown an intention to part with the whole of her residuary property in favour of charity, from which one can spell out a charitable intention which can only be carried out by the application of the *cy-près* doctrine.

B For that proposition there are two cases which are of assistance. The first is a decision by ROMER, J., in *Re King* (3) ([1923] 1 Ch. 243) in which the headnote is this:

C "A bequest of residue to provide for the erection of a stained-glass window in a parish church to the memory of the testatrix and certain of her relations is a good charitable gift, and if the residue is more than sufficient to meet the cost of a window of the best possible character, the surplus remaining in the hands of the trustees must be applied *cy-près*."

D I do not think the judgment in that case is very helpful, particularly because I think, with great respect to the learned judge, he has quoted the wrong passage from TYSSSEN'S CHARITABLE BEQUESTS. I think that the relevant passage in that book is that to which I have referred (p. 184). The passage which ROMER, J., quoted is at p. 202, but I think the passage which I have quoted is that which gives the key to the solution of the present question. If the decision in *Re King* (3) is right, I think it is indistinguishable from this case, and if I am not

E further fortified in my view by the second case which I wish to mention, *Re Royce* (4) ([1940] 2 All E.R. 291). In that case both a share of residue and a pecuniary legacy were given to the vicar and churchwardens of the parish church of Oakham "for the benefit of the choir". There was a great deal of discussion as to what the words "for the benefit of the choir" meant. The

F decision was that it was the intention of the testator to provide a fund for the maintenance and improvement of the musical services of the church, and that being a bequest for the advancement of religion, it was a valid charitable bequest. SIMONDS, J., in deciding the case said that a general charitable intention was shown by the will, but the amount being greater than could be used for the choir, a scheme was directed for the application of the surplus income. I read that

G case as indicating that where the testatrix has shown an intention to use the whole of the residue, or the remaining portion of the residue, for a charitable purpose, it is not necessary to do more than to find that intention, viz., an intention to part with the whole subject-matter of the residuary gift for a charitable purpose. It is not necessary to find a general charitable intention in the wider sense in

H which those words are sometimes, and perhaps more frequently, used.

I I think that the testatrix has shown on the face of her will an intention to give the whole of the residue of her estate for charitable purposes. She did not mean to keep anything back. She gave no further directions. True it is she did not leave any part of the residue to the vicar or churchwardens or the parochial church council or to anybody else, but merely indicated the purpose for which this money was to be applied. But I think that she showed no intention whatever of leaving anything out of what she designed as an application of her residuary estate to charity.

I think that it is very necessary in these cases to remember that the application of the doctrine differs very much according to whether or not it is applied to residue or a share of residue or merely to a legacy. I think that where there is a residuary gift out and out for a charitable purpose, and there is a surplus over and above what is required for that particular purpose, the overriding

ention of a charitable disposition should prevail, with the result that the surplus must be applied cy-près. A

Order accordingly.

Solicitors: *Champion & Co.*, agents for *Dawson, Arnott & Pickering*, Barnard Castle, Durham (for the plaintiff and the second defendant); *Treasury Solicitor*.

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*] B

CHANDRIS v. UNION OF INDIA

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), November 29, 30, 1955, January 25, 1956.]

Shipping—Charterparty—Seaworthy trim clause—Expense incurred in shifting cargo to trim ship—Overtime in moving ship and looking after stowage—Loss of time—Meaning of “homogeneous cargo”—What expenses recoverable from charterers. C

A charterparty incorporated the seaworthy trim clause of the “Austral” charterparty, under which “if the option of ordering the vessel to discharge at two ports is not exercised . . . before loading has commenced, any expense incurred by the shipowners at the first port of discharge in shifting, discharging and/or reloading any cargo . . . for the purpose of putting the vessel into seaworthy trim for the passage to the second port . . . shall be paid by the charterers . . . In the event of the cargo being a homogeneous cargo (i.e., of the same description, quality and mark) the master shall discharge the cargo in such manner as to leave the vessel in seaworthy trim . . .” Another clause provided: “overtime to be for account of the party ordering it”. D

The cargo comprised ten thousand tons of wheat, of which nine thousand were loaded in bulk and, on the requirement of the master of the vessel to ensure safe stowage, one thousand in bags. During the voyage (i.e., after loading had commenced) the charterers exercised the option to discharge at two ports instead of one. Some 2,900 tons of wheat in bulk was discharged at the first port. That left the ship no longer in seaworthy trim and necessitated trimming the rest of the bulk wheat into lower holds, covering it with tarpaulins and stacking bagged wheat over it. As the ship had to be shifted for this to be done from the wharf to a buoy in a stream, twenty-one hours’ delay was caused, involving loss to the shipowner, including £9 13s. 6d. for crew’s overtime in moving the ship and looking after the stowage, and £175 through loss of time, this figure being based on the rate payable for demurrage. The shipowner claimed to be entitled to recover these sums from the charterers under the seaworthy trim clause in the charterparty. E

Held: (i) the shipowner was entitled to recover the cost of the overtime as being an “expense incurred . . . in shifting . . . any cargo” within the clause, since it was incidental to the shifting of the cargo, and she was so entitled notwithstanding the clause as to charging overtime, which was a general clause which was overridden by the particular provisions of the seaworthy trim clause. F

(ii) the shipowner was not entitled to recover the £175 (per MORRIS, L.J., not entitled to recover the whole of the £175 claimed) for loss of time, because it was not an “expense incurred . . . at the first port of discharge in shifting . . . any cargo” within the clause, which in the charterparty meant actual and specific disbursements in shifting the cargo and did not include damage for time lost, viz., such damage as loss of profit or earnings or (MORRIS, L.J., dissenting) the cost of running the ship. (See pp. 360, 361, post, p. 362, letter F, p. 366, letters E to H, and p. 367, letter H, post). G

(iii) the charterers were not relieved of liability by the last part of the I

A seaworthy trim clause, because the cargo was not homogeneous, the wheat being partly in bulk and partly in bags.

(iv) the £175 was not recoverable as demurrage.

Appeal allowed.

[As to demurrage and damages for detention of a ship, see 30 HALSBURY'S LAWS (2nd Edn.) 344-349, paras. 524-528; and for cases on the subject, see 41 DIGEST 559-576, 577-580, 3851-3998, 4016-4038.]

Appeal.

Following the exercise by the charterers, after loading the ship had commenced, of an option to discharge cargo at two ports instead of one, the discharge of part of the cargo at the first port left the ship no longer in seaworthy trim and necessitated moving her from her berth to a buoy in a stream for the trimming of the remaining cargo, with an attendant loss of twenty-one hours. The shipowner brought an action for money alleged to be due under the charterparty, for demurrage and/or damages for detention and for damages for breach of charterparty against the charterers, claiming under the seaworthy trim clause £9 13s. 6d. in respect of crew's overtime and £175 loss occasioned by the delay. The charterers contended that the overtime was not an expense incurred in shifting cargo for the purpose of putting the vessel into seaworthy trim within the meaning of the clause in the charterparty, on the ground that it was incurred in shifting the ship and in looking after the stowage of the cargo; that the £175 was not such an expense because it did not represent specific disbursements, and that it was not demurrage, since the time lost could not be counted as lay days, having been lost after the completion of the discharge of the cargo; and that the shipowner was disentitled to make the claim because the cargo was a homogeneous cargo (wheat, though part in bulk and part in bags) and under the same clause in the charterparty the master had therefore been under a duty so to discharge the cargo as to leave the ship in seaworthy trim. On July 7, 1955, DEVLIN, J., gave judgment for the shipowner, holding that both sums were expenses incurred in shifting cargo for the purpose of putting the vessel into seaworthy trim, and that the cargo was not a homogeneous cargo. The charterers appealed.

A. A. Mocatta, Q.C., and M. R. E. Kerr for the charterers.

Eustace Roskill, Q.C., and B. S. Eckersley for the shipowner.

Cur. adv. vult.

Jan. 25. The following judgments were read.

DENNING, L.J.: In 1948 the Union of India, the charterers, chartered the steamship *Eugenia Chandris* to carry a cargo of corn from Argentina to a safe port in India. The charterers stipulated for an option to discharge at two ports instead of one, in which case the freight was to be 2s. 6d. a ton more on the entire cargo. Nearly ten thousand tons of wheat was loaded in the Argentine. The charterers elected to load it in bulk, but there were no shifting boards erected, so the master said that ten per cent. must be in bags so as to ensure safe stowage. So nine thousand tons were loaded in bulk and one thousand tons in bags. During the voyage, the charterers exercised their option. They ordered 2,900 tons of wheat to be discharged at Cochin and the rest at Bombay. The master carried out these instructions. He discharged 2,900 tons at Cochin. This was all wheat in bulk. The physical discharge of it was completed at 4.30 p.m. on Saturday, Nov. 27, 1948. The master, however, was unable immediately to sail for Bombay, because the ship was not then in seaworthy trim. The removal of the 2,900 tons of bulk wheat had left it out of trim. It was necessary to trim the rest of the bulk wheat into the lower holds, cover it with tarpaulins, and stack bagged wheat over it. The port authorities at Cochin would not allow the ship to remain at the wharf whilst this was being done, because the space was needed for another ship. So the ship had to be shifted from the wharf to a buoy in the stream. This took two hours from 4.30 p.m.

to 6.30 p.m. The work of trimming the ship itself took until 6.0 a.m. the next morning, Sunday, Nov. 28. Then it had to be passed by the port authorities. They did not pass it until mid-day. A pilot boarded the ship at 1 p.m. and she sailed for Bombay at 1.30 p.m. The ship was thus delayed for twenty-one hours owing to the necessity of putting her into seaworthy trim. The question is who is to bear the expense of the work and the loss caused by the delay. A

The charterers have paid the charges of the port authorities for shifting the ship and the stevedores' bill for work on the cargo, but they have not paid the crew's overtime, which amounts to £9 13s. 6d., nor have they paid anything for the loss caused by the delay, which is put at £175. The shipowner claims that the charterers should pay these also. This depends on the true construction of the charterparty. This was in the "Centrocon" form, but it incorporated the seaworthy trim clause of the "Austral" charterparty, which is in these words: B

"Safe trim between ports of discharge. If the option of ordering the vessel to discharge at two ports is not exercised, or if correct particulars of the cargo to be discharged at the first port of discharge are not given to the master, before loading has commenced, any expense incurred by the shipowners at the first port of discharge in shifting, discharging and/or reloading any cargo either for the purpose of putting the vessel into seaworthy trim for the passage to the second port or to enable the cargo for discharge at the first port to be conveniently so discharged shall be paid by the charterers, and the charterers shall indemnify the shipowners against any claims by bill of lading holders in respect of such shifting, discharging and/or reloading cargo. In the event of the cargo being a homogeneous cargo (i.e., of the same description, quality and mark) the master shall discharge the cargo in such manner as to leave the vessel in seaworthy trim to proceed to the second port of discharge." C

Under this clause it is plain that the shipowner can recover "any expense incurred in shifting the cargo". This obviously includes the stevedores' bill. It also includes, I think, the charges of the port authority for shifting the ship, and also the crew's overtime. This overtime was incurred in shifting the ship from the wharf to the stream and in looking after the stowage of the cargo. It was an expense which was necessarily incidental to the shifting of the cargo and, as such, is recoverable under the seaworthy trim clause. It is true that cl. 48 says that "overtime to be for account of the party ordering it", but that is a general clause which must give place to the particular provisions of the seaworthy trim clause. The shipowner is entitled, in my opinion, to the £9 13s. 6d. claimed by her. D

I do not think, however, that the shipowner can recover any compensation for the twenty-one hours' delay to the ship. My reason is simply because the word "expense" means money spent out of pocket and does not include loss of time. At any rate, that is clearly its meaning in this charterparty, because there are numerous clauses which draw a distinction between "expense" or "expenses" on the one hand, and "time occupied" on the other hand. In clause after clause you will find that, whenever the parties intend that time is to count as lay days, they say so expressly. I may refer, for example, to cl. 9 of the print and cl. 49 of the type. This leads me to think that "time" is not included in "expenses". If it is to count, the parties must say so; otherwise it is not recoverable. E

It was suggested in the course of the argument that "expense" might include the cost of running the ship for the time occupied, and thus enable the shipowner to recover a proportion of wages, insurance, overheads and so forth. Counsel for the shipowner did not press this suggestion very much because of the practical difficulties in its application. He put his case plainly and distinctly on loss of time, for which he should be paid a sum equal to the demurrage rate. On this he is wrong, because it is not an "expense". In any case, the cost of running F

A the ship is, I think, not recoverable because it is not expense incurred "in shifting, discharging or reloading the cargo".

Counsel for the shipowner next contended that the time should count as lay days, because it was time occupied in discharging the cargo, in that the discharge could not be said to be completed until the ship was made trim again ready to proceed on her voyage. The answer is, however, that the discharge was completed as soon as the last grain of the 2,900 tons was put off. The time occupied thereafter in trimming the ship is another matter altogether, and must be recovered under the "Austral" clause or not at all.

C At one time in the agreed statement of facts it was suggested that the sum could be recovered as damages for breach of an implied term in the contract; but that was not pressed before us, for the simple reason that the matter is covered by express clauses in the charterparty and there is no room for any implication.

D I must mention one further matter. Counsel for the charterers urged that this cargo was a "homogeneous" cargo and came within the second sentence of the "Austral" clause. I think not. It was a cargo partly in bulk and partly in bags and was therefore not homogeneous. It is true that this came about only because the master required a proportion of it to be bagged, but that makes no difference. If the charterers themselves had elected to load partly in bulk and partly in bags, it would clearly not be homogeneous. The important matter is the nature of the cargo when it comes to be discharged; and that is the same, no matter whether it results from the charterers' choice or the master's direction.

E In the result, on the agreed statement of facts, I think the shipowner is entitled to recover the sum of £9 13s. 6d. and no more. The appeal should be allowed accordingly.

F **HODSON, L.J.:** This is a claim by a shipowner for moneys due under a charterparty, for demurrage (or damages for detention) and for damages for breach of charterparty. **DEVLIN, J.**, awarded the shipowner £175 in respect of twenty-one hours' delay of a vessel at Cochin and £9 13s. 6d. in respect of overtime paid to the crew there. The defendants, who were the charterers of the vessel, have appealed to this court.

G By the charterparty, dated Sept. 15, 1948, made between the agents for the shipowner and charterers respectively, the shipowner agreed to carry in her steamship, the *Eugenia Chandris*, a full and complete cargo of wheat in bags and/or bulk to be loaded in the Argentine, the charterers having the option of discharging at two safe ports on the same coast of the Dominion of India. The charterers elected to load in bulk, but, for the purpose of complying with the provisions for safe stowage contained in the charterparty, part of the cargo had to be supplied to them in bags, and this was done. All the wheat was of the same quality; it bore no mark or special description. The option of ordering the vessel to discharge at two ports was not exercised before loading commenced, but was exercised on Nov. 5, 1948, during the voyage, by an instruction to the master to discharge part of the cargo at Cochin and part at Bombay.

H The vessel arrived at Cochin on Nov. 25, 1948. Notice of readiness to discharge was given by 1 p.m. Discharge commenced at this hour, as also the lay days. The physical discharge of the quantity of wheat to be discharged at Cochin was completed at 4.30 p.m. on Saturday, Nov. 27, 1948. The vessel was unable to sail to Bombay until Sunday, Nov. 28, at 1.30 p.m. To comply with the requirements of the port authority, the vessel had to shift from the wharf at which discharge had taken place into the stream. The shifting occupied two hours from 4.30 p.m. until 6.30 p.m. on Saturday, Nov. 27, 1948. From then until 6 a.m. on the morning of Sunday, Nov. 28, 1948, the time was occupied in trimming bulk wheat into the lower holds, covering with tarpaulins and stacking bagged wheat over it. The work was passed by the port authority at mid-day. A pilot boarded at 1 p.m. and the vessel sailed for Bombay at 1.30 p.m.

on that day. If the charterers had not exercised their option to discharge at two ports, Cochin and Bombay, none of the delay and none of the extra expense claimed would have been incurred. A

The charterparty included the seaworthy trim clause taken from the "Austral" charterparty, which my Lord has already read.

The main question to be determined is whether the charterers are liable to pay for the twenty-one hours' time during which the vessel was delayed at Cochin. This depends on the construction of the words B

"any expense incurred by the shipowners at the first port of discharge in shifting . . . any cargo . . . for the purpose of putting the vessel into seaworthy trim for the passage to the second port."

DEVLIN, J., said:

"There can be no reason in principle why specific disbursements should be distinguished from any other form of loss or expense which the shipowner has to bear as a result of the late declaration of two ports. The same principle could, in fairness, be made to cover them both; indeed, it is manifest, as I should have thought, that delay and the cost of delay to the shipowner is bound to be by far the larger part of the result of what I call the delayed declaration, and to exclude that from the compensation he receives under the clause would be to give him very far from an equitable recompense if delay and all the cost of running the ship and so forth are to be excluded. Accordingly, I think a broader meaning should be given to the words and that they should cover the cost of the delay and the expenses which are set out in para. 9 of the agreed statement of facts. I think they cover in a broad sense the expense to the shipowner of having to do the work of shifting, discharging and reloading the cargo." C D

In my judgment, the learned judge has given to the words "any expense" in this context too extended a meaning. The extract from the "Austral" charterparty covers the situation which has arisen, since the option of ordering the vessel to discharge at two ports was not exercised before loading had commenced and the clause is designed to compensate the shipowner for the particular expense described. This is expense incurred at the first port in shifting cargo, not by reason of shifting it. I do not find these words apt to cover the whole expense of running the ship during the period in which she was delayed. Such expense is not, in my opinion, properly described either as incurred at the first port of discharge or in shifting the cargo. The qualifying words following the words "any expense" have, in my opinion, the effect of showing that the expense is limited to specific disbursements and not extended to matters which are involved in the delay of the ship and the consequent loss to the owner. E F

When time is in question, provision is to be found in the language of the charterparty. Several examples of this are to be found, such as in cl. 11, 13, 15, 45 and 49. Clause 9 is typical. It deals with loading berths, and reads: G

"Steamer to shift at her own expense to a second safe shoot or berth, in any rotation, at each loading port or place if required by charterers. If it is necessary for the steamer to get up steam to enable her to shift to a second loading shoot or berth notice to be given before loading at the first berth is completed otherwise time lost to count as lay days." H

The expense of shifting and time are here dealt with separately, and cl. 9 may, I think, be looked at as a parallel clause to the "Austral" clause under consideration for the purpose of construing the latter. I

These clauses lead to the conclusion that, if the parties had intended to cover loss of time in the "Austral" clause, they would have said so, for when time is to count it is made clear. Further, it is not, I think, irrelevant to remember that demurrage is, as I think DEVLIN, J., has said in another case, an agreed quantity of damages for detention, and in this case it appears to have been taken as the

A basis of the award, for the expense caused by the twenty-one hours' delay has been equated to demurrage and thus has the figure of £175 been reached. This involves a simple calculation which is contemplated where time is counted as lay days.

I do not think, however, that the demurrage rate is necessarily the right measure of compensation for delay, for, if the words "any expense" in their context are wide enough to cover cost of delay, the demurrage rate may well be too low. If the owner is right in her contention, the figure should be such as fully to compensate her for the delay incurred and would involve a detailed calculation of all the items which are included in the cost of running the ship. Such a calculation would be possible and is made by the Admiralty registrar in many cases where damages for detention are awarded, but I cannot think that the parties contemplated an elaborate inquiry in order to ascertain the cost to the owner of delay when using the words "any expense" and defining this as that which is incurred at a specific port in shifting cargo. Moreover, most of the cost of running the ship was not incurred at Cochin and could not be ascertained until the end of the voyage. On the other hand, they must have had in mind specific disbursements incurred at the port in the operation of shifting cargo. Finally, apart from context, I think the primary meaning of the word "expense" is actual disbursements. Taking the words "any expense" in the context of the "Austral" extract and of the whole charterparty, I give the words their primary meaning.

I have confined what I have said to the first part of the incorporated extract from the "Austral" charterparty and have not referred to the last sentence, which deals with homogeneous cargoes, since I agree with DEVLIN, J., and with his reasons for thinking that this cargo was not homogeneous in the sense of the definition provided in the same sentence. I need not, therefore, further consider the last sentence of the extract.

The second head under which the owner claims is demurrage. The discharge of cargo at Cochin ceased at 4.30 p.m. on Saturday, Nov. 27, and the whole of the vessel's delay supervened. The ship was then dealing with the re-stowing of the Bombay cargo. The claim, therefore, must fail under this head.

There was an alternative claim for damages for breach of charterparty based on an implied term in the charterparty to cover the cost of delay in the circumstances of this case, but this, it was rightly said by the charterers, would involve an embroidering of the charterparty without justification, and the claim was not pressed under this head. Any loss by delay not covered by the charterparty must lie where it falls.

There remains a sum of £9 13s. 6d. for crew's overtime after 4.30 p.m., being money expended in connection with shifting the ship and looking after the stowage of the cargo. Clause 48 of the charterparty deals with overtime as follows:

H "Overtime to be for account of the party ordering it. If ordered by the port controller or his representative, charterers to pay all extra expenses incurred."

Since the shipowner cannot recover under this clause, she relies on the overriding effect of the typed clause taken from the "Austral" charterparty and says that this money represents expense incurred in shifting the cargo at the first port of discharge.

I The charterers have not disputed certain sums for crew's overtime, but object to pay the sum in question for the following reasons: As to £3 19s. 6d., this was incurred, it is said, in shifting the ship and not in shifting the cargo. The answer to this objection is, I think, that in the circumstances of this case shifting the ship was part of the operation of shifting the cargo and therefore that the objection fails. As to the balance, it is said that looking after the stowage is not shifting cargo, but work of superintendence while the stowdors were

working. I reject this objection also, as I think superintendence of the work is necessarily involved in its performance. A

The "Austral" clause does, in my opinion, override cl. 48 so as to cover these overtime payments and, accordingly, I would allow the claim for the £9 13s. 6d. Otherwise, I would dismiss the claim and allow the appeal to the necessary extent.

MORRIS, L.J.: The charterers had the option of discharging at two safe ports on the same coast of India. They did not, however, exercise that option before loading commenced. The result was that, under the seaworthy trim clause, they might be liable to pay certain expenses incurred by the shipowner. The question arises whether, in the events that happened, the charterers became so liable. B

The vessel was required to discharge 2,900 tons of wheat at Cochin and that quantity (all in bulk) was discharged by 4.30 p.m. on Saturday, Nov. 27. The vessel could not, however, immediately sail for Bombay, for the reason that the port authority lawfully required that the bagged cargo already on board should be re-stowed to their satisfaction before the vessel sailed. To comply with this requirement the vessel had to move from the wharf at which discharge had already taken place to the stream. This move took two hours (i.e., until 6.30 p.m.). From 6.30 p.m. until 6.0 a.m. on Sunday, Nov. 28, the time was occupied in trimming bulk wheat into the lower holds, covering it with tarpaulins and stacking bagged wheat over it. The satisfaction of the port authority, which was requisite, was expressed at noon. A pilot boarded the vessel an hour later, and the vessel sailed half an hour afterwards (i.e., at 1.30 p.m.). C D

In the circumstances to which I have referred, I consider that the following words of the seaworthy trim clause became applicable: E

"... any expense incurred by the shipowners at the first port of discharge in shifting . . . any cargo . . . for the purpose of putting the vessel into seaworthy trim for the passage to the second port . . . shall be paid by the charterers . . ."

It was submitted on behalf of the charterers that the first part of the seaworthy trim clause did not operate in the event of the cargo being what in the second sentence of the clause is called "a homogeneous cargo", and it was submitted that the cargo on the vessel was "a homogeneous cargo". Such a cargo is referred to in the sentence as being cargo "of the same description, quality and mark". I do not think that it is necessary to say that the second sentence is alternative to the first. But where a cargo is a homogeneous cargo and where the master performs the duty of discharging the cargo G

"in such manner as to leave the vessel in seaworthy trim to proceed to the second port of discharge",

there would not, in ordinary circumstances, be any expense incurred by the shipowner which, within the words of the first part of the clause, would qualify for payment by the charterers. In the present case, however, I do not consider that the cargo was "a homogeneous cargo" as that phrase in its context and with its definition was used. I consider that, for present purposes, wheat in bulk should not be regarded as "of the same description" as wheat in bags. H

The words of the seaworthy trim clause which I have recited above as being applicable involve that in this case there can be recovery (a) if there was expense incurred by the shipowner, (b) if such expense was incurred at Cochin, and (c) if such expense was incurred in shifting cargo for the purpose of putting the vessel into seaworthy trim for the passage from Cochin to Bombay. I

One part of the claim presented by the shipowner (see para. 11 of the agreed statement of facts) was that she should be recouped by the charterers "in respect of the delay to the vessel". That the vessel was delayed is, I think, beyond

- A doubt and the delay was caused by the necessity of putting the vessel into seaworthy trim for the passage from Cochin to Bombay (subject only to the subsidiary question whether the delay from noon on Sunday to 1.30 p.m. was unconnected with the work of putting the vessel into seaworthy trim). If there had not been the necessity of putting the vessel into seaworthy trim at Cochin, then she would have sailed for Bombay at 4.30 p.m. on Saturday, Nov. 27.
- B As it was, the vessel was delayed because the trimming had to be done and the cost of running the vessel for twenty-one hours (or at least $19\frac{1}{2}$ hours) was caused by the delay. The shipowner can only recover if she can bring herself within the words of the contract which she made. The figure that has been awarded to the shipowner is £184 13s. 6d., of which £175 was on what was called "the delay account". That amount of £175 related to a period of twenty-one hours' delay
- C and was calculated on the basis that a reasonable figure to take for the purpose of assessing any damages payable for the detention of the vessel would be £200 for twenty-four hours. Such a figure would include something for loss of profit. I find it difficult to see how, on any footing, a loss of profit related to time lost could be said to be an "expense" incurred at Cochin in shifting cargo.

- Though it may well be that the shipowner incurred expense and also suffered
- D a loss of profit as the result of delay, the sole question here is whether she proved that she incurred expense at Cochin in shifting cargo. The word "expense" conveys the idea of something spent or laid out or paid or disbursed or of some liability incurred. If it had been desired to compensate the shipowner on the basis of the value of time lost, that could have been provided for in the contract. The contract had of necessity to make provisions relating to time for purposes of
- E loading and unloading and there were provisions as to when demurrage should be payable and as to the amount of it. Thus in cl. 9 of the charterparty (which deals with loading berths) it is provided that

- "if it is necessary for the steamer to get up steam to enable her to shift to a second loading shoot or berth notice to be given before loading at the first berth is completed otherwise time lost to count as lay days."

- F Clause 11 deals with loading orders. If orders for the first loading port or place were not given as specified in the clause, then it was provided that

"all time lost to the steamer through waiting for orders shall be reckoned as loading time, or in the event of this charter being cancelled, shall be paid for at the demurrage rate hereinafter mentioned."

- G In the same clause it was provided that in a certain event

"the time lost in putting up shifting boards (if required) shall count as lay days . . ."

- In other events it was provided by cl. 15 that the time occupied in erecting shifting boards was not to count as lay days: and by that clause it was also provided that time occupied or time lost by reason of certain stated events should not count as lay days. Clause 13 provided for the rate of loading and for the amount of demurrage, if payable, and contained the necessary provisions as to when time for loading should commence to count. Other provisions in the charterparty related to unloading and to ports of discharge. Clause 26 contains a provision as to the time from which lay days are to count where there is insufficient water at a discharging port, and provides that in the defined circumstances "time occupied in proceeding from the anchorage to the port of discharge is not to count". Clause 45 provides for the average rate of discharging and for the amount of demurrage, and defines when "time" is "to count". When at a loading port or place, the steamer had, if required by the charterers, to shift at her own expense to a second safe shoot or berth (see cl. 9). If two berths were used at the discharging port, then by cl. 49 it was provided as follows:

"cost of shifting including bunker fuel used to be for charterers' account and time occupied in shifting to count."

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A consideration of these various clauses lends confirmation to the view that the words "any expense incurred" are not apt words to bring about the result that there is to be recoupment in respect of delay on the basis of what sum would be awarded if the ship were delayed or detained. If the parties had wished to provide that, in the stipulated circumstances, any time occupied at the first port of discharge in shifting cargo for the purpose of putting the vessel into seaworthy trim for passage to the second port should count as part of the lay days, it would have been easy for them so to provide and to use language comparable to that used where in various events they were agreeing that time should for certain purposes count. For these reasons, I consider that the claim in its widest form was not established.

This still leaves the question whether expense was incurred at Cochin in shifting cargo. The facts are not in dispute. Instead of proceeding on her voyage to Bombay at 4.30 p.m. on Saturday, Nov. 27, the vessel had to move from the wharf to a position in the stream. Why? Because some shifting of the cargo, to put the vessel into seaworthy trim, was necessary. The expense of moving the vessel seems clearly to be an expense within cl. 43. I do not think that the words "any expense incurred . . . in shifting" in cl. 43 can be limited to the expense incurred in the actual touching or handling of the cargo. This matter can be tested by considering what would have been the position if, instead of merely having to shift the cargo, the vessel had had to discharge cargo on to a quay or into a warehouse. It could hardly be said that the clause covered merely the handling of the cargo and did not extend to cover any warehouse charges or port charges or dues which might be involved. The expense referred to in the seaworthy trim clause, I think, must include any expense necessarily incurred and solely incurred in order to effect the required shifting or discharging or re-loading of the cargo. In the present case I cannot think that the charterers could have avoided refunding to the shipowner the amount which the latter had to pay to the port authority by way of shifting charges in respect of the ship. The charterers did in fact refund these amounts, but with no admission of liability so to do. In the move, bunker fuel may have been used. If so, the expense of this was, I think, clearly an expense that became necessary because cargo had to be shifted. It was only incurred because the cargo had to be shifted and in order that the cargo could be shifted. It was, I think, an expense incurred in shifting the cargo.

The position may be compared with that which is covered by cl. 9, to which I have referred. Under that clause, the charterers may require the vessel to shift to a second safe shoot or berth at each loading port or place and then ordinarily the vessel is "to shift at her own expense". In the present case, if the movement of the vessel was occasioned by the necessity of shifting the cargo, as I think it was, then the expense of moving the vessel has to be paid by the charterers. By a parity of reasoning, it seems to me that the expense of maintaining the vessel, not during the voyage or during loading or unloading times, but in the place where shifting of cargo for trimming purposes had to be done and for such time only as the process of trimming involved, was an expense incurred at that place in shifting cargo for the purpose of putting the vessel into trim.

After the vessel was moored in the stream, work was done by stevedores in trimming bulk wheat into the lower holds, covering it with tarpaulins and stacking bagged wheat over the tarpaulins. The sums payable to the stevedores constituted an expense incurred in shifting the cargo. But the stevedores could not have done this work unless the vessel remained at Cochin and, indeed, the vessel was not allowed to leave and was obliged to stay until the shifting had taken place. It seems to me, therefore, that the cost of running and maintaining the vessel at Cochin was an expense incurred in shifting the cargo. Had the necessity to shift the cargo not arisen, the vessel would not have been at Cochin at all after 4.30 p.m. on Nov. 27. She would have been sailing on so as to

A complete her voyage, so as thereafter to be free to earn freight on a further voyage.

The necessity of shifting the cargo involved that some overtime had to be worked by the crew. An amount of £14 9s. 3d. in respect of such overtime is admitted by the charterers to be payable by them. This means that it is admitted that the overtime payments due from the shipowner to her crew constituted an expense incurred in shifting the cargo. Equally I think that the expense of maintaining the vessel for some time in a place where she otherwise would not be, and maintaining her there solely for the purpose of shifting the cargo, was an expense in shifting the cargo. Overtime also became payable to certain officers and men of the crew who had to look after the stowage of the cargo. The amount of such overtime was, I think, clearly an expense in shifting the cargo. It is true that by cl. 48 it is provided that overtime is "to be for account of the party ordering it". But that is a general provision and it is overridden by the special provision of cl. 43 if particular facts bring the seaworthy trim clause, which is a part of cl. 43, into operation. The overtime payments to certain officers and men only arose because of the necessity of, and in the process of, shifting the cargo to put the vessel into approved seaworthy trim; so the expense solely caused by having to wait while cargo was shifted and until trim was approved was an expense incurred at Cochin. If expense was there incurred, in the sense that liability to pay was there incurred or in the sense that things that cost money were there consumed (such as fuel for the ship or food for the crew) or in the sense that services which have to be paid for were there prolonged, then it is immaterial that actual payment may have been made elsewhere.

It was submitted on behalf of the charterers that, though the words of the seaworthy trim clause are borrowed from the "Austral" charter, they are firmly incorporated into the charter now under consideration, the whole of which can therefore be looked at where construction of words or phrases is necessary. I think that this is correct and it is, I think, a legitimate argument that where "time is to count" this is in terms agreed. In the events that have happened, it could not be said that time was to count as discharging time. The applicable words must be given only their reasonable meaning. The charterparty employs in some clauses the phrase "extra expenses". Clause 6 provides that in some circumstances "all extra expenses" in loading and discharging cargo other than grain are to be paid by the charterers. Clause 14 provides:

"The steamer to work at night if required by the charterers, they paying all extra expenses for such work."

Clause 48 provides that, if overtime is ordered by the port controller, then the charterers are to pay "all extra expenses" incurred. Overtime involves an "extra" expense because payments in respect of labour services for ordinary hours would merely be an expense. The phrase "extra expenses" denotes expenses additional to expenses which would otherwise be incurred. The phrase "any expense incurred" must have a wider import.

The conclusion that I have reached is that the phrase "any expense incurred" did not cover loss of profit or loss of earnings and that the amount to which, in the events which happened, the shipowner became entitled could not be measured on the basis of the demurrage rate or by reference to a figure that it would be reasonable to take for the purpose of assessing damages payable for the detention of the vessel. In my judgment, the shipowner is entitled to receive a sum which represents the expense she incurred at Cochin in shifting the cargo. On the agreed facts, which are special to this case, there was expense incurred of the nature to which I have referred. The material is not before the court to enable it to determine the exact sum. Unless it were agreed, there would have to be further inquiry. Any inquiry will involve investigating the facts and figures of this particular case. If any expense incurred in the period after mid-day on the Sunday (when the port authority expressed satisfaction with the trimming)

was avoidably incurred, then it would not be allowed: but, in the absence of proof to the contrary, it would be reasonable to assume that the vessel sailed as soon as was practicable after permission to leave was forthcoming. In my judgment, the facts of the case show that the agreement would have operated somewhat hardly on the shipowner had there not been an inclusion of words entitling her to be recouped for expense incurred.

An alternative method of claim, expressed as being one for damages for detention and alleging breaches of implied terms of the charterparty, was abandoned. A further alternative method of claim was argued, in that it was submitted that the activities between 4.30 p.m. on Saturday, Nov. 27, and midnight should be regarded as being part of the process of discharging, with the result that the 7½ hours should count as time used as part of the lay days. The submission did not extend to the time after midnight because of the provision in cl. 45 that Sundays were to be excepted from inclusion as weather working days for discharging. I cannot accede to the submission made. It seems to me that discharging ended at 4.30 p.m. and that the later activities were of the nature for which special provision was made by the terms of cl. 43.

In the result, while I am to a substantial extent in agreement with the conclusions of the learned judge, I consider that the sum to which the shipowner is entitled should not include any allowance for loss of profit, but should be specifically computed so as to represent the actual expense incurred at Cochin in shifting the cargo. I have indicated which are the kinds of items of expense which, in my judgment, should be computed. In the result I would have allowed the appeal to the extent that, instead of receiving the sum awarded, the shipowner should receive a sum to be calculated (either in a further hearing or in an inquiry or reference) on the basis that I have set out.

Appeal allowed. Order of DEVLIN, J., *varied by substituting* £9 13s. 6d. *for* £184 13s. 6d.

Solicitors: *William A. Crump & Son* (for the charterers); *Constant & Constant* (for the shipowner).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re W. AND ANOTHER (infants).

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.), January 16, 1956.]

Court of Appeal—Interlocutory appeal—Leave to appeal—Appeal from order varying maintenance of infants—Original order related both to custody and maintenance—Whether variation order was an order where custody of infants concerned—Whether leave to appeal necessary—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5 c. 49), s. 31 (1) (i) (i).

Infant—Maintenance—Custody granted to mother—Means of mother taken into consideration in assessing sum payable by father—Guardianship of Infants Act, 1925 (15 & 16 Geo. 5 c. 45), s. 3 (2).

In or about 1953 the mother of two infant children left the matrimonial home, and she and the children went to live with her parents. On Jan. 13, 1955, a magistrates' court made an order, under the Guardianship of Infants Act, 1886, s. 5 and the Guardianship of Infants Act, 1925, s. 3 (2), whereby the custody of the children was granted to the mother and, by consent, the father was directed to pay 30s. a week for the maintenance of each child. Shortly afterwards the husband applied for a variation of the order by reducing the amount payable in respect of the children, on the ground that he was unable to comply with the terms of the order, but he did not apply for any variation of the order in so far as it gave the custody of the children to the mother. The justices made an order dated Apr. 25, 1955, reducing the sum payable in respect of each child from 30s. to 22s. 6d. a week. An

- A appeal by the mother to the Chancery Division of the High Court was dismissed and, the judge having refused leave to appeal, the mother applied therefor to the Court of Appeal. On the questions (a) whether the judge's order, which admittedly was an interlocutory order, was one where the custody of infants was concerned within s. 31 (1) (i) (i) of the Supreme Court of Judicature (Consolidation) Act, 1925 (since, if it were, leave to appeal would not be needed), and (b) whether the justices were entitled, under s. 3 (2) of the Guardianship of Infants Act, 1925, to have regard, not only to the means of the father, but also to the means of the mother,

B **Held:** (i) leave to appeal was necessary since neither the justices' order of Apr. 25, 1955, nor the judge's order on appeal to him was an order where the custody of infants was concerned, within the meaning of s. 31 (1) (i) (i) of the Supreme Court of Judicature (Consolidation) Act, 1925, as the question of custody did not arise before the justices or the judge on the occasions of the making of those orders and, therefore, since the order of the judge was an interlocutory order under s. 31 (1) (i) of the Act of 1925, the mother could not appeal from the order without leave.

C (ii) in determining what was a reasonable sum to order the father to pay to the mother for the infants' maintenance, under s. 3 (2) of the Guardianship of Infants Act, 1925, the mother's means was a relevant circumstance which could be taken into account among other circumstances (*Re T. (an infant)*, [1953] 2 All E.R. 830 approved); but there might be circumstances (e.g., if the mother were at work, the child young and delicate and with no one to look after him, and the husband's means sufficient to enable both to be supported) where the mother's means should not be a criterion (observations of ROXBURGH, J., in *Re T. (an infant)*, [1953] 2 All E.R. at p. 831, considered; see p. 372, letter F, post).

E (iii) in the circumstances leave to appeal would be refused.

F Per SIR RAYMOND EVERSHED, M.R.: it was rightly conceded that the order of the judge was an interlocutory order (*Chinchen v. Chinchen* ([1950] W.N. 22) and *Re W. (an infant)* ([1953] 2 All E.R. 1337) followed; see p. 371, letter B, post).

Application dismissed.

[For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (i) (i), see 5 HALSBURY'S STATUTES (2nd Edn.) 360.

G For the Guardianship of Infants Act, 1925, s. 3 (2), see 12 HALSBURY'S STATUTES (2nd Edn.) 955.]

Cases referred to:

- (1) *Chinchen v. Chinchen*, [1950] W.N. 22; 2nd Digest Supp.
 (2) *Re W. (an infant)*, [1953] 2 All E.R. 1337; 3rd Digest Supp.
 (3) *Re T. (an infant)*, [1953] 2 All E.R. 830; [1953] Ch. 787; 117 J.P. 517;
 H 3rd Digest Supp.

Motion.

I This was an application for (i) an order for leave to appeal from an order of ROXBURGH, J., made on Oct. 5, 1955, and entered on Nov. 8, 1955, and (ii) an order that leave to appeal be allowed notwithstanding that the time for appeal had expired. Alternatively, the applicant applied for an order that she was entitled to appeal from the order of ROXBURGH, J., notwithstanding that the time for appeal had expired.

The applicant was the wife of the respondent, who lived at all material times at Loughborough, Leicestershire. In or about November, 1953, the applicant left the matrimonial home, taking with her the two infant sons of the marriage, and went to live with her parents in Cardiff. On Jan. 13, 1955, at the magistrates' court at Cardiff, the stipendiary magistrates, in exercise of their jurisdiction under the Guardianship of Infants Acts, 1886 and 1925, made an order

granting the legal custody of the children to the applicant (referred to hereinafter as "the mother"), and directing the respondent (referred to hereinafter as "the father") to pay 30s. a week to the mother for maintenance in respect of each child, the father having voluntarily offered to pay this amount. The infants were then about four and six years of age. Shortly afterwards a complaint was made by the father for a variation of the order of Jan. 13, 1955, on the ground that since the making of the order the maintaining of the matrimonial home had placed heavy commitments on him by virtue of which he was unable to meet the terms of the order. The father did not challenge the direction of the Cardiff magistrates as to custody. Under the Magistrates' Courts Rules, 1952 (S.I. 1952 No. 2190), r. 34, the complaint to vary was forwarded for hearing by the justices for the petty sessional division of Loughborough, sitting as a magistrates' court at Loughborough, and was heard by them on Apr. 25, 1955. The mother did not appear, but a letter from her solicitors containing objections to the father's proposals was before the court. In the letter it was stated that the mother, who received no maintenance for herself from the father, had taken a job to support herself. Evidence was given by the father, who said, among other things, that he had kept the matrimonial home together in the hope that the mother might return for the sake of the children, and that, when the mother left, he had to pay £50 in respect of her debts. The justices accepted the father's evidence as to his earnings and expenses, and considered that, having regard to the circumstances of the parties and to the facts (a) that the wife was living with her parents and in work and (b) that the original order was made by consent, they should exercise their power of variation, and, accordingly, they varied the order of Jan. 13, 1955, by directing the father to pay 22s. 6d. a week for each child. On an appeal by the mother from the decision of the justices, ROXBURGH, J., made an order affirming the order of Apr. 25, 1955.

V. B. Watts for the applicant, the mother.

J. H. Boraston for the respondent, the father.

SIR RAYMOND EVERSHERD, M.R.: This motion, which seeks leave to appeal notwithstanding that the time for appeal has expired, has raised two questions of some general significance. First let me say that, although we have not heard counsel for the respondent, the father of the infants, I see no difficulty in the way of the applicant, the mother of the infants, on the question of the time of the application. The order from which the mother desires to appeal is an order made by ROXBURGH, J., on Oct. 5, 1955, and entered on Nov. 8, 1955, whereby the learned judge affirmed an order dated Apr. 25, 1955, and made by the magistrates' court at Loughborough, under the Guardianship of Infants Acts, 1886 and 1925. Counsel for the mother, or those for whom counsel appears, took the proper steps to appeal to this court within due time: the only reason why the matter has not hitherto been considered is because of the other points with which I am about to deal.

[HIS LORDSHIP stated the facts, and, after referring to the evidence given by the father before the magistrates' court at Loughborough on Apr. 25, 1955, said:] To dispose of one of the points taken by counsel for the mother, it seems to me idle to suggest that there was no evidence on which the justices could act. They were entitled to listen to the father's evidence and, if they thought him, as they plainly did, an honest witness, they were entitled to hold, as a matter of fact, that £3 a week was, in the existing circumstances, too great a burden, and that, having regard to his means (I am quoting now the language of s. 3 (2) of the Guardianship of Infants Act, 1925) it was more than he reasonably ought to pay. They, therefore, reduced the 30s. a week to 22s. 6d. a week, and it was from that order that the mother appealed unsuccessfully to ROXBURGH, J.

The first question which counsel for the mother raised is whether any leave to appeal is required. That question depends on the true construction of s. 31 (1)

A (i) (i) of the Supreme Court of Judicature (Consolidation) Act, 1925. Section 31 (1) provides:

"No appeal shall lie . . . (i) without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge, except in the following cases, namely—(i) where the liberty of the subject or the custody of infants is concerned . . ."

B Counsel for the mother conceded that the order of ROXBURGH, J., was an interlocutory order, and, in my judgment, he was plainly right so to concede. The matter has been considered on two occasions by this court: in *Chinchen v. Chinchen* (1) ([1950] W.N. 22), and in *Re W. (an infant)* (2) ([1953] 2 All E.R. 1337). Those cases make it clear, I think, that, even if the matter of custody were directly determined or considered, still an order of the character of any of the three orders which I have mentioned is an interlocutory order or judgment. Counsel submits that although the matter of custody was not debated before the Loughborough justices (and not, therefore, before ROXBURGH, J.) yet the order was one where the custody of infants was "concerned". It is true that the matter of maintenance arose out of the making of the order by the Cardiff magistrates, who, under s. 3 of the Guardianship of Infants Act, 1925, had given custody to the mother and had therefore, under s. 3 (2), proceeded to order maintenance from the father. To say that the order of ROXBURGH, J., was within the scope of the phrase "where the custody of infants is concerned" gives, however, far too wide and vague a signification to those words. ROXBURGH, J., was not in any true sense "concerned" with the custody of the infants. He was not asked to deal with that matter, and the custody was left, by the consent of both parties, with the mother. No question arose before the learned judge which in any way interfered in this respect with the effect of the original order. I think, therefore, that beyond a peradventure this is an interlocutory order and, not being one within sub-para. (i) of s. 31 (1) (i), leave is required in order to challenge in this court the order made by ROXBURGH, J.

F That being so, ought we to give leave? Counsel for the mother said that, notwithstanding the learned judge's own refusal, we should grant leave, on two grounds, the first being that this case raises an important matter of law as to the meaning of s. 3 (2) of the Guardianship of Infants Act, 1925, namely, the competence of the court in such cases to pay any regard to the means of the mother. Secondly, counsel for the mother wishes to challenge the whole proceeding on the ground that there was no evidence which justified, or could have justified, the justices in reducing the sum from 30s. per child to 22s. 6d. per child.

G I have sufficiently dealt already with the second point, because I have stated my view that there was evidence, and I do not propose to spend any more time on it. The other point is, however, of some significance; and I gather that the view that prevailed in this case has been acted on in practice for some considerable time. It is, therefore, right that I should say now whether I think the view hitherto taken is correct. Let me say at once that I think it is. The point arises because of the precise language of s. 3 (2) of the Guardianship of Infants Act, 1925, which is:

I "Where the court under the said section* as so amended makes an order giving the custody of the infant to the mother, then, whether or not the mother is then residing with the father, the court may further order that the father shall pay to the mother towards the maintenance of the infant such weekly or other periodical sum as the court, having regard to the means of the father, may think reasonable."

The contention on behalf of the mother was that the express reference to "the means of the father" necessarily excluded reference to the means of anyone

* Section 5 of the Guardianship of Infants Act, 1886; 12 HALSBURY'S STATUTES (2nd Edn.) 943.

else, whether a mother or a cousin or an aunt or anybody. I do not agree with that view. I accept for my part the reasoning of ROXBURGH, J., in *Re T. (an infant)* (3) ([1953] 2 All E.R. 830). There the conclusion of the matter was put thus by the learned judge (*ibid.*, at p. 831):

"The phrase employed is 'towards the maintenance of the infant', not 'in satisfaction of' or 'in discharge of', or anything of that sort. It is 'towards the maintenance'. The first thing that the court has to consider is: What does the infant need? For that purpose, the court has to consider, for instance, the age of the infant, whether it is at school or in a perambulator or at a university, and its standard of life hitherto is by no means immaterial. It would quite plainly be permissible to consider whether it had funds provided for its maintenance by some deceased parent or aunt. Why not consider how far its mother is able to maintain it? I can see no reason for excluding that one circumstance, which seems to me to be very relevant, from all the other relevant circumstances which have to be considered."

Subject to one qualification, which I will state in a moment, I agree with that statement by ROXBURGH, J. After all, what Parliament is saying is that the court may order the father to pay what the court thinks is reasonable in all the circumstances of the case, including the circumstances particularly appertaining to the infants, having regard to the ability of the father to pay. The slight expansion of the Parliamentary language makes it clear, I think, that the reasonableness must be judged, among other things, in the light of what there is, in fact, available to the infants, whether (as ROXBURGH, J., put it) from the benefaction of a deceased parent or an aunt, or, as in the present case, from the circumstance that the mother is able to make provision, through her own parents, for a home for the children. I now state (though it is perhaps obvious) the qualification. It does not follow that, because it is shown that the mother is earning £x a week, that is necessarily a correct yardstick for determining how much the father, out of what he earns, has to pay. It might well be, for example, that the court would say that the court did not think it at all a good thing that the mother should be earning anything. The children might be very small; they might be delicate; they might have no one to look after them. The court might consider that the mother ought to spend all her time with the children and look after them; and that the father could well afford it if she did. That, no doubt, explains why, in considering how much the father ought to pay, Parliament directs particular attention to the father's means. It seems to me, however, for the reasons which I have already given, that it would be quite contrary to the whole tenor of the Act to make the father's means the exclusive standard, the exclusive subject-matter to be regarded, in fixing what ought to be paid, without any notice whatever being taken of what the particular circumstances of the children may happen to be.

I agree, as I have said, with the judgment of ROXBURGH, J., in *Re T. (an infant)* (3). I gather from what he there said that that view has been acted on by magistrates' courts throughout the country, and I am glad to think that on this occasion I can also give to their interpretation of the matter the imprimatur of the Court of Appeal. For the reasons which I have given, I think that no ground is shown why we should grant leave to appeal.

BIRKETT, L.J.: I agree entirely with the judgment which the Master of the Rolls has just delivered, but I would like to say a few words about the points which have been raised in this rather important matter. The statement of the facts as they appear in the reasons given by the justices for their decision seems to me to have a very considerable bearing on one or two of the matters involved.

The first point arose under s. 31 (1) (i) (i) of the Supreme Court of Judicature (Consolidation) Act, 1925. Section 31 (1) (i) provides that there shall be no appeal

- A “without the leave of the judge or of the Court of Appeal from any interlocutory order . . . made . . . by a judge, except in the following cases, namely—(i) where . . . the custody of infants is concerned . . .”

B There was no question in this case but that the original order made by the Cardiff magistrates, on which everything else has followed, was in the ordinary sense of the word, “concerned” with the custody of the infants, because the order made at the Loughborough magistrates’ court on Apr. 25, 1955, recited that the mother was “granted the legal custody of the two children of the marriage and the sum of 30s. for the maintenance of each of the said children”. Thus, on a strict interpretation of the words used, it would be impossible to say that the order was not “concerned” with the custody of the children. I am quite satisfied, however, that, on the proper construction of s. 31 (1) (i) (i), the word

C “concerned” there means something equivalent to where the custody of infants is in contest or in issue, or is the real matter which is to be determined, and it is only in that event, where a real live issue is before the court dealing with the custody, that the words of sub-para. (i) become operative.

D The other point, which was the important point taken in the case, dealt with the construction of s. 3 (2) of the Guardianship of Infants Act, 1925. The contention on behalf of the mother was that that sub-section really forbade the court to have regard to the means of the mother as distinct from those of the father. [HIS LORDSHIP stated the facts, and continued:] In the course of the reasons which the justices gave for reducing the sums payable by the father, they said:

- E “We considered that, having regard to the circumstances of the parties, the wife living with her parents and in work, and the fact that the original order was made by consent, we should exercise our power of variation and we varied the order to 22s. 6d. per week for each child.”

F Counsel for the mother said that the justices took into account the means of the mother, and that s. 3 (2) gave them no power to do so. First let me say that I am by no means certain that the justices took into account the means of the mother, in any true sense of that term. After reciting the facts and stating that, in their view, the father was an upright and honest man, the justices said:

- G “As the original order was made by consent upon an offer made by the husband we considered that, if we were satisfied that the husband had made an offer which he afterwards realised was too high and with which he was not able to comply, then having regard to the means of the parties we were entitled to reconsider the amount of the order.”

“The means of the parties” may be said, of course, to include what is known about the position of the wife; but the justices went on to say:

- H “We were satisfied that the husband in offering a total sum of £3 per week had taken on an obligation which he had found himself unable to meet. We were impressed by the husband as a witness and considered that his action throughout had been entirely honest and praiseworthy and that his thoughts for his children had been those of a good father . . . we were of the opinion that a weekly sum of 22s. 6d. for each child was a just and adequate sum . . .”

- I There is, therefore, no doubt that the justices did consider, as the main matter in the case, the sum which the father originally had volunteered to give as maintenance for the children, and were satisfied that in making that offer he had taken on a burden or obligation which he could not meet, and they said so after listening to the evidence. The passage, “We considered that, having regard to the circumstances of the parties, the wife living with her parents and in work, and the fact that the original order was made by consent”, may be taken perhaps to mean no more than this: “We have considered the means of the father and we think, having regard to the means of the father, it is reasonable

to make this order of 22s. 6d." That is, of course, what s. 3 (2) enjoins—"such . . . periodical sum as the court, having regard to the means of the father, may think reasonable." A

In the course of the argument I asked counsel for the mother what was the point of the word "reasonable" in that sub-section. He contended that the only matter which the justices could consider was the means of the father. The Master of the Rolls put to counsel various illustrations about money B having been left to the children, or a trust made for them, or a kindly aunt providing for them; but the contention appeared to be that the justices were entitled to consider merely the means of the father. I am not at all sure that, even if that interpretation were right (which I do not think it is), on the facts of this case the justices did not confine themselves to the means of the father in making their order, and that they then said, in effect: "But we know the state C of the parties", as though they were intending to say: "The welfare of the children will in no degree suffer."

Re T. (an infant) (3), a decision of ROXBURGH, J., from which my Lord quoted, is a perfect authority for the justices to do as they did, because there ROXBURGH, J., having this identical point before him, namely, whether the justices could take into account the means of the mother, said that they could. ROXBURGH, J., D said ([1953] 2 All E.R. at p. 832):

"Incredible results would follow if the court could consider, in exercising its discretion under s. 3 (2), only the means of the father—so incredible that counsel did not suggest that that was the interpretation. He says that it should be read as follows: 'The court may further order that the father shall pay to the mother towards the maintenance of the infant such sum as the court may think reasonable, having regard to all relevant circumstances, including means, but, as to means, having regard to those of the father only'." E

ROXBURGH, J., went on to say that a different construction from that suggested by counsel had been put on s. 3 (2) for over thirty years.

In the present case ROXBURGH, J., had to consider the order which had been made as varied by the magistrates' court at Loughborough. Under s. 3 (2) the justices were entitled to look at the circumstances of the case to see what sum was, in fact, reasonable in all the circumstances for the father to pay in this case, and if, on the consideration of that matter, they found the children in a particular situation, they were entitled to take those circumstances into account. I cannot think for one moment that either the justices or ROXBURGH, J., fell into any G error about that matter in this case.

ROMER, L.J.: I agree. For my part I think it is fairly plain that, in exercising the jurisdiction conferred by s. 3 (2) of the Guardianship of Infants Act, 1925, the court may treat as a relevant circumstance the means of the mother. One can imagine a case, for example, where the mother has a house of her own and an independent income of her own of perhaps £1,000 a year, while the husband is in some occupation in which he is earning £6 or £7 a week. In circumstances such as those, it is plain, I should have thought, that justices could properly take into account, having regard to the terms in which the sub-section is framed, the income and assets of the mother. Nevertheless, I should like to re-emphasise what the Master of the Rolls pointed out in the judgment which he delivered, namely, that, although the justices can take a mother's means into account, it by no means necessarily follows that they always should in all circumstances. My Lord gave an illustration of a case in which it might be right not to take the mother's means into account. For example, as he said, where she is working in order to make some money for herself and for the children, which involves her being absent from the home in which the children are living when they are all of tender age, it would be in their interest that she should be there to look after them, and, in those circumstances, if she gave up H I

A her employment she would lose her income, but the children would be better off from the point of view of having her in attendance. There are other examples which might be given as well. But that the court has jurisdiction to take into account as a relevant factor the means of the mother, and, indeed, should normally do so, I have no doubt. For those reasons, with those which my brethren have given, I agree that the application should be dismissed.

B

Application dismissed.

Solicitors: *Rhys Roberts & Co.*, agents for *C. James Hardwicke & Co.*, Cardiff (for the mother); *Vizard, Oldham, Crowder & Cash* (for the father).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

C

LEWIS v. LEWIS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), January 19, 1956.]

Divorce—Residence by wife—"Ordinarily resident"—Temporary absence—Resumption of ordinary residence—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 18 (1) (b).

D

The parties were married in England in 1942 and lived together in a flat in London. The flat was in the wife's name and was furnished to a large extent by her. The wife's parents lived much of the time with the parties at the flat. In 1951 the husband went to Australia in the course of his employment. The wife and child went with him. The parties expected to be in Australia for an indefinite period, although the wife was under the impression that they would return after about six months. The flat remained a home to which they could return but in their absence the wife's parents occupied the flat. On Sept. 11, 1951, the wife set sail for England, taking the child with her, and the husband remained in Australia. She arrived in England on Nov. 4, 1951. On Oct. 5, 1954 (i.e., two years and eleven months after her arrival in England but over three years after her departure from Australia) the wife presented a petition for divorce alleging that the parties were domiciled in England, and, in the alternative, that the court had jurisdiction to entertain the suit under the Matrimonial Causes Act, 1950, s. 18 (1) (b), on the ground that she was resident in England and had been "ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings". On the preliminary issue arising under s. 18 (1) (b),

E

Held: the court had jurisdiction on the ground that the wife had been ordinarily resident in England for the three years immediately preceding Oct. 5, 1954, because (i) on the facts the wife's stay in Australia was temporary at all times and she remained throughout ordinarily resident in England, and (ii) even if she had become ordinarily resident in Australia, her act of boarding a ship to bring her back to the country which had previously been her home was in the circumstances a resumption by her of ordinary residence in England.

F

Observations of SOMERVELL, L.J., in *Macrae v. Macrae*, [1949] 2 All E.R. at p. 36 applied.

G

[For the Matrimonial Causes Act, 1950, s. 18 (1) (b), see 29 HALSBURY'S

H

STATUTES (2nd Edn.) 405.]

Cases referred to:

- (1) *Stransky v. Stransky*, [1954] 2 All E.R. 536; [1954] P. 428; 3rd Digest Supp.
- (2) *Macrae v. Macrae*, [1949] 2 All E.R. 34; [1949] P. 397; [1949] L.J.R. 1671; 113 J.P. 342; 27 Digest (Repl.) 693, 6629.

Issue.

The parties were married in England on Oct. 24, 1942, and there was one child

of the marriage. They lived together in a flat in London. The flat was in the wife's name and was furnished to a large extent by her. The wife's parents resided with the parties at the flat. In 1951 the husband went to Australia in the course of his employment, to work in Sydney. The wife and the child accompanied the husband, the wife being under the impression, according to her evidence, that they would all be returning to England after about six months, or, at any rate, within a year. The wife's parents remained in occupation of the flat. The wife's mother died, and the child became ill, and accordingly, it was agreed between the husband and the wife that she should return to England taking the child with her. The wife left Australia by ship on Sept. 11, 1951, and arrived in England on Nov. 4, 1951. From that date she had continued to reside at the flat in London and the husband had remained in Australia. On Oct. 5, 1954, the wife presented a petition for divorce in which she alleged that the parties were domiciled in England. By amendment the wife alleged that if the parties were not domiciled in England, the court had jurisdiction pursuant to the Matrimonial Causes Act, 1950, s. 18 (1) (b), on the ground that she was resident in England and had been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings. The husband alleged that he was domiciled in Australia. The question whether or not the court had jurisdiction under s. 18 (1) (b) of the Act of 1950 was ordered to be tried as a preliminary issue.

G. H. Crispin and W. J. K. Millar for the wife.

H. V. Brandon for the husband.

WILLMER, J.: Section 18 (1) of the Matrimonial Causes Act, 1950, reads as follows:

"Without prejudice to any jurisdiction exercisable by the court apart from this section, the court shall by virtue of this section have jurisdiction to entertain proceedings by a wife in any of the following cases, notwithstanding that the husband is not domiciled in England, that is to say: . . . (b) in the case of proceedings for divorce or nullity of marriage, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man."

For the purpose of the argument today it has to be assumed—although I am not saying that it is a fact—that the husband is domiciled in Australia.

[His LORDSHIP stated the facts and continued:] The petition was dated Oct. 4, 1954, and filed on Oct. 5, 1954. In those circumstances it is clear that the wife has in fact been continuously resident in England only for a period of two years and eleven months. When I say continuously resident in England I mean physically within the boundaries of this country. It is, however, contended on her behalf, as one of the ways in which her case is presented, that from the time the ship cast off her moorings in Australia the wife, who was bound for England, must be regarded as ordinarily resident in England. The burden of proof is on the wife, who is asserting the jurisdiction of the court on this ground of residence. She puts her case in two ways. On the one hand, she contends that she was resident in this country at the moment of filing the petition, and that she has always been ordinarily resident in this country. On that basis she contends that the relatively short period during which she and the child were physically in Australia was not such a gap as could be regarded as terminating her ordinary residence in this country. In the alternative, should it be held against her that, on leaving for Australia, she ceased to be ordinarily resident in this country, it is contended on her behalf that she resumed ordinary residence in this country from the moment that her ship left Sydney. On that alternative basis, if the argument be acceded to, then she can get three years of ordinary

A residence preceding the presentation of the petition. She cannot, however, get three years' ordinary residence if I have to take the date that the ship arrived in this country.

I have been referred to the judgment of KARMINSKI, J., in *Stransky v. Stransky* (1) ([1954] 2 All E.R. 536) but I need refer only to that part of the judgment (*ibid.*, at p. 541) in which he quotes the words of SOMERVELL, L.J., in *Macrae v. Macrae* (2) ([1949] 2 All E.R. 34). It seems to me that the whole of the law which I have to administer in the present case is summed up in one short passage from the judgment of SOMERVELL, L.J., where he says this ([1949] 2 All E.R. at p. 36):

C "Ordinary residence . . . can be changed in a day. A man is ordinarily resident in one place up till a particular day. He then cuts the connection he has with that place—in this case [*Macrae v. Macrae* (2)] he left his wife; in another case he might have disposed of his house—and makes arrangements to have his home somewhere else. Where there are indications that the place to which he moves is the place which he intends to make his home for, at any rate, an indefinite period, as from that date he is ordinarily resident at that place."

D I propose to endeavour to apply that statement of the law to both aspects of the present case, i.e., to test both of the alternative contentions put forward on behalf of the wife by reference to that statement of the law.

E For the husband it is the last sentence of that passage from the judgment of SOMERVELL, L.J., which is particularly relied on. It is contended by counsel for the husband that the present is a case where there were all the indications that the place to which the parties moved in 1951, namely, Australia, was a place where they intended to make their home for, at any rate, an indefinite period. In those circumstances it is contended on behalf of the husband that from the time of arrival in Australia (March, 1951) the parties became ordinarily resident in Australia. On behalf of the wife, on the other hand, it is the earlier sentence which is much relied on, that in which SOMERVELL, L.J., refers to the case of a man—the same would apply to a woman—who cuts the connection with the place where he has been resident. The learned lord justice instances what was the fact of that case, namely, the case of a man deserting his wife; but he also instances the case of a man who has disposed of his house. It is pointed out that nothing like that happened in the present case. On the contrary these parties had a settled matrimonial home at the flat in London. That home was never disposed of. It was throughout retained as a place to which they could return and in the interim the wife's parents were left in residence there.

H The wife's evidence with regard to what she knew about the proposed length of the stay in Australia was challenged by counsel for the husband in cross-examination. I have, of course, heard no evidence on the other side. I do not think that it is necessary to form any concluded view as to the correctness or otherwise of the wife's evidence on this point, and I should certainly wish to avoid doing so, as I do not want to say anything on this preliminary issue which might in any way prejudice hereafter the question of the credibility of the parties. It is sufficient to say that she regarded it as a visit to Australia which was intended to be of limited duration, although what the precise limit was going to be was left indefinite. To that extent I think the husband is well founded in saying that it was to be a residence in Australia for an indefinite period. On the other hand I must confess that I am very impressed in the wife's favour by the other indications detailed in her evidence, namely, the fact that this was her own flat in London where she had her own furniture, where she had left her household goods, and where she had left her parents, so to speak, as caretakers. That all goes to confirm her evidence that the stay in Australia was always intended to be of only temporary duration, and that at the date of departure, and indeed during the term of the wife's residence in Australia, there was always an intention at some time in the future to return to the matrimonial home in England. In those circumstances,

I think the proper view to take on the facts of the present case is that, as in *Stransky v. Stransky* (1) there never was any real interruption of the ordinary residence of the wife in England; that is to say, on the facts I find that during the temporary stay in Australia the wife remained ordinarily resident in England. A

If I am wrong, however, I should like to add that I should in any case have come to the conclusion that this court has jurisdiction to entertain the present case on the basis that a period of ordinary residence of three years in this country has been established, having regard to the fact that the wife left Australia on Sept. 11, 1951. On this alternative point the persuasive argument put forward by counsel for the husband was that the period before Nov. 4, 1951, cannot be regarded as a gap in a current period of residence. When the statute requires that there should be a period of three years' ordinary residence (so the argument goes), you must find that at some time there was a beginning to that ordinary residence. It is not good enough to say that there has in any case been two years and eleven months, and that the other month can be treated as a gap like the gaps in *Stransky v. Stransky* (1)*. Counsel for the husband says that you cannot find a gap until you have found that a period of the ordinary residence has already begun. If I am wrong in thinking that there was, throughout, ordinary residence in the present case, then it becomes, I agree, necessary for me to fix the date when the wife did once again become ordinarily resident in this country; and the choice, as I see it, is between Nov. 4, 1951, from which date it is conceded that she has been ordinarily resident in this country, and, on the other side, Sept. 11. Counsel for the husband says that the wife cannot be taken as being ordinarily resident in this country until she arrives here, whereas it is said on the other side that, even if not ordinarily resident here before, she became ordinarily resident in this country when she boarded the ship which was to take her to England. B C D E

I think myself that is a matter which has to be viewed in the context of all the other circumstances of the case. I think there may be a difference between the case of a person who boards a ship to go to a country where he or she has no roots and no immediate connection, and a case like the present where the party boards a ship to return to the place which has previously been that party's home and where that party has his or her roots. It is only to a case of the latter kind that I am applying my mind at the moment, and I do not wish it to be thought that I am deciding in the present case what is the appropriate inference to be drawn in other cases from the fact of a party boarding a ship to travel from one country to another. In the present case I have regard to the fact that at the time when the wife left Australia there was, as appears from the evidence, and as is apparently corroborated by the letters received by the wife and put in evidence before me, no real intention further to reside or make the matrimonial home in Australia; and I have also regard to the fact that the wife had throughout maintained her flat in this country, where one of her parents was still residing and where she had her furniture. When she boarded the ship in Australia she was boarding it for the purpose of returning to what had previously been her home. In those circumstances it seems to me that, even if she had not been ordinarily resident in England throughout, then the fact of her setting foot on board the ship which was to bring her home from Australia, was in its context to be interpreted as a resumption of ordinary residence in this country. I asked the question in argument, what would the wife have answered if she had been casually asked by someone else in the course of her voyage home: "What is your ordinary residence?" Certainly she would not have said Australia. I apprehend that she would have answered without hesitation "15 Addisland Court, Addisland Road, London." F G H I

It is said that ordinary residence, unlike domicile, is not a thing that everyone is necessarily deemed to have at all. There are, of course, nomadic people who

* See [1954] 2 All E.R. at p. 541, letter B.

- A have no ordinary residence anywhere. I do not propose to deal with that class of case, except to remark that no one can suggest that either of the parties in the present case was a nomad. I think one has got to approach the facts of the present case on the basis that we are dealing with people who are accustomed to live in permanent homes of one sort or another. In those circumstances it would be artificial to take the view that a person such as the wife, during the period of her voyage between Australia and England, had no ordinary residence anywhere at all. If she is to be regarded as having an ordinary residence during that period, the only ordinary residence I can impute to her in the circumstances of the present case is an ordinary residence in this country. For those reasons I come to the conclusion, on both grounds which I have attempted to set out, that the wife was both resident in this country at the date of the presentation of the petition, and had been ordinarily resident within the meaning of the statute, during a period exceeding three years prior to the presentation of the petition.

Order accordingly.

Solicitors: *Culross & Co.* (for the wife); *Coleman & Co.* (for the husband).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

D

NOTE.

E DAVIE v. NEW MERTON BOARD MILLS, LTD.

[QUEEN'S BENCH DIVISION (Havers, J.), January 17, 1956.]

Negligence—Pleading—Defence—Defendants relying on act of third party—Necessary to plead specific act relied on—Ground of defence that tool was supplied by reputable suppliers—R.S.C., Ord. 19, r. 4, r. 15.

F [As to matters which must be specially pleaded, see 25 HALSBURY'S LAWS (2nd Edn.) 267, para. 449.]

Cases referred to:

- (1) *Philipps v. Philipps*, (1878), 4 Q.B.D. 127; 48 L.J.Q.B. 135; 39 L.T. 556; subsequent proceedings, (1879), 40 L.T. 815; Digest (Pleading) 201, 1691.
 (2) *A.-G. v. Sheffield Corpn.*, (1912), 106 L.T. 367; 76 J.P. 185; 13 Digest 366, 997.

G

Action for damages for personal injuries.

H The plaintiff in this case, James Gibson Davie, alleged in his statement of claim that the defendants, New Merton Board Mills, Ltd., were his employers and that in March, 1953, while working on a machine with a drift and hammer, a piece of the drift had broken off and entered his left eye. He claimed that this had happened owing to the negligence of the defendants in, inter alia, failing to supply him with a drift which could be hammered safely without the risk of pieces flying off. In their defence the defendants admitted that the plaintiff was employed by them but they denied all the allegations of negligence in the statement of claim, their defence amounting to a total traverse apart from the one admission stated. At the conclusion of the opening of the case for the plaintiff counsel for the defendants intervened to explain that the defendants would call evidence to show that the drift in question had been bought by them from a firm of reputable manufacturers and that they [the defendants] had no reason to suppose that it was anything but properly made, and that, therefore, they were not negligent. Counsel for the plaintiff contended that the plaintiff had been taken by surprise by this suggestion as, in spite of an order for discovery made on Jan. 18, 1955, that the defendants should within fourteen days deliver to the plaintiff a list of documents relating to the history and origin of the drift

I

in question, no documents had been disclosed to suggest that the drift was not manufactured by the defendants. A

Martin Jukes, Q.C., and *M. J. Morris* for the plaintiff.
Tudor Evans for the defendants.

Tudor Evans: I submit that the defendants when setting up a defence of this character are not obliged to allege in addition to denying negligence that the appliance or plant in question was purchased from some third party. The allegation in the statement of claim is that the particular tool, the drift, was unsuitable in the respects which are there set out. Those are denied in the defence. It is sufficient for the defendants to deny the negligence. They do not have to go further and indicate that the drift was purchased from some third party. That is really a matter of evidence. It is open to the defendants to say that they were not negligent because they did not make the drift but bought it from a reputable supplier. B C

HAVERS, J.: That leaves the plaintiff in a very unfortunate position because he has had no opportunity of joining any other person. Suppose that the defendants succeeded in establishing this defence that they had bought the drift from reputable manufacturers. D

Tudor Evans: If this were a case of plant having been provided for the use of a workman where the plant had some latent defect which was not discoverable on reasonable examination, that would be a matter, in my submission, which defendants would be obliged specifically to plead. Where, however, a denial of negligence involves the assertion that there may or may not be negligence on the part of a third party, defendants are not, in my submission, obliged positively to aver that in their defence. E

HAVERS, J.: There may be a great deal of time wasted and money spent on the issue whether this was a suitable drift, whereas in fact the defendants' case may be that the drift was not suitable but it was bought from reputable manufacturers. The plaintiff has brought expert witnesses to this trial today. Moreover the court is entitled to know from the record what the issues are which have to be tried. F

Tudor Evans: It often happens, particular under the new R.S.C., Ord. 30, that the plaintiff serves a notice to admit facts on the defendant. One way in which, in my submission, this matter could have been settled was for the plaintiff to have delivered such a notice to admit facts to the defendants and to have asked us to admit that the drift was manufactured by us. G

Martin Jukes, Q.C.: This is a genuine surprise. In my submission the plea is in the nature of a confession and avoidance. To this day we do not know who is supposed to have supplied this drift. The makers should be here. I shall have to object at the appropriate stage to any evidence being adduced to show that this drift was made by any other firm than the defendants. It would be unfair to the plaintiff to go on, and perhaps to lose his case, if the law is that the defendants escape if they bought it from a reputable manufacturer. On that view the plaintiff might have to pay all the costs of this action and then sue the manufacturers. He might have to have two actions and two sets of costs, one of which he would have to pay himself. H

HAVERS, J.: I shall have to rule whether on the defence as pleaded this ground of defence is open to the defendants. I

[After further discussion and disclosure of the name of the manufacturers, HIS LORDSHIP requested that the defendants' proposition should be formulated in writing and adjourned the case for a short time.]

Tudor Evans: The proposition is: "that the defendants purchased the drift from a reputable supplier and were not negligent in failing to subject the drift

A to any test or examination before it was put into use." If your Lordship rules against me, I must apply for leave to amend.

B HAVERS, J.: I find that proposition very difficult to extract from the defence, because the pleading leaves it open to the defendants to say that they did not fail to provide the plaintiff with a suitable drift. [HIS LORDSHIP referred to the terms of R.S.C., Ord. 19, r. 4, r. 15, and notes thereto* in the ANNUAL PRACTICE, emphasising that R.S.C., Ord. 19, r. 15, required a defendant to raise by his pleading ". . . all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise". HIS LORDSHIP continued:] I feel bound to rule against the defendants, basing myself on the rules to which I have referred and the notes. I think that this has clearly taken C the plaintiff by surprise.

I shall give leave to amend, the amended defence to be delivered within ten days from today. The conditions of the leave will be that the defendants pay the costs of and occasioned by the amendment, including the costs thrown away today.

Solicitors: *W. H. Thompson* (for the plaintiff); *E. P. Rugg & Co.* (for the defendants).

[*Reported by A. P. PRINGLE, Esq., Barrister-at-Law.*]

* R.S.C., Ord. 19, r. 4, provides: "**Pleading to state material facts and not evidence.** Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be . . ." The note to which HIS LORDSHIP referred was the following:—" **All material facts.** The general rule is thus stated by COTTON, L.J., in *Philipps v. Philipps* (1) (1878) (4 Q.B.D. 127 at p. 139): 'In my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard, and tell them what they have to meet when the case comes on for trial.'"

R.S.C., Ord. 19, r. 15, provides: "**New fact must be specially pleaded.** The defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, statute of limitations, release, payment, performance, facts showing illegality either by statute or common law, or statute of frauds."

The passage which HIS LORDSHIP quoted from the notes in the ANNUAL PRACTICE reads as follows:—

"The office of a traverse is to contradict, not to excuse or justify, the act complained of; its object is to compel the plaintiff to prove the truth of the allegation traversed, not to dispute its sufficiency in point of law. All matters justifying or excusing the act complained of must be specially and separately pleaded . . . And no evidence of such matters can, as a rule, be given at the trial if they be not expressly pleaded."

SHILVOCK v. BOOTH.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Stable, J.J.),
January 27, 1956.]

*National Insurance—Contributions—Recovery—Arrears of contributions—
“Recoverable as a penalty”*.—*National Insurance Act, 1946* (9 & 10 Geo. 6
c. 67), s. 8.—*National Insurance (Contributions) Regulations, 1948* (S.I.
1948 No. 1417), reg. 19 (1), (3), (5).

The respondent pleaded guilty to an information charging him with failing to pay a contribution which he was liable to pay as a self-employed person under the National Insurance Act, 1946. He was also found liable to pay arrears of contributions as a self-employed person, as set out in a notice served on him in accordance with reg. 19 of the National Insurance (Contributions) Regulations, 1948.* The justices having refused to order payment of any of the contributions on the ground that they had no jurisdiction to make such an order in the criminal proceedings then before them,

Held: the justices had jurisdiction under reg. 19 (1), (3) to order payment of the contributions and could have made such an order in the criminal proceedings then before them since, by reg. 19 (5), the unpaid contributions were recoverable as a penalty, viz., in the same way as a fine was recoverable.

Appeal allowed.

[For the National Insurance Act, 1946, s. 8, see 16 HALSBURY'S STATUTES (2nd Edn.) 681; and for a summary of the National Insurance (Contributions) Regulations, 1948, see 15 HALSBURY'S STATUTORY INSTRUMENTS 226.]

Case Stated.

This was a Case Stated by justices for the Borough of Sutton Coldfield, in respect of their adjudication as a magistrates' court sitting at Station Street on Aug. 30, 1955. On Aug. 16, 1955, the appellant, Ashleigh Kenneth Shilvoek, preferred an information against the respondent, Thomas Booth, charging that, between May 15 and May 23, 1955, at 93, Dugdale Crescent, Four Oaks, Sutton Coldfield, he failed to pay a contribution in respect of the week commencing May 16, 1955, which he was liable to pay under the National Insurance Act, 1946, as a self-employed person, contrary to s. 2 (6) of the Act. The respondent pleaded guilty to the offence set out in the information and was convicted thereof, and the following facts were found. A summons was issued in respect of the information and duly served on the respondent, together with a notice dated Aug. 16, 1955, under the National Insurance (Contributions) Regulations, 1948, to the effect that, in the event of the respondent's conviction on the information laid against him, it was intended to give evidence of his failure to pay other contributions as a self-employed person under the Act for a total period of forty-seven weeks during the period between Sept. 21, 1953, and May 15, 1955, amounting to £17 8s. 7d. He had not paid 7s. 5d. in respect of his contribution as a self-employed person for the week commencing May 16, 1955, nor had he paid £17 8s. 7d. in respect of the arrears of his contributions as a self-employed person as set out in the notice, and he was liable to pay these sums to the National Insurance Fund.

It was contended on behalf of the appellant that the justices had jurisdiction to make two orders, one under the National Insurance (Contributions) Regulations, 1948, reg. 19 (1), ordering the respondent to pay 7s. 5d. in respect of the contribution which he was liable to pay as a self-employed person for the week commencing May 16, 1955, and the other under reg. 19 (3) of the same regulations ordering him to pay £17 8s. 7d. in respect of the arrears of contributions which he was liable to pay as a self-employed person during the period between Sept. 21, 1953, and May 15, 1955, as set out in the notice, and that they were under a duty

* The relevant terms of the regulation are printed at p. 383, letters G to I, and p. 384, letter C, post.

- A to make such orders on proof that the respondent had failed to pay such contribution and arrears of contributions, respectively. The respondent, who was not represented, offered no observations.

The justices refused to make the orders asked for on the ground that they had no jurisdiction under the National Insurance (Contributions) Regulations, 1948, reg. 19, or the Magistrates' Courts Act, 1952, or the Magistrates' Courts Rules, 1952, to make an order for payment of a civil debt on proceedings on an information for a criminal offence. The amount which an insured person was liable to pay could be recovered summarily before justices under the National Insurance Act, 1946, s. 54, on complaint and after due service of a summons thereon under the Magistrates' Courts Act, 1952, and the Magistrates' Courts Rules, 1952.

- C Section 47 (3) of the Act of 1952 required a summons issued on complaint to be served before a magistrates' court could order payment of a civil debt. The notice served under reg. 19 of the Regulations of 1948 was neither a complaint nor a summons. The appellant now appealed.

Rodger Winn for the appellant.

The respondent did not appear and was not represented.

- D **LORD GODDARD, C.J.:** This is a Case Stated by justices for the Borough of Sutton Coldfield, before whom the respondent was charged with failing to make an insurance contribution under the National Insurance Act, 1946, and the simple question raised is whether the justices have power not only to order him to pay the contribution in respect of which he was expressly summoned but other contributions which stood in exactly the same position and which he ought to have paid and had not.

- E The matter turns on the true construction of reg. 19 of the National Insurance (Contributions) Regulations, 1948 (S.I. 1948 No. 1417)*. Under the National Insurance Act, 1946, a self-employed person, like an employed person, is liable to make contributions and, under s. 2 (6), if he fails to make contributions for which he is liable there is a penalty not exceeding £10 for any contribution which
- F he does not pay. For the purpose of collecting those contributions, s. 8 (1) of the Act provides:

" Regulations may provide—(a) for . . . the payment and collection of contributions under this Act, including the co-ordination thereof with the payment and collection of contributions under the Industrial Injuries Act . . . "

- G The regulations make provision for the recovery of contributions, and reg. 19 provides:

" (1) In any case where an employer or an insured person has been convicted of the offence under s. 2 (6) of the Act of failing to pay a contribution, he shall be liable to pay to the National Insurance Fund a sum equal to the amount which he failed to pay.

- H " (3) On any such conviction as is mentioned in either of the last two foregoing paragraphs, if notice of intention to do so has been served with the summons or warrant, evidence may be given . . . (b) in the case of an insured person (other than an employed person), of the failure on his part to pay other contributions as such an insured person during those two years; and
- I on proof of such failure the employer or the insured person shall be liable to pay to the National Insurance Fund or, as the case may require, the Industrial Injuries Fund or each such Fund, a sum equal to the total of all the contributions under the Act or, as the case may be, the Industrial Injuries Act, which he is so proved to have failed to pay."

* The Regulations of 1948 have been amended by S.I. 1950 Nos. 330 and 1947; S.I. 1952 No. 1393; S.I. 1953 Nos. 495 and 1544; S.I. 1954 No. 189; S.I. 1955 No. 1602; reg. 19 is not affected by any of these amendments.

That seems to me to be a perfectly intelligible provision. It is akin to the practice of taking into account other offences. They say: "We summon you for one offence, that is to say, establish your liability to pay by getting a conviction for that one offence, and at the same time we serve on you a notice telling you that, if you are convicted of that offence, we shall ask for an order on you to pay all these other contributions which you have not paid." It is really done, I think, not only to save time, but expense and various other things, because, if a man has not paid, say, twenty contributions, he might take the point, "I am not liable to pay". If it is established that he is liable on one of those occasions, then it follows that he ought to have paid and might be liable to be prosecuted for every one of them, and he would be held liable by the justices to pay.

Regulation 19 having provided that, on proof of such failure, the insured person should be liable to pay the amount, it is then provided by para. (5):

"Any sum ordered to be paid to the National Insurance Fund or the Industrial Injuries Fund under this regulation shall be recoverable as a penalty";

in other words, the amount shall be recovered in the same way as the fine is recovered.

I fully realise the trouble the justices and their clerk have taken over this case, and, if they have doubts on a point of law, it is very desirable that they should express them, but I venture to think that they have imagined difficulties which do not really exist. A statute or regulation very often says that a person who fails to do something shall be liable to a fine; that means that he will be fined. If he is liable to pay, that means he can be told that he must pay. He is liable to pay these contributions as he is liable to pay the fine; and, although the draftsman might have written "On proof of such failure the insured person shall be ordered to pay", it is clear enough that that is what is meant. It is a summary and cheap method of recovering these contributions without further proceedings.

For these reasons, I think the justices came to a wrong decision, and this case must go back with a direction that it is their duty to make an order that the respondent should pay the contributions which it has been proved he has failed to pay, by such instalments as the justices may order.

HILBERY, J.: I agree.

STABLE, J.: I agree.

Appeal allowed.

Solicitor: *Solicitor, Ministry of Pensions.*

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A MORRIS v. WEST HARTLEPOOL STEAM
NAVIGATION CO., LTD.

[HOUSE OF LORDS (Lord Morton of Henryton, Lord Porter, Lord Reid, Lord Tucker and Lord Cohen), December 5, 6, 7, 8, 1955, January 31, 1956.]

B *Ship—Negligence in—Seaman injured by falling down an open hatch in grain ship while ship at sea—General practice of grain ships not to fence hatches while at sea—Whether damage reasonably foreseeable—Liability of ship-owners.*

Master and Servant—Liability of master—Seaman falling down an open hatch in grain ship while at sea—General practice of grain ships not to fence hatches while at sea—Whether danger reasonably foreseeable.

C The appellant, a deck hand aged eighteen, who had been some six months at sea, was employed by the respondents on a grain ship and was engaged, while the ship was at sea, in preparing the holds so as to be ready to receive grain on arrival at port. He was sent with two others to find spare boards suitable for use in the hold on which they were working. To find and collect the boards upper hatch covers had to be removed above another hold which had been prepared and the men had to go down 'tween decks and past that hold which was unprotected at 'tween decks by any guard-rails fencing the open hatch. While passing the hold the appellant fell through the open hatch and was seriously injured. The evidence did not show how the appellant happened to fall. Stanchions and rope necessary to form a guard-rail for the hold were available and could have been erected without difficulty. Evidence was given to show that there was a general practice to leave off the 'tween deck hatch covers of holds in grain ships after the holds had been prepared and not to erect guard-rails round the hatches while grain ships in ballast were at sea, and that accidents by falling into such holds were rare; there was also evidence that on this ship men were often sent down 'tween decks to collect pieces of timber after the holds had been prepared.

F **Held** (LORD MORTON OF HENRYTON and LORD PORTER dissenting): notwithstanding the evidence of a general practice not to cover or guard 'tween deck hatches after the preparing of holds was finished, the respondents were guilty of negligence in not fencing the hatch of the hold on this ship, because (i) the risk to which the appellant was exposed by reason of the unprotected hatch was an obvious risk, (ii) the consequences of falling into the hold would obviously be serious, (iii) the risk could readily have been avoided and (iv) (per LORD REID and LORD COHEN) it ought to have been foreseen when the hold was being prepared that on this ship men might later be sent down 'tween decks past this hold.

G Principle stated by LORD DUNEDIN in *Morton v. William Dixon, Ltd.* (1909 S.C. at p. 809) as explained by LORD NORMAND in *Paris v. Stepney Borough Council* ([1951] 1 All E.R. at p. 49) applied.

H Appeal allowed.

[As to a master's duty of care at common law, see 22 HALSBURY'S LAWS (2nd Edn.) 187-191, paras. 313-321; and for cases on the subject, see 34 DIGEST 194-196, 1580-1601.]

I Cases referred to:

- (1) *Paris v. Stepney Borough Council*, [1951] 1 All E.R. 42; [1951] A.C. 367; 115 J.P. 22; 2nd Digest Supp.
- (2) *Morton v. William Dixon, Ltd.*, 1909 S.C. 807.
- (3) *Gallagher v. Balfour, Beatty & Co., Ltd.*, 1951 S.C. 712; 3rd Digest Supp.
- (4) *Carroll v. Andrew Barclay & Sons, Ltd.*, [1948] 2 All E.R. 386; [1948] A.C. 477; 1948 S.C. (H.L.) 100; [1948] L.J.R. 1490; *affmg.*, 1947 S.C. 411; 2nd Digest Supp.

- (5) *Montgomery & Co., Ltd. v. Wallace-James*, [1904] A.C. 73; 73 L.J.P.C. 25; 90 L.T. 1; 36 Digest (Repl.) 373, 142. A
- (6) *Benmax v. Austin Motor Co., Ltd.*, [1955] 1 All E.R. 326; [1955] A.C. 370.
- (7) *Glasgow Corpn. v. Muir*, [1943] 2 All E.R. 44; [1943] A.C. 448; 1943 S.C. (H.L.) 3; 112 L.J.P.C. 1; 169 L.T. 53; 107 J.P. 140; 2nd Digest Supp. B
- (8) *Bolton v. Stone*, [1951] 1 All E.R. 1078; [1951] A.C. 850; 2nd Digest Supp. B

Appeal.

Appeal from an order of the Court of Appeal, dated Dec. 9, 1954, reversing an order of STREATFIELD, J., at Winchester Assizes, dated July 26, 1954. The facts appear in the opinion of LORD MORTON OF HENRYTON.

Sir Frank Soskice, Q.C., and *Michael Lee* for the appellant. C

R. H. Forrest, Q.C., and *M. B. Summerskill (J. F. Donaldson with him)* for the respondents.

The House took time for consideration.

Jan. 31. The following opinions were read.

LORD MORTON OF HENRYTON: My Lords, about 9 a.m. on Oct. 13, 1951, the appellant, Robert Thomas Morris, a seaman aged eighteen years, fell down hatch No. 2 on the 'tween deck of a vessel called the Daltonhall, belonging to the respondents. He fell some thirty or forty feet into the hold and sustained serious injuries. At the time when the accident occurred, the appellant was classified as an "efficient deck hand", and he had been at sea about six months. His experience had been mostly on "home trade" passenger ships, but he had been to sea in a deep sea ship four or five times, including a voyage to the Persian Gulf. D

The following summary of the relevant facts is taken, in substance, from the judgment of PARKER, L.J. When the appellant met with his accident, the vessel was on her way, light, from Avonmouth to Montreal to load grain in bulk. She had left Avonmouth on Oct. 3, and was due in Montreal in three days. She had carried grain on her previous voyage and, in accordance with the normal practice in grain-carrying ships, her holds were being made ready on the voyage, so that she could load on arrival at Montreal. This involved cleaning out the holds one by one, repairing the feeders and shifting boards, making them fast in position and generally making the holds grain-tight. In the process of making each hold ready, men had to work close to the 'tween deck hatch, which had a coaming of only nineteen inches in height so as not to interfere with the operation of swinging loads between the decks. At times they would have to sit on the hatch beams in order to fix the shifting boards in position. With a forty foot drop from the 'tween deck to the bottom of the hold, the preparation of the hold was necessarily a somewhat dangerous operation, albeit one which sailors take in their stride despite the movement of the vessel. As each hold was made ready, the upper deck hatch was battened down, while the 'tween deck hatch covers were left off ready for loading. This vessel, like other vessels, carried stanchions which could be fitted round each hatch, and a wire rope which could be fixed round the stanchions to form a guard-rail. It was necessary to have these stanchions and this wire in order to comply, while in port, with any dock regulations which might be applicable, but this guard-rail could not be up while a hold was being made ready, and was not, in fact, erected round the hold after it had been made ready while at sea. Any timber not required for repairs in a hold was stacked on the 'tween deck beside the side of the ship, occupying four or five feet of the seventeen feet three inches of space between the coaming round the hatch and the side. E F G H I

By Oct. 13, 1951, holds Nos. 1, 2 and 3 had been made ready, and work was in progress on No. 4 hold. The appellant was one of those who had worked

- A on all the holds. On that day, the appellant and two others, on the instructions of the boatswain, went to fetch a piece of timber from the pile of timber on the 'tween deck near No. 1 hold. Owing to there being a bulkhead aft of No. 2 hold, it was necessary to open part of the upper deck hatch covers and to descend to the 'tween deck by means of a rope ladder. On the instructions of the boatswain, these men opened about two sections on the port side and descended.
- B Not finding the desired piece of timber in the pile by No. 1 hatch, they inspected two further piles at and aft of No. 2 hatch. Still not having found the desired piece, they were returning to the first pile in single file, with the appellant last, when there was a scream and the appellant fell down No. 2 hatch.

Exactly how the accident happened will never be known. The appellant, who suffered grievous injuries, remembers nothing, and the two men with him saw nothing of his fall. It was alleged that the light was insufficient, but the evidence did not bear this out, and the learned judge did not so find. It may be that he lost his balance owing to the movement of the ship, and this was the view taken by the learned judge, though it is only right to say that there was no evidence of any unusual or sudden movement. Mr. Burke, one of the men with the appellant, said:

- D "I do not know how the sea was striking us; I do not remember. A bit of sea was running, and a breeze, because she threw a small amount of spray up. I do not recollect; I do not remember that."

The appellant was asked: "How was [the ship] moving?", and replied: "She had a beam swell". He was then asked: "Was there any spray coming over the main deck forward?", and replied: "I do not remember that".

- E The writ in the present action was not issued till Jan. 15, 1954. STREAT-FIELD, J., found that the respondents were negligent in failing to put a guard-rail round the open hatch, and awarded the appellant £10,960 damages, which included £960 agreed special damage. His judgment was set aside by the Court of Appeal (DENNING and PARKER, L.JJ., MORRIS, L.J., dissenting).

- F My Lords, the nature of the evidence required to establish, as against an employer, that he has been guilty of negligence in failing to provide a safeguard for his workmen has recently been considered by this House in *Paris v. Stepney Borough Council* (1) ([1951] 1 All E.R. 42). LORD NORMAND, in a passage which has often been cited since, said (*ibid.*, at p. 49):

- G "The kind of evidence necessary to establish neglect of a proper precaution was considered in *Morton v. William Dixon, Ltd.* (2) (1909 S.C. 807) by LORD DUNEDIN, Lord President. That was an action by a miner against his employers alleging negligence in failing to take precautions against the fall of coal from the top of the shaft into the space between the side of the shaft and the edge of the cage. It was, of course, a Scottish case, but, in my opinion, there is no difference between the law of Scotland and the law of England on this point. The Lord President said (*ibid.*, at p. 809): 'Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either—to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it'. The rule is stated with all the Lord President's trenchant lucidity. It contains an emphatic warning against a facile finding that a precaution is necessary when there is no proof that it is one taken by other persons in like circumstances, but it does not detract from the test of the conduct and judgment of the reasonable and prudent man. If there is proof that a precaution is usually observed by other persons, a reasonable and prudent man will follow the usual practice in the like circumstances.
- H
- I

Failing such proof the test is whether the precaution is one which the reasonable and prudent man would think so obvious that it was folly to omit it.” A

In the same year, in *Gallagher v. Balfour, Beatty & Co., Ltd.* (3) (1951 S.C. 712), the Lord President (LORD COOPER) referred to LORD NORMAND’s speech, just quoted, and observed (*ibid.*, at p. 716): B

“The law . . . as epitomised in the Dunedin formula, has been adopted in every textbook, and, as was observed in *Carroll v. Andrew Barclay & Sons, Ltd.* (4) (1947 S.C. 411 at p. 418), it has been used as a proper direction to juries ‘in scores of cases’, and also, may I add, as a test of the relevancy of scores of cases of defective system.” C

The Lord President protested (1951 S.C. at p. 717) against discarding

“in favour of a milder version the formula which we have used consistently for more than forty years, and which is sanctioned by the highest authority.”

Later he referred to LORD NORMAND’s speech in *Paris v. Stepney Borough Council* (1) (*ibid.*, at p. 718) as “the latest pronouncement on the subject. D
It reverts to the forcible language of the original formula . . .”

My Lords, I refer to *Gallagher v. Balfour, Beatty & Co., Ltd.* (3) because I deprecate a tendency, manifested in the present and other cases, to substitute some other word for the word “folly” in LORD DUNEDIN’s formula. Either the substituted word has the same meaning, in which case the substitution serves no useful purpose, or it has a different meaning, in which case the substitution is unjustified. The word “folly” was repeated by LORD NORMAND and myself in *Paris v. Stepney Borough Council* (1), and there was no difference of opinion in the House as to the test to be applied, although there was a difference of opinion as to the result of applying it. In the present case, attention was called, in the course of the argument, to the fact that in *Paris v. Stepney Borough Council* (1) LORD NORMAND ([1951] 1 All E.R. at p. 50) used the words “so obvious”, whereas LORD DUNEDIN in *Morton v. William Dixon, Ltd.* (2) (1909 S.C. at p. 809) had used the words “so obviously wanted”. I think it is clear that LORD NORMAND did not intend to introduce any qualification into LORD DUNEDIN’s language. He merely desired to point out that, in considering whether a precaution was E F

“so obviously wanted that it would be folly in anyone to neglect to provide it”, G

the court must look at the matter from the standpoint of the reasonable and prudent man. I mention this matter because I can imagine contexts in which the word “obvious” might have a different meaning from “obviously wanted”, H
but the word clearly bore the meaning “obviously wanted” in the context in which LORD NORMAND used it.

My Lords, I now return to the facts of the present case. It is manifest that the evidence, far from establishing that the erection of a guard-rail while the vessel was at sea was

“a thing which was commonly done by other persons in like circumstances”, I

was all to the effect that, for various periods up to forty years, it had never been done by persons in like circumstances. Your Lordships must, therefore, consider whether the appellant proved—for the onus was on him to prove negligence—that a reasonable and prudent owner or master of the Daltonhall would have thought, before the accident happened, that a guard-rail was

A "a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it."

My Lords, in my view, the evidence falls very far short of proving this. In so saying, I am differing from the view of the learned trial judge, who heard the evidence, but, in the present case, there was no conflict between the witnesses, except, possibly, on the question whether men were "often" sent to fetch timber from the 'tween deck. On that question, I accept the finding of STREATFEILD, J., that this was "quite usual". The case is, therefore, one in which the question is simply whether the facts proved do, or do not, give rise to the inference that the respondents were negligent. That question, as the EARL OF HALSBURY, L.C., said in *Montgomerie & Co., Ltd. v. Wallace-James* (5) ([1904] A.C. 73 at p. 75),

C "... the original tribunal is in no better position to decide than the judges of an appellate court."

See also the observations of VISCOUNT SIMONDS in *Benmax v. Austin Motor Co., Ltd.* (6) ([1955] 1 All E.R. 326 at p. 327).

D To my mind, the appellant's allegation of negligence was disproved, to a large extent, by the only witness he called, the seaman Burke, who was with him when the accident occurred. Mr. Burke was an "able-bodied seaman" who had been four years at sea. I quote the following portion of his evidence:

E "Counsel for the appellant: Mr. Burke, while you were working down on the 'tween deck in No. 2 hold, and indeed No. 1 hold, had those hatches on the 'tween deck ever been guarded by hatch boards or guard-rails while the ship was at sea? A.—No, Sir, they had never been covered; while we were working on that particular job they had never been covered.

"STREATFEILD, J.: Covered with what? A.—Hatch boards, and there were no guard-rails.

F "Counsel: Mr. Burke, what was the practice in your four years at sea; what is the practice with merchant shipping at sea when there is work to be done getting the holds ready for a cargo? A.—In that case, when you are cleaning the hold ready for grain, it is general to leave the hatches open in the 'tween deck; that is the usual thing; and as regards the safety rails, for my part I have never seen safety rails erected in a case like that. We had already swept and cleaned the 'tween deck.

G "Q.—Once the work is finished, what happens then? A.—When the work is finished you have no more reason to enter the holds, if the work is finished, and the hatches are still left uncovered.

H "STREATFEILD, J.: But then if you had happened to go and do some more work there, is there any reason why there should not be any guard-rails? A.—No reason, my Lord, no; but there were no guard-rails, and I have never seen them used."

Later he said:

"I have never heard of anyone asking or demanding that guard-rails should be put round while at sea. You would probably be laughed at, Sir."

I I couple with that evidence the evidence of Mr. Clark, the chief officer (forty years at sea): "I have never seen guard-rails erected in my life"; of Mr. Barker, the boatswain (sixteen years at sea): "we never put guard-rails up at sea"; and of Captain Lovegrove (thirty-five years at sea): "In actual practice they are not put up at sea".

My Lords, in the face of this evidence, I would find it difficult to hold that a guard-rail round the hatch was a thing which was "so obviously wanted", that the owners and master of the Daltonhall, and, inferentially, the owners and masters of all the ships of a similar type on which these four experienced witnesses had sailed, were guilty of folly in failing to ensure that such a rail was erected.

I agree with the observation of DENNING, L.J., that "general practice weighs heavily in the scale, but it is not conclusive", but, weighing all the circumstances of this case, I agree with DENNING and PARKER, L.J.J., that the respondents are not proved to have been negligent. It must be borne in mind that, once the work of cleaning and repairing hatches Nos. 1 and 2 had been finished, the portion of the 'tween deck which contained them was a completely enclosed space. The upper deck hatches were battened down and the bulkhead aft of No. 2 hatch cut off this portion of the 'tween deck. No one, except members of the crew, could go into this space while the ship was at sea, and there would appear to be no reason for any member of the crew to go there unless he was ordered, as the appellant was, to fetch timber from one of the three piles already mentioned.

I shall not detain your Lordships by travelling all through the evidence. No witness had heard of any similar accident occurring. The appellant was an active young man of eighteen years who was training to be a heavy-weight boxer and had been at sea for six months, as he said, "more or less for the toughening up process for boxing". The learned judge rejected the suggestion that the light was not good enough to enable him to see where he was going. He knew his way about and knew the exact position of the hatches as he had been working in the preparation of them. There is no evidence that the weather conditions were in any way exceptional. All that he had to do was to follow two other men past the hatch on a portion of the deck, which was twelve feet wide at its narrowest point. Yet he fell through the open hatch. To my mind, this was an extraordinary event which could not have been anticipated. I agree with DENNING, L.J., that the words of LORD THANKERTON in *Glasgow Corpn. v. Muir* (7) ([1943] 2 All E. R. 44), are particularly appropriate (ibid., at p. 47):

"The court must be careful to place itself in the position of the person charged with the duty . . . and not to give undue weight to the fact that a distressing accident has happened . . ."

Further, as PARKER, L.J., said, the reasonable and prudent employer is

"entitled to take into consideration the degree of risk, if any, involved in taking precautionary measures . . . If there was any real degree of risk in walking along the twelve foot gangway, then the risk of accident to a man putting up the guard-rail by the edge of the coaming would be, if anything, greater. Captain Lovegrove said: 'I think it [i.e., the erection of a guard-rail] might be a degree more dangerous than doing a job a few feet away from the hatch—on the basis of movement of the ship. The guard-rail would be only a matter of a few inches from the coaming'; and again: 'If I had a personal choice myself between sending the seaman to get a piece of timber from the wing of the deck, and giving him the job of putting up the guard-rail, and the ship was rolling, I would choose the former.' It is true that other witnesses said that the guard-rail could have been put up without danger in a very few minutes, but it is clear that they all took the view that there was equally no danger in walking along the gangway."

I think that STREATFIELD, J., based his decision in favour of the appellant largely on two answers by Captain Lovegrove. He was asked whether, as a matter of precaution, guard-rails should have been erected, and he answered:

"In practice it is not done; I do not say that they should not be erected, but in practice it is not done."

At the end of his evidence come the following questions and answers:

"Q.—Well, now you know it has been brought home to us all what happens to a young man, a strong and fit young man, who is cast forty feet down to another deck? A.—Yes, but apart from that, the accident, I would go on for quite a considerable time not having guard-rails put up

A because it is not the usual practice to put them up at sea. Q.—But is it not time the practice was altered? A.—I agree.”

My Lords, I agree with the majority of the Court of Appeal in thinking that these answers are too slender a basis for finding negligence against the respondents. Captain Lovegrove was, I think, being wise after the event, being moved, no doubt, by regret that so sad an accident had happened. These two answers must be read together with the rest of his evidence, and he had already said, in agreement with all the other witnesses, that guard-rails never were put up and had added that “it would not occur to anybody to put them up”.

In my opinion, the respondents are not proved to have been guilty of any negligence, and I would dismiss the appeal.

C LORD PORTER: My Lords, the relevant facts in this matter are contained in a very small compass. For my purpose it is enough to say that the appellant was one of three men sent down to the 'tween deck above Nos. 1 and 2 deep holds of the s.s. Daltonhall when on a voyage from Avonmouth to Montreal unladen, but with the purpose of loading grain at the latter port. Their object and instructions were to find spare boards suitable for use in No. 4 hold, which was being cleaned for the reception of cargo at Montreal. That hold was separated from Nos. 1 and 2 by the central structure of the ship and, in order to reach the latter, some of the hatch coverings of the upper deck above No. 1 lower hold had to be removed. From this opening, a certain amount of light was provided for the 'tween deck. One of the appellant's allegations in his pleading was that not enough light was given through the aperture thus provided to enable anyone engaged on a task in the 'tween decks to see his surroundings adequately. I refrain from discussing this point because there was little evidence that it had any effect on the case, and the learned judge who tried it thought a lack of light had no bearing on the conclusion which he reached in favour of the appellant. Reliance was, however, placed on the facts that the first two deep holds were open to the 'tween decks, were unprotected by any guard-rails fencing the open hatches and that the ship was rolling to an appreciable degree in a beam sea.

F The boards on the 'tween decks in question were stacked in three positions—(i) against the skin of the ship opposite the aft end of No. 1 deep hold; (ii) in a pile next to the skin of the ship opposite No. 2 hatchway; and (iii) aft of No. 2 hatchway, and against a temporary bulkhead and some twelve feet inwards from the ship's port side. I ought to add that, in each of the two former cases, the pile of timber extended some four to five feet from the ship's side. In the direct line between the third pile and the second was a trimming hatch, eleven feet behind No. 2 hatchway and eight feet eight inches from the ship's port side, so that anyone passing from the third to the second pile would have to go either to port or starboard of it.

H The appellant was eighteen years old at the relevant time, had been about six months at sea, and four or five times in deep sea ships. He and Mr. Burke, an older and more experienced man, together with Mr. McCambridge, a boy of seventeen, were, on the day in question, the three persons sent to search for suitable timber in the 'tween deck, and it is clear that it was proper, in performing this task, that they should visit and search each of the three piles which have been mentioned. They did search all three piles, starting from that opposite No. 1 hold, proceeding thence to No. 2 and then to No. 3. In none of them did they find the type of material required and, by way of ensuring that they had not overlooked what they wanted, they purposed to return to piles 2 and 1 in order to look again. All three men started to walk back from No. 3 to No. 2 pile, Mr. Burke and Mr. McCambridge leading and the appellant following. On their way a scream was heard, and the appellant was found to have fallen into the deep hold No. 2 and to be very seriously injured.

The sole question for the consideration of your Lordships is whether the respondents were negligent in not fencing the hatchway into this hold. There

was at one time some suggestion that the hatches should have been replaced, A
 but no great stress was laid on this allegation as, admittedly, fencing round the
 hatch would have been an adequate safeguard, and the necessary stanchions and
 wire ropes were available and could easily have been erected in anything from
 fifteen minutes to half an hour. Under Board of Trade regulations, it is
 obligatory to erect the fencing round open holds whilst the ship is in port, unless B
 work is actually being done at the hold in question. At sea, there is no such
 requirement, and, indeed, the respondents claimed to have established in evidence
 a practice never to do so in a grain-carrying ship, as this one was, whilst at sea.
 The appellant, however, asserted that the practice had not been proved to be
 universal in all such ships, and pointed out that, in cross-examination, Captain
 Lovegrove, the expert witness called on behalf of the respondents, acknowledged C
 that he did not know the conditions in the Daltonhall or what the weather was
 like, or what work had been done, or when, and that he was just talking about
 general practice in saying that guard-rails were not put up at sea.

Counsel for the appellant not unnaturally, and perhaps wisely, did not pursue D
 that matter with the witness any further. The witness was not, however,
 asked in what way this ship differed from other grain-carrying ships, and the
 weather and the work which had been done were established aliunde. Apart
 from these matters, Captain Lovegrove's evidence was that, at sea, the guard-
 rails were never erected; he did not say "they should not be erected", but
 "in practice it is not done." In cross-examination he was asked:

"It is just really that it is not done because seamen generally are
 expected to look after themselves?", E

and replied:

"They are not expected to look out for themselves; it is their natural
 bent, and, being seamen, to be able to handle themselves in all parts of
 ships in all weather."

The appellant had complained that he was apt to be seasick and, therefore, had F
 not got his sea legs, though the ship had been some ten or twelve days at sea,
 and the witness was asked:

"You have seen, have you not, men who have not found their sea legs,
 or inexperienced deck hands staggering about the deck with a sudden roll?",

and replied:

"Well, I must say that I have noticed that the average young man will G
 gain his sea legs very quickly; if for no other reason than to prove to his more
 senior mates that he has got hold of the job."

He added that some might find it more difficult

"but not very long after leaving port, not in the case of the young men."

It is only fair to add that he agreed that, after the accident, it was time that the H
 practice of not putting up the guard-rails at sea was altered.

I have set out this evidence because it is, I think, the high-water mark of the
 appellant's case on the question of the danger involved, and was claimed to give
 some support to the contention that the practice of never railing the 'tween
 deck hatches when at sea had not been generally established.

The rest of the evidence on behalf of either side did not accept the existence I
 of any danger. Mr. Burke, a witness for the appellant, when asked in cross-
 examination:

"if you had been sent down to the 'tween decks to carry out some work
 and you knew it was going to take a little longer than just looking for timber,
 you would have asked for a guard-rail to go up?",

replied:

"No, Sir, I would not, it perhaps would not even have crossed my mind."

A As to guard-rails, his general evidence was that they were never put up at sea, though they may sometimes have been left up if erected previously in port. One can perhaps best exemplify Mr. Burke's view as to guard-rails by quoting a further portion of his evidence in cross-examination by counsel for the respondents:

B "Mr. Burke, when you had been at sea on the other ships, do I understand you to say that you had never seen guard-rails on those other ships when the hatch-covers are off the 'tween decks? A.—I cannot recollect seeing any. They did not strike me as being important enough to me, if I had seen them, to remember them. Q.—You cannot recollect? A.—I cannot recollect, but I have never heard of anyone asking or demanding that guard-rails should be put round while at sea. You would probably be
C laughed at, Sir."

One more matter as to danger may conveniently be disposed of at this point. Captain Lovegrove, in his evidence, said that, in his opinion, the putting up of stanchions involved greater danger than passing along the 'tween deck with the hold open. Mr. Burke would have none of it. In his view, it would not involve
D any appreciable danger, and, indeed, this was the general view of the other witnesses and was accepted by the learned judge. There was ample evidence to justify this finding, and, in my opinion, it would be wrong for your Lordships to differ from him.

None of the other witnesses appears to have been asked directly whether, in their opinion, as seamen, they would have looked on the task set to the three
E men as involving any danger, though, in answer to a question by counsel for the appellant, Mr. Barker, the boatswain who sent the men down and was called on behalf of the respondents, agreed that the presence of either hatches or a guard-rail would have prevented an accident, but his general attitude was, I think, that seamen were safe without them. His attitude can be illustrated by certain questions asked and answers given in examination in chief to counsel for the
F respondents.

"Q.—We know that there were sockets for guard-rail stanchions but that no guard-rails were up. A.—That is correct. Q.—As bos'n, did you ever require them to be put up? A.—Well, I had only joined the ship myself seven days, and we were finding them in various places round the 'tween
G decks. I did not see any complete. Q.—Were they ever put up to your knowledge when you were on the ship? A.—Not that voyage. Q.—Did you ask for them to be put up? A.—I never asked; we do not usually ask for them; we are usually asked ourselves to put them up for other people. We do not ask to put them up, as we do not need them normally ourselves. Q.—Just tell me why? A.—Well, it is a case that we are used to the job
H more than other people, and we just do not think of it, like the dockers; but I suppose if we had been asked for them we would have had to put them up."

I have already dealt with Captain Lovegrove's evidence as to the practice of not putting up guard-rails round the hatches whilst at sea. The other witnesses, without exception, said that, although there was no difficulty in erecting them,
I it was, in fact, never done in this or any other ship so far as they knew. Mr. Clark, however, like Captain Lovegrove, accepted the view put to him in cross-examination that it might have been worth while to prevent this sort of thing happening if he and the boatswain had put their minds to it, but here again he was speaking after the event.

One of the chief criticisms of this class of evidence was that the conditions in this ship might well be different from those in others, that the appellant was a young and inexperienced man who had not got his sea legs, and that, whereas some of the witnesses explained that the erection of guard-rails was unnecessary

because members of the crew never, or at any rate seldom, entered the 'tween decks during the voyage, in fact in this ship and, indeed, in some others men were not infrequently sent to them. Though the appellant said he was constantly seasick, his fellows regarded him as a sufficiently experienced hand quite capable of looking after himself and thought that any seaman, after a few days out, would have gained his sea legs. Admittedly, he had been working in the holds and knew of the open hatch, and it is not suggested that his seasickness was known to anyone. Nor was any evidence given or suggestion made as to the respects (if any) in which this ship differed from other grain-carrying ships. A B

As to the general practice of putting up guard-rails at sea, I can find no evidence that in this or any other grain ship they were ever erected. Moreover, there remains the fact that there are Board of Trade regulations requiring their erection in port, whereas there are no regulations creating an obligation for their use at sea. It is possible, as was suggested, that the Board of Trade had no jurisdiction over ships outside the three-mile limit, but if it was a plain danger I should have expected it to be dealt with in some way. C

Ultimately, the question is: would a reasonably prudent shipowner or seaman have foreseen the danger of this accident and guarded against it? Speaking for myself, I should not regard the passing along a twelve-foot passageway, even in a moderate sea, as a danger to a seaman, nor should I have expected any seaman to have foreseen the likelihood of such an accident, especially after forty years in which no accident was, at any rate, known to the witnesses to have occurred, nor was evidence of any such event having occurred forthcoming. Opinions differ, no doubt, and apparently the learned judge was impressed by the risk of an open hold. The Court of Appeal, on the other hand, by a majority took the view that no appreciable danger had been established. MORRIS, L.J., however, who agreed with the learned judge, thought that, if the appellant's route from No. 3 to No. 2 pile had led him to pass the starboard side of the trimming hatch and he had then walked directly forward, he might pass within three feet of the open hatchway. No doubt he might, but he was proceeding not directly parallel to the sides of the ship but to the second pile, and, if he did so, whether he went to port or starboard of the trimming hatch, his route to the second pile would never be less than nine or ten feet from the hatchway to No. 2 hold. I, myself, am a good deal influenced, and, I think, rightly, by evidence which seems to establish that the existence of any such danger would never have occurred to a seaman. D E F

Apart from these considerations, I am additionally strengthened in my view by the evidence of the practice prevailing on grain ships. To my mind, it is amply proved, and, though some witnesses thought that the reason was because it was unnecessary to go to the 'tween decks between ports, yet they cast no doubt on the existence of the practice itself. The practice is established, though the reason given for it may be mistaken. As to the difference between the obligation in port and at sea, it may well be that with dockers working round a hold it is desirable to take precautions which are not necessary in the case of seamen who have at least nine or ten feet of space between them and the open hold. At any rate, the difference in obligation in fact exists. G H

It was suggested that the reason why the danger was not appreciated was that no one had brought their minds to bear on it. In *Bolton v. Stone* (8) ([1951] 1 All E.R. 1078), I expressed the view (*ibid.*, at p. 1081) that defendants would be in a stronger position if the risk was so small that they never thought about it than if they had considered it and decided the risks were very small. I adhere to that view. Men do not stop to consider whether each step they take is safe. They act on what is generally regarded as a safe course until some untoward event shows that they may have been mistaken, and then, as LORD THANKERTON pointed out in *Glasgow Corp'n. v. Muir* (7) ([1943] 2 All E.R. 44), one must be careful not to impute negligence from *ex post facto* events. I

A If the practice is fully established, as I think it is, I am content to follow the words of LORD DUNEDIN in *Morton v. William Dixon, Ltd.* (2) (1909 S.C. 807), as re-stated in this House by LORD NORMAND in *Paris v. Stepney Borough Council* (1) ([1951] 1 All E.R. at p. 49). LORD DUNEDIN's words are (1909 S.C. at p. 809):

B “Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either—to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it.”

C LORD NORMAND put the same opinion in his own words in this way ([1951] 1 All E.R. at p. 50):

“... the test is whether the precaution is one which the reasonable and prudent man would think so obvious that it was folly to omit it.”

D I quote the words, though for the purpose of this case I am content, without expressing any opinion as to its exact meaning, to construe “folly” as PARKER, L.J., did, to mean no more than “imprudent” or “unreasonable”. To my mind, having regard to the practice, the omission to fence was neither imprudent nor unreasonable, much less an act of folly. The learned lord justice added:

E “It is true that other witnesses [i.e., other than Captain Lovegrove] said that the guard-rail could have been put up without danger in a very few minutes, but it is clear that they all took the view that there was equally no danger in walking along the gangway”,

and with this view I agree.

F Accordingly, I am of opinion that the appeal should be dismissed, both because the evidence, to my mind, establishes that, to a seaman, no such accident would have been looked for, especially since, in an experience lasting up to forty years, such an accident was unknown and because it was not the practice in grain ships to put guard-rails round the hatchways to the lower hold whilst at sea. I should add that, if I thought the arguments equally balanced, I should think it my duty to follow the decision of the Court of Appeal.

G Finally, I was urged on us that the learned judge had the witnesses before him and was, therefore, in a better position than an appellate court to evaluate the evidence. Where belief in the accuracy of witnesses or their demeanour comes in issue I agree, but, as I have pointed out, there is little dispute as to the facts save in two cases, in both of which I have followed the findings of the court of first instance. Otherwise it is not fact but inference from facts with which your Lordships are concerned, and, in such a case, an appellate court is in as good a position to determine the issue as is the judge who tried the case.

H I would dismiss the appeal.

LORD REID: My Lords, a seaman may encounter a variety of grave and inescapable perils, and, in comparison, the risk to which the appellant was subjected in this case was very small. But it has not been argued that a ship-owner is under any less duty than an occupier of premises on land to eliminate unnecessary risks so far as that is reasonable and practicable.

I In the present case, the appellant had to walk along a space on the 'tween deck some twelve feet wide between a pile of dunnage and an open hatchway. He knew the place and, even allowing for a permissible degree of inattention, I find some difficulty in understanding how, without foolhardiness or negligence, he could have come to be so near the hatchway as to fall into it. In the defence of this action the respondents pleaded

“the defendants will contend that the said accident was caused or contributed to by the plaintiff's own negligence,”

but this defence was abandoned at an earlier stage of the case. As there is now A
no plea of contributory negligence, the case must be dealt with on the footing
that it cannot be inferred from the evidence that the accident could not have
happened without the appellant being guilty of negligence. The case could not be
decided in favour of the respondents on a ground which they do not now plead.
If we must take it that the accident may have happened without the appellant
being negligent, it necessarily follows that there was some risk to a seaman who B
was not negligent if he was required to walk past this open hatchway, and the
only question is whether that was a risk which the respondents ought to have
foreseen and eliminated. The appellant's case is that a guard-rail should have
been erected, and that this could have been done with very little trouble, and
would have prevented the accident.

In some cases, it may be open to an employer to say that, although the accident C
shows that there was, in fact, a risk to a man who was not negligent, the kind of
risk was such that it could not reasonably have been foreseen before the accident;
but I do not think that that can be said in this case. An open hatchway is an
obvious danger and, if a man can without negligence come sufficiently near it to
fall into it, I do not see how it can be said that this is not reasonably foreseeable,
or that there is no risk at all of his doing so. For a young and active seaman, D
it may be that the risk is small even when the ship is rolling, but there are so
many ways in which a man may slip or lose his balance without that being solely
due to his negligence that I do not think that a prudent employer would be
entitled to assume that there was no risk at all of an accident even in rough
weather.

The respondents rely on a statement of the law by LORD DUNEDIN in *Morton* E
v. William Dixon, Ltd. (2) (1909 S.C. 807), which has often been approved.
I need only refer to the speech of LORD NORMAND in *Paris v. Stepney Borough*
Council (1) ([1951] 1 All E.R. at p. 49), and the opinion of Lord President
COOPER in *Gallagher v. Balfour, Beattie & Co., Ltd.* (3) (1951 S.C. 712). Mr. Morton,
a bottomer in a pit, was injured by a piece of coal which fell down the shaft,
and it was alleged that there ought to have been some sort of shielding contrivance F
to prevent this. There was no evidence that this was a common expedient and
it was at least doubtful whether it was practicable in this particular shaft.
LORD DUNEDIN said (1909 S.C. at p. 809):

"Where the negligence of the employer consists of what I may call a fault
of omission, I think it is absolutely necessary that the proof of that fault
of omission should be one of two kinds, either—to show that the thing which G
he did not do was a thing which was commonly done by other persons in like
circumstances, or—to show that it was a thing which was so obviously wanted
that it would be folly in any one to neglect to provide it."

LORD NORMAND having quoted this passage said ([1951] 1 All E.R. at p. 49):

"The rule is stated with all the Lord President's trenchant lucidity. It H
contains an emphatic warning against a facile finding that a precaution is
necessary when there is no proof that it is one taken by other persons in like
circumstances, but it does not detract from the test of the conduct and
judgment of the reasonable and prudent man. If there is proof that a
precaution is usually observed by other persons, a reasonable and prudent
man will follow the usual practice in like circumstances. Failing such I
proof the test is whether the precaution is one which the reasonable and
prudent man would think so obvious that it was folly to omit it."

In *Gallagher v. Balfour, Beattie & Co., Ltd.* (3), LORD COOPER, after expressing
some apprehension that LORD DUNEDIN's test had been weakened by certain
decisions, said (1951 S.C. at p. 718) that the passage which I have quoted from
LORD NORMAND's speech

"... reverts to the forcible language of the original formula, and in my

A view replaces it on the pedestal from which it seemed to be dislodged . . . ”

LORD DUNEDIN’S statement of the law must now be read with LORD NORMAND’S gloss, and it is important to see what it was that this House held to be “folly” in *Paris v. Stepney Borough Council* (1). A one-eyed garage hand, trying to remove from a vehicle a bolt which had rusted in, struck it with a hammer and a metal chip flew off and injured his eye. He alleged fault in respect that his employers failed to provide him with, and require him to wear, suitable goggles. It was proved that it was not the practice to wear goggles at such work. It was not decided whether the employers were entitled to rely on this practice in the case of men with no disability, but it was, in effect, held that, by reason of the more serious consequences to a one-eyed man if an accident causes him to lose the sight of an eye, goggles were for him

C “a thing . . . so obviously wanted that it would be folly in any one to neglect to provide it”,

or a precaution which

D “the reasonable and prudent man would think so obvious that it was folly to omit it.”

I must now turn to the evidence in this case. This ship was one which carried grain in bulk and made the outward voyage in ballast. No. 2 ’tween deck hatch, where the accident occurred, was partly open and partly occupied by a large wooden feeder which remained in position. Earlier in the outward voyage the hold had been cleaned out and the feeder and other woodwork repaired.

E There is evidence that a guard-rail could not have been put up while this work was going on because it would have impeded the work, and, if there was negligence, it was in failing to put up a guard-rail when the work was finished and before the men left that part of the ’tween deck. The only access to that part of the ’tween deck was by ladder from the upper deck where the hatches were battened down, and, if there was no likelihood of men being sent down to

F the ’tween deck during the remainder of the voyage, there was no point in guarding the open hatch and no obligation to do so. But the evidence in this case is that, in this ship, men were not infrequently sent down to the ’tween deck as the appellant was. He and two other men were sent down to look in the piles of dunnage for timber required for other work. So when the cleaning and repair work at this hatch was finished, it ought to have been foreseen that men might well have to return to that part of the deck at some time during the remainder of the voyage, and the question is whether, in that state of affairs, it was negligent to leave unprotected that part of the open hatchway not occupied by the feeder.

G There is evidence that the general practice was not to put guard-rails round open hatches on the ’tween decks, but the evidence of some of the witnesses H is that the reason for that practice was that no one was likely to go near the open hatches. Mr. Burke, an able seaman, said:

“you have no more reason to enter the holds, if the work is finished, and the hatches are still left uncovered.”

Mr. Clark, the chief officer, said that there was no reason why guard-rails should I not be put up, and when asked why it was not the practice to put them up he said:

“there is really no necessity for them, because when the work is finished in one hold there is no need for anybody to go down there”,

and again:

“Nobody goes down to the ’tween decks when there is no work going on.”

He thought, wrongly, that the appellant ought not to have been in that part

of the ship when the accident occurred. Mr. Barker, the boatswain, when asked why guard-rails were not put up, said: A

“The truth is that if the stanchions were there we would have had a lot of trouble with the feeder: with that and various other things.”

There is nothing to support this reason, the agreed plans do not support it and counsel were unable to explain how any such trouble could arise. This was, however, a good reason for not putting up guard-rails while cleaning operations were proceeding and, perhaps, that is what the boatswain had in mind. B

The most important witness was Captain Lovegrove, who had many years' general experience. He said that, in dock when the regulations apply, guard-rails are put up at the beginning of the day by the ship's crew. I do not think that he meant that this was done every day but that it was done if the circumstances were such as to bring the regulations into operation. Then he explained that guard-rails are not put up at sea while cleaning and repairing is going on because they would impede the work, and, when asked about putting up the guard-rails when that work is finished, he said: C

“In practice it is not done; I do not say that they should not be erected, but in practice it is not done.” D

And when asked whether it would not be easy to put them up he said:

“It would, yes, but it would not occur to anybody to put them up.”

He said he had not personally known of an accident like this before and then:

“Q.—If it had happened to you would you have seen to it in future that guard-rails were put up? A.—I would, yes. Q.—Because you would then realise the magnitude of the risk? A.—Quite.” E

Finally he said:

“apart from . . . the accident, I would go on for quite a considerable time not having guard-rails put up because it is not the usual practice to put them up at sea. Q.—But is it not time the practice was altered? A.—I agree.” F

I cannot find in Captain Lovegrove's evidence any indication whether, or to what extent, he thought that it was a general practice for men to go down to the 'tween deck during the voyage after the cleaning up is finished, but, in giving his opinion that the practice of leaving 'tween deck hatches open was a bad practice, I think he must have had in mind that the men are at least occasionally sent near these open hatches. Before leaving Captain Lovegrove's evidence, I must note an answer which he gave about the danger of putting up guard-rails. He said: G

“If I had a personal choice myself between sending the seaman to get a piece of timber from the wing of the deck, and giving him the job of putting up the guard-rail, and the ship was rolling, I would choose the former.” H

I think that he must have had in mind sending someone down specially to put up the rails. I can hardly think that he meant that there would have been any additional danger if the men who were cleaning and repa ring at the open hatch stopped to put up rails before they left. If it had been right to leave the hatch open at that time because no one was likely to come near it again, and if later there had been some unexpected necessity for some men to go down there, then it would have been quite unreasonable to send someone down first to put up the rails. But, as I have said, the evidence shows that it ought to have been foreseen at the time of the cleaning operation that men might be sent down later in the voyage. I

It was argued that, whether the practice of leaving the hatches unprotected was good or bad, the respondents were entitled to rely on it because it had gone on a long time and no one had heard of an accident arising from it. I would agree that, if a practice has been generally followed for a long time in

A similar circumstances and there has been no mishap, a reasonable and prudent man might well be influenced by that, and it might be difficult to say that the practice was so obviously wrong that to rely on it was folly. But an employer seeking to rely on a practice which is, admittedly, a bad one must at least prove that it has been followed without mishap sufficiently widely in circumstances similar to those in his own case in all material respects. This part of this case

B has caused me considerable difficulty, but I do not think that it has been proved that the circumstances were similar where the practice prevailed. There was no evidence that it was the practice in other ships for men to be sent to the 'tween decks after cleaning and repairing was finished, and two witnesses thought it was not; on the other hand there is evidence, accepted by the trial judge, that that was "quite usual" in this ship. And if, in other ships, this happened very

C seldom, then it is not surprising that no one had heard of an accident. If it ought to have been foreseen in this case, as I hold it ought, that men might be sent near this hatchway during the remainder of the voyage, I do not think that the respondents can rely on this practice as having absolved them from the duty to consider whether guard-rails ought to be put up.

Apart from cases where he may be able to rely on an existing practice, it is

D the duty of an employer, in considering whether some precaution should be taken against a foreseeable risk, to weigh on the one hand the magnitude of the risk, the likelihood of an accident happening and the possible seriousness of the consequences if an accident does happen, and on the other hand the difficulty and expense and any other disadvantage of taking the precaution. Here the likelihood of an accident may have been small, but at least it was

E sufficient to prevent the respondents from maintaining that the accident could not have happened without the appellant being negligent. And the consequences of any accident were almost certain to be serious. On the other hand, there was very little difficulty, no expense and no other disadvantage in taking an effective precaution. Once it is established that danger was foreseeable and, therefore, that the matter should have been considered before the accident, it appears to

F me that a reasonable man weighing these matters would have said that the precaution clearly ought to be taken.

I am, therefore, of opinion that the appeal should be allowed.

LORD TUCKER: My Lords, this appeal turns almost entirely on the evaluation to be placed on the facts found by the trial judge which have been

G already referred to, and as to which there has been very little dispute at any stage of the proceedings. The open 'tween deck hatch with a drop of forty feet was an obvious danger; the consequences of anyone falling to the bottom of the hold might well prove fatal and would almost inevitably be serious. The degree of danger would vary with the kind of weather encountered and with the skill and experience of the crew who were required from time to time to go to the

H 'tween deck to fetch pieces of timber which were stacked by the side of the ship occupying some four or five feet of the seventeen feet three inches of space between the nine-inch coaming round the hatch and the ship's side, an operation which was performed in a subdued light. The precise cause of the appellant's accident is unknown. The weather was not rough, but there was evidence that a "bit of a sea was running, and a breeze, because she threw a small amount of spray

I up" and "she had a beam swell". The inference drawn by the trial judge and **MORRIS, L.J.**, that some movement of the ship was probably a contributing cause was, I think, fully justified.

What, then, was the explanation or justification for leaving this 'tween deck in that condition? It seems to have been accepted that, in this particular type of ship, it was not practicable to put the hatch covers on when the work of cleaning and repairing each hold was completed, because a "feeder" used for loading grain was placed across the hatch. This being the position, it was apparently not considered necessary to take the precaution of putting up the

stanchions, which were available and carried on board in case they should be required in certain circumstances which may arise in the course of loading or unloading when in port, and using them with a rope to form a guard. The evidence clearly established that this could easily have been done in a very short time. I will return later to the possible danger involved in this operation. A

The defence was that, in doing as he did, the master was merely following the invariable practice adopted at sea within the experience of witnesses which covered a period of some forty years, during which time no accident of this nature had occurred. The value of this evidence as to the general practice is, I think, greatly diminished when it is closely examined. In the first place, in so far as it relates to all vessels without distinction, it is of no assistance, because the use of guard-rails does not arise unless there are special reasons—as in the present case—why the hatch covers cannot be replaced, or where the circumstances do not require the crew to visit the 'tween deck in the ordinary course of their duties. Therefore it is only the practice of grain ships travelling in ballast that is relevant. The practice relied on cannot, in my opinion, be justified. C
It was a practice which prevailed in all circumstances, irrespective of weather conditions or the age and experience of the crew. It is said that, in rough weather, the upper deck hatches would not have been taken off, and so access to the 'tween deck would not have been available, and that the boatswain would use his discretion with regard to sending men to fetch these timbers in bad weather even if it was possible to remove the upper deck hatch covers. D

My Lords, I cannot think that such a practice as this comes up to the standard required from a reasonably prudent employer, whose duty it is to take reasonable steps to avoid exposing his servants to unnecessary risks. Sailors are, of course, necessarily exposed to many risks by the very nature of their calling, and no one would suggest that the courts should be ready to interfere with the practice based on past experience with regard to such occupational risks, but the risk in the present case was not of this nature. It was obvious its consequences were likely to be calamitous, and the remedy was simple and available. I do not consider that it is imposing too high a standard of care on a master to require that he should take the precaution suggested, notwithstanding that no such accident had occurred before in his experience. Evidence of general practice is often of great value and sometimes decisive, but, in such cases as these, it may require close examination, and, for the reasons which I have endeavoured to state, I do not consider the very general practice relied on in the present case stands up to such examination, or that its more limited application in the case of grain ships can be justified by the standard of the reasonably prudent employer. E
F
G

There was one factor in the case which weighed with PARKER, L.J., in the Court of Appeal to which I should refer. He took the view that, if there was any real degree of risk in walking along the twelve foot gangway, then the risk of accident to a man putting up the guard-rail by the edge of the coaming would be, if anything, greater, and, in this connection, he referred to the evidence of Captain Lovegrove, a witness for the defence, who had said: H

“If I had a personal choice myself between sending the seaman to get a piece of timber from the wing of the deck, and giving him the job of putting up the guard-rail, and the ship was rolling, I would choose the former.” I

No other witness had suggested any danger in putting up the guard-rail, but I think the real answer is that the two operations cannot properly be compared. In the first case, the man may well not realise that he is in any danger and some slight inattention or slip may precipitate him, and this is the very reason why a guard of some kind is required; in the second operation the danger is obvious, and the man or men performing it will have to take the necessary precautions. Moreover, if it is considered to require any exceptional degree of care or skill, men with the necessary qualifications can be chosen. In the one case you have an

A operation which can be carried out in a few minutes by skilled men if necessary, and in the other you have all the crew at different times for appreciable periods of the voyage exposed to risks, the degree of which they may very well not fully appreciate. I cannot accept the view that the risk involved in putting up the guard-rail is of such a nature as to justify the omission, or that it should turn the scale in favour of the respondents.

B My Lords, the degree of care and foresight required from an employer necessarily varies with the circumstances of each case, and it is a matter on which there is scope for much difference of judicial opinion, as this case has shown. I can only say that, in my opinion, STREATFEILD, J., was fully justified for the reasons stated by him and for those given by MORRIS, L.J., in the Court of Appeal, in holding that the respondents had been proved to have been in breach of their
C common law duty to the appellant. I would, accordingly, allow the appeal and restore the judgment of STREATFEILD, J.

LORD COHEN: My Lords, I need not recapitulate all the facts. Suffice it to say that, as they strike me, the salient admitted facts appear to be on the one hand the size of the gaping hole in the 'tween decks when the hatch is
D opened, the risk of anyone in the vicinity falling down if he loses his balance, the obvious gravity of the injuries which were likely to be done to anyone who fell through that hole, the easiness of taking the precaution of fixing the stanchion and wire rope fence around the open hatch and the fact that the saving of time in not erecting it was negligible; on the other hand the width of the passage, some twelve feet, between the stack of dunnage and the open hatch, the fact
E that only seamen would be passing along that passage, and the fact that, according to the evidence, it was not the practice aboard grain ships to fence in open hatches 'tween decks or cover them up after the holds had been made ready for reloading, and the fact that no evidence was given of any occurrence of a similar accident by any of the witnesses, one of whose experience went back some forty years. There was one disputed fact to which some importance
F attaches, and that is the frequency with which it was necessary for members of the crew to have access 'tween decks after the holds had been made ready. On that point I think it is clear that the learned judge accepted the evidence of the boatswain, Mr. Barker, to the effect that men were often sent down 'tween decks to collect pieces of timber for use in connection with repair work, and I am not prepared to differ from him on that point.

G What is the law to be applied to those facts? Counsel for the respondents relied on the observations of LORD DUNEDIN in *Morton v. William Dixon, Ltd.* (2) (1909 S.C. at p. 809), as approved and applied by LORD NORMAND in *Paris v. Stepney Borough Council* (1) ([1951] 1 All E.R. at p. 49):

H "Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either—to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it."

I I agree with the view expressed by PARKER, L.J., in the Court of Appeal, that the use of the word "folly" may lead to misconception of what the law is if it is read in the sense of "ridiculous", but I do not think this was the sense in which LORD DUNEDIN used it. LORD NORMAND, after quoting LORD DUNEDIN, continued (*ibid.*):

"The rule is stated with all the Lord President's trenchant lucidity. It contains an emphatic warning against a facile finding that a precaution is necessary when there is no proof that it is one taken by other persons in like circumstances, but it does not detract from the test of the conduct and judgment of the reasonable and prudent man."

I think that the effect of their Lordships' observations is that, when the court finds a clearly established practice "in like circumstances", the practice weighs heavily in the scale on the side of the defendant and the burden of establishing negligence, which the plaintiff has to discharge, is a heavy one. A

In applying the law as laid down by LORD NORMAND to the present case, the first question that arises is whether the circumstances existing on board the ships as to which evidence of practice was given are like those prevailing on board the Daltonhall. I share the doubt expressed by MORRIS, L.J., whether that was proved to be the case, since both Mr. Burke and the chief officer, Mr. Clark, seemed to say that when any section of the 'tween deck had been swept and cleaned there was ordinarily no more reason to enter the hold, whereas Mr. Barker, as I have already said, deposed that it was often necessary to do so on the Daltonhall. But, even if the circumstances can be regarded as like, I should still be of opinion that the appellant is entitled to judgment. Applying the test laid down by LORD NORMAND, PARKER, L.J., says: B C

"What then is the reasonable and prudent employer bound and entitled to take into consideration? He is certainly (i) bound to take into consideration the degree of injury likely to result; (ii) bound to take into consideration the degree of risk of accident; (iii) entitled to take into consideration the degree of risk, if any, involved in taking precautionary measures." D

Later on in his judgment, he indicates that the decision of the matter in each case must depend on whether, balancing these considerations (and, I would add, taking into account any other factors which may be relevant in a particular case), the plaintiff has proved that the omission of the precaution relied on by the plaintiff was a thing which the defendants, as reasonable and prudent employers, should have thought so obvious that it was unreasonable or imprudent to omit it. E

My Lords, I agree with this approach but, proceeding along those lines, I have arrived at the opposite conclusion to that reached by PARKER, L.J. There was an obvious risk in being near to the open hatch; it was one to which the appellant became exposed in carrying out the duty assigned to him; the consequences of an accident would obviously be very serious; the risk was an unnecessary risk in that it could easily have been avoided and no sort of advantage resulted from its existence. In these circumstances, it seems to me that, on the evidence, the trial judge and MORRIS, L.J., were justified in holding that the appellant had established that the respondents had omitted a precaution which, in the sense in which I understand LORD NORMAND's words, it would be folly to neglect to take. F G

My Lords, the respondents, as I think wisely, did not press their contention that the damages were excessive, and, for the reasons I have given, I would allow the appeal and restore the judgment of the trial judge.

Appeal allowed.

Solicitors: *Neil Maclean & Co.* (for the appellant); *Holman, Fenwick & Willan* (for the respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

A

STAVELEY IRON & CHEMICAL CO., LTD. v. JONES.

[HOUSE OF LORDS (Lord Morton of Henryton, Lord Porter, Lord Reid, Lord Tucker and Lord Cohen), November 29, 30, December 1, 5, 1955, January 31, 1956.]

B *Master and Servant—Liability of master—Negligence of fellow servant—Standard of care—Contributory negligence—Standard of care.*

The respondent, who was employed by the appellant company as a core-maker, was at work in the company's foundry on the lifting of a load in an iron pan by an overhead crane. Attached to the crane was a main hook from which hung four chains with hooks at the end. For safe working the

C

main hook had to be centred over the load, otherwise it would swing out. The respondent, assisted by another man, hooked the chains on to a pan. It was the respondent's duty to assist the crane-driver to lower the hook as nearly as possible over the centre of the pan, but, as the respondent was standing at the side of the pan, his centring could be only approximate. The

D

crane-driver, who was also employed by the appellant company, should have paused, but did not pause, before beginning the lift to see that the load was centred and hanging vertically. The load swung out and the respondent was injured. The respondent claimed damages for negligence against the appellant company. The company denied negligence and pleaded contributory negligence on the part of the respondent, but at the trial of the action no evidence was given on behalf of the company that the respondent did something wrongfully, or failed to do something, which resulted in the load not being properly centred.

E

Held: on the facts (a) the crane was negligently handled by the crane-driver, and (b) contributory negligence was not proved against the respondent, because it was not shown that his conduct fell below the standard required from a reasonably careful workman assisting in such an operation; and, therefore, the respondent was entitled to damages in full against the appellant company.

F

Per LORD MORTON OF HENRYTON, LORD PORTER and LORD REID: it is not correct that conduct which can amount to negligence if the person injured were a stranger may not amount to negligence if the person injured is a fellow servant (see p. 408, letter C, and p. 405, letter G, post).

G

Per LORD TUCKER (LORD MORTON OF HENRYTON, LORD PORTER and LORD COHEN agreeing):

(i) recent legislation has not altered the standard of care which is required from workmen or employers, and the standard cannot differ whether the workman is being sued personally or his employer is being sued in respect of the workman's acts or omissions in the course of his employment (see p. 414, letter A, post).

H

(ii) accepting that in cases where alleged breaches of absolute obligations imposed by statute on employers are in question the doctrine that "it is not for every risky thing which a workman in a factory may do in his familiarity with machinery that a plaintiff ought to be held guilty of contributory negligence" applies, yet it is to be doubted whether this doctrine can properly be applied to a simple case of common law negligence where there is no evidence of repetitive work being performed under strain (see p. 413, letter F, post).

I

Ratio decidendi of DENNING, L.J. ([1955] 1 All E.R. at p. 8) disapproved.

Decision of the Court of Appeal sub nom. *Jones v. Staveley Iron & Chemical Co., Ltd.* ([1955] 1 All E.R. 6) affirmed.

[**Editorial Note.** The decision in the present case is an evaluation of fact, found at the trial, but the speeches in the House of Lords show the concurrence

of a majority of the members on a number of points of law which may be relevant to many cases at the present day. It is thought that these may be summarised as follows—(a) that the standard of care by which to test whether negligence at common law is proved is the same whether the plaintiff is or is not an employee of the defendant and whether the plaintiff sues the workman who was negligent or the workman's employers; and (b) that the test of contributory negligence is not necessarily the same where contributory negligence is raised in an action by an employee against his employer for breach of a statutory duty of absolute obligation as it is where the contributory negligence is raised in answer to a claim for negligence at common law, at any rate where the employee's work was not repetitive or done in circumstances where noise and strain might cause inattention (cf. p. 414, letter B, post). In such cases, as in a case of breach of statutory duty, the employer may not be able to maintain against an employee that every risky act due to familiarity with the work or every inattention due to noise or strain amounts to contributory negligence.

As to the extent of a master's duty to a servant, see 22 HALSBURY'S LAWS (2nd Edn.) 187-189, paras. 313, 314; and for cases on the subject, see 34 DIGEST 194, 195, 1583-1590.

As to the degree of negligence amounting to contributory negligence, see 23 HALSBURY'S LAWS (2nd Edn.) 680, para. 964; and for cases on the subject, see 36 DIGEST (Repl.) 170-173, 912-937; and as to the effect of contributory negligence between master and servant, see 22 HALSBURY'S LAWS (2nd Edn.) 190, para. 319.]

Cases referred to:

- (1) *Jones v. Manchester Corpn.*, [1952] 2 All E.R. 125; [1952] 2 Q.B. 852; 116 J.P. 412; 3rd Digest Supp.
- (2) *Broom v. Morgan*, [1953] 1 All E.R. 849; [1953] 1 Q.B. 597; 3rd Digest Supp.
- (3) *Stapley v. Gypsum Mines, Ltd.*, [1953] 2 All E.R. 478; [1953] A.C. 663; 3rd Digest Supp.
- (4) *Esso Petroleum Co., Ltd. v. Southport Corpn.*, [1955] 3 All E.R. 864.
- (5) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; 2nd Digest Supp.
- (6) *Bartonshill Coal Co. v. McGuire*, (1858), 3 Macq. 300; 31 L.T.O.S. 258; 34 Digest 126, 972.
- (7) *Bartonshill Coal Co. v. Reid*, (1858), 3 Macq. 266; 31 L.T.O.S. 255; 22 J.P. 560; 34 Digest 126, 971.
- (8) *Smith v. Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 34 Digest 202, 1657.
- (9) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 1937 S.C. (H.L.) 46; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.
- (10) *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1934] 2 K.B. 132; 103 L.J.K.B. 465; 151 L.T. 87; *reversd. on other grounds*, H.L., [1936] A.C. 206; 36 Digest (Repl.) 173, 929.
- (11) *Nance v. British Columbia Electric Ry. Co., Ltd.*, [1951] 2 All E.R. 448; [1951] A.C. 601; 2nd Digest Supp.
- (12) *Lewis v. Denyé*, [1939] 1 All E.R. 310; [1939] 1 K.B. 540; 108 L.J.K.B. 217; 160 L.T. 244; *affd.* H.L., [1940] 3 All E.R. 299; [1940] A.C. 921; 109 L.J.K.B. 817; 163 L.T. 249; 2nd Digest Supp.

Appeal.

Appeal by the employer, Staveley Iron & Chemical Co., Ltd., from an order of the Court of Appeal, dated Dec. 8, 1954, and reported sub nom. *Jones v. Staveley Iron & Chemical Co., Ltd.*, [1955] 1 All E.R. 6, reversing an order of SELLERS, J.,

A at Derby Assizes, dated June 18, 1954. The facts appear in the opinion of LORD TUCKER, p. 410, letter G, to p. 411, letter B, post.

Marven Everett, Q.C., and *A. E. James* for the appellant company.
F. W. Beney, Q.C., and *D. J. Turner-Samuels* for the respondent.

The House took time for consideration.

B Jan. 31. The following opinions were read.

LORD MORTON OF HENRYTON: My Lords, the respondent was injured in an accident which occurred in the appellant company's works at Hollingwood in the county of Derby. A pan laden with heavy cores, which was being lifted by an overhead travelling crane, swung outwards and the respondent's arm was trapped between the pan and a railway wagon. Both the respondent and the crane-driver were employed by the appellant company.

C The appeal raises two questions of fact—(i) Was the crane-driver negligent? (ii) If so, was the respondent guilty of contributory negligence? I have had the advantage of reading in print the speech prepared by my noble and learned friend, LORD TUCKER, which deals fully with these questions of fact, and also with questions as to the standard of care to be applied in the circumstances of the present case. I entirely agree with this speech, but I think I ought to add a few words on two passages in the judgments below which were discussed very fully in the course of the argument.

SELLERS, J., began his judgment as follows:

E “This is a claim in respect of an accident occurring in a factory or shop, and it is one of a character which is common in the courts now but which could not have been maintained successfully prior to [the Law Reform (Personal Injuries) Act, 1948] which removed the defence to employers of common employment. It is a type of action which seems to be increasingly entertained in the courts at the present time. To my mind it does give rise to a serious question as to whether these acts of carelessness, or inadvertence, which arise in factories in the course of work where people are collaborating together and working in a team should be described, except in exceptional circumstances where the conduct is so excessively bad as to require the description, as acts of negligence or errors of judgment.”

F My Lords, this passage is open to the interpretation that, in deciding the question G “negligence or no negligence”, the court should apply an especially lenient standard of conduct in a case where workmen are collaborating together and working in a team. If the passage does bear that meaning, I cannot agree with it, and no authority was cited to the House which supports it. The crane-driver was bound, in accordance with well-established principles, to use that degree of care which an ordinary prudent crane-driver would have used in the circumstances. As to the case of the injured respondent who was charged with contributory negligence, I desire to add nothing to the observations of my noble and learned friend, LORD TUCKER.

H A second passage with which I cannot wholly agree occurs in the judgment of DENNING, L.J. In dealing with the question whether the crane-driver was negligent the learned lord justice said ([1955] 1 All E.R. at p. 8):

I “He [i.e., the employer] acts by his servant; and his servant's acts are for this purpose to be considered as his acts. Qui facit per alium facit per se. He cannot escape by the plea that his servant was thoughtless or inadvertent or made an error of judgment. If he takes the benefit of a machine like this, he must accept the burden of seeing that it is properly handled.”

The learned lord justice then proceeded:

“It is for this reason that the employer's responsibility for injury may be

ranked greater than that of the servant who actually made the mistake (see *Jones v. Manchester Corpn.* (1) [1952] 2 All E.R. 125) and he remains responsible even though the servant may for some reason be immune (see *Broom v. Morgan* (2) [1953] 1 All E.R. 849). A good illustration, as counsel for the plaintiff pointed out, is *Stapley v. Gypsum Mines, Ltd.* (3) ([1953] 2 All E.R. 478) where the widow of the dead man Stapley succeeded against his employer, although she would no doubt have failed against his fellow workman Dale, because of their joint agreement."

My Lords, what the court has to decide in the present case is: Was the crane-driver negligent? If the answer is "Yes", the employer is liable vicariously for the negligence of his servant. If the answer is "No", the employer is surely under no liability at all. Cases such as this, where an employer's liability is vicarious, are wholly distinct from cases where an employer is under a personal liability to carry out a duty imposed on him as an employer by common law or statute. In the latter type of case, the employer cannot discharge himself by saying: "I delegated the carrying out of this duty to a servant, and he failed to carry it out by a mistake or error of judgment not amounting to negligence". To such a case one may well apply the words of DENNING, L.J. ([1955] 1 All E.R. at p. 8): "... [the employer] remains responsible even though the servant may for some reason be immune". These words, however, are, in my view, incorrect as applied to a case where the liability of the employer is not personal but vicarious. In such a case, if the servant is "immune", so is the employer (see, for instance, *Eso Petroleum Co., Ltd. v. Southport Corpn.* (4) [1955] 3 All E.R. 864). This passage in the judgment of DENNING, L.J., receives no support in the judgments of HODSON and ROMER, L.JJ., and I cannot find that the decisions in the cases cited by DENNING, L.J., lend any support to it, though it may be that the passage is to some extent supported by certain dicta in the first two of these cases.

Although I have felt bound to express my dissent from this passage in the judgment of DENNING, L.J., I am glad to find myself in agreement with the views expressed by him and by his colleagues that the crane-driver was negligent, and that contributory negligence is not proved against the respondent.

I would dismiss the appeal.

LORD PORTER: My Lords, I have had the opportunity of reading in print the opinions of my noble and learned friends, LORD MORTON OF HENRYTON and LORD TUCKER, and find myself in agreement with the views expressed by them, and concur in the result.

LORD REID: My Lords, the injured man, Mr. Jones, the respondent, was in charge of a tray or pan full of cores which was to be moved by an overhead crane to a different part of the works. The crane moves on overhead girders and there is suspended from it a large hook or crab from which four chains hang. The pan had to be lifted by attaching one of these chains at each corner. Two men are required to do this, and the respondent had brought another man, Mr. Groves, to help him. Apparently the crane-driver, Miss Howett, saw that the load was ready and she brought her crane to a position where the crab was over the pan, and, without waiting for any signal, she appears to have lowered the crab so that the chains were within reach of the two men on the ground.

For safe working, the crab must be centred over the load; otherwise, when the load is lifted, it will swing as it did in this case. The evidence shows that the crane-driver is not in a good position to see that the crab is centred and that the man in charge on the ground is supposed to see to this, but there is no evidence to show just what the respondent, the man in charge, ought to have done. He was standing at the side of the pan, a position from which it would not seem easy to see whether the crab and chains were too near his side or too near the other side of the pan. The respondent was not asked whether, at this stage, he looked

A to see if the crab was properly centred, and there was no evidence whether it would have been sufficient for him to look from that point, or whether he should have moved out to some other point where he would have had a better view. He and Mr. Groves each took two of the hanging chains and fastened them at the corners of the pan. Again, there is no evidence whether the respondent had a duty or an adequate opportunity at that stage to look at the centring of the crab;

B but, as he had to hold one chain in place with each hand until the crane took the weight, he would not seem then to have had a good opportunity to check the centring.

The occurrence of the accident shows that the crab must have been considerably off centre and nearer to the respondent's side of the pan, and that it may well be that, if the respondent had looked at the crab at the proper time and from the proper angle, he would have seen this. But, in the absence of any evidence as to what he ought to have done and of any cross-examination as to what he did do at each stage, I am not prepared to hold that it has been proved that he was at fault or guilty of negligence. Any finding that he was at fault would, in my view, be based on surmise and not on evidence.

When the crane-driver thought that the men were ready, she raised the load and it immediately swung towards the respondent and caught his arm against a truck standing just behind. It is proved that the proper practice is not to raise the load at once, but only to take the weight on the chains and then to pause to see whether everything is in order. For some reason which she could not explain, the crane-driver did not do this, and, if she had done, the lack of centring ought to have been noticed and the accident would almost certainly have been avoided.

E The question is whether her failure to pause in lifting the load was negligence for which the appellant company, her employer, is responsible.

SELLERS, J., held that both the respondent and the crane-driver were guilty of errors of judgment but not of negligence, but, at least as regards the crane-driver, I do not think that he applied the right test of negligence. As regards the respondent, I do not find it necessary to decide whether the learned judge applied the right test of contributory negligence because, as I have already said, the evidence is too indefinite to warrant a finding of contributory negligence on any test. His reasons appear from the following passages in his judgment:

"It is a type of action which seems to be increasingly entertained in the courts at the present time. To my mind it does give rise to a serious question as to whether these acts of carelessness, or inadvertence, which arise in factories in the course of work where people are collaborating together and working in a team should be described, except in exceptional circumstances where the conduct is so excessively bad as to require the description, as acts of negligence or errors of judgment. The question is not without considerable importance because, as I have said, these accidents are very common . . .

"I think there was some fault on the crane-driver's part but I think there was at least as great, and probably greater, fault on the part of the plaintiff himself and, as I say, it raises quite acutely the question whether the court here ought to characterise this failure to do that which ought to have been done in the circumstances as acts of negligence—which would mean that the plaintiff would recover some damages, but only a proportion which is ultimately assessed to be his due having regard to his own conduct—or whether in circumstances such as this where there is team work, routine work, work which necessitates a close co-operation with both and where there is a mistake which results, but only just results, in an accident as here, whether it is not more appropriate to regard them in such a case as this as errors of judgment on the part of both. I recognise that errors of judgment which might have been so described at any rate a hundred years ago perhaps have tended to be described in more recent years as acts of negligence, but when the question arose as to the conduct of operatives in a factory some years

ago as to whether their inadvertent careless acts ought to be characterised as contributory negligence, the court took the view, and the House of Lords, the higher court, took the view, that it was not every act of inadvertence and carelessness which might arise in the course of a day's work where operatives were subject to noise, fatigue and diversions of one sort and another which ought to be contributory negligence. I should not describe the acts of either the plaintiff himself or the crane-driver in the circumstances of this case as acts of negligence but of errors of judgment . . . I think it was one of those accidents which occur and are bound to occur in the rough and tumble of industry and can quite properly be described as an error of judgment."

This seems to me to be based on the view that conduct which would amount to negligence if a stranger were injured may not amount to negligence if the person injured is a fellow servant. If that was the view of the learned judge, I cannot agree with it. One can imagine a case where the conduct of a servant has caused injury both to a fellow servant and to a passer-by in the street. If that conduct is negligence vis-à-vis the stranger, I cannot see how it could be other than negligence vis-à-vis the fellow servant; if the servant is liable to the one he is equally liable to the other (apart from any question of contributory negligence); and, if the servant is liable, so is the master. Moreover, the abolition of the doctrine of common employment appears to me to make it necessary to hold that the test of negligence is the same whether the person injured is a fellow servant or a stranger. To hold otherwise would mean that, if a servant causes damage, then, by reason of their common employment, a fellow servant would not have as full a remedy against his master as a stranger would have.

It was argued that this view of the law would lead to grave anomalies and, indeed, is not consistent with *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (5) ([1939] 3 All E.R. 722). That case decided, at least with regard to cases of breach of statutory duty—I express no opinion whether it goes farther—that what I may call excusable lapses do not amount to contributory negligence. It was suggested that two fellow servants might be injured by such lapses on the part of both of them; then, unless *SELLERS, J.*, is right, each could sue the employer founding on the negligence of the other, but neither could be held guilty of contributory negligence, and it was argued that this could not be right. It may be that some such result is inevitable—again, I express no opinion until the case arises—but that would not be a reason, in my view, for trying to make *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (5) apply to negligence as well as to contributory negligence. In that case, this House was only dealing with contributory negligence and most of the reasoning is quite inapplicable to anything else. It may be that a servant can say to his employer, "You cannot complain of my lapse because you put me in a situation where a careful and prudent man might well have a lapse like mine," but neither he nor his employer can say that to a fellow servant. All either of them could say would be, "You cannot complain because when you took on the work you must have known that lapses of this kind were bound to happen". In other words *scienti non fit injuria*. That, however, would just be reviving the doctrine of common employment which Parliament has abolished.

The Court of Appeal reversed the decision of *SELLERS, J.*, but different views were expressed on the law. *DENNING, L.J.*, as I read his judgment, did not find it necessary to hold that the crane-driver was herself negligent. He said ([1955] 1 All E.R. at p. 8):

"The employer is made liable, not so much for the crane-driver's fault, but rather for his own fault committed through her . . . He acts by his servant; and his servant's acts are for this purpose to be considered as his acts. *Qui facit per alium facit per se*. He cannot escape by the plea that

- A his servant was thoughtless or inadvertent or made an error of judgment. If he takes the benefit of a machine like this, he must accept the burden of seeing that it is properly handled. It is for this reason that the employer's responsibility for injury may be ranked greater than that of the servant who actually made the mistake . . ."
- B My Lords, if this means that the appellant company could be held liable, even if it were held that the crane-driver was not herself guilty of negligence, then I cannot accept that view. Of course an employer may be himself in fault by engaging an incompetent servant, or not having a proper system of work, or in some other way. But there is nothing of that kind in this case. DENNING, L.J., appears to base his reasoning on a literal application of the maxim *qui facit per alium facit per se*, but, in my view, it is rarely profitable, and often misleading, to use Latin maxims in that way. It is a rule of law that an employer, though guilty of no fault himself, is liable for damage done by the fault or negligence of his servant acting in the course of his employment. The maxims *respondeat superior* and *qui facit per alium facit per se* are often used, but I do not think that they add anything or that they lead to any different results. The former merely states the rule baldly in two words, and the latter merely gives a fictional explanation of it. In *Bartonshill Coal Co. v. McGuire* (6) (1858) (3 Macq. 300 at p. 306), LORD CHELMSFORD, L.C., said:

E "It has long been the established law of this country that a master is liable to third persons for any injury or damage done through the negligence or unskilfulness of a servant acting in his master's employ. The reason of this is, that every act which is done by a servant in the course of his duty is regarded as done by his master's orders, and consequently is the same as if it were the master's own act, according to the maxim, *Qui facit per alium facit per se*."

- F On the same occasion, LORD CRANWORTH used the two maxims apparently without thinking that there was any difference between them (see *Bartonshill Coal Co. v. Reid* (7) (1858) (3 Macq. 266 at p. 283)), and later authorities do not appear to me to establish any material difference. I do not think that the foregoing passage from LORD CHELMSFORD's speech will support an employer being held liable for something which was not negligent or wrongful on the part of his servant.

- G DENNING, L.J., refers to three cases in support of his view. *Jones v. Manchester Corpn.* (1) ([1952] 2 All E.R. 125) was a complicated case in which there were considerable differences of opinion. I find nothing in the decision relevant to the present question, but there are statements that master and servant are joint tortfeasors. They may be treated as such, but that does not seem to me to lead to the conclusion that the master may be held liable for some act of the servant which was not negligent or wrongful on his part. In *Broom v. Morgan* (2) ([1953] 1 All E.R. 849), a husband and wife were fellow servants, and the wife was injured by the negligence of the husband. She recovered damages from her employer, although she could not sue her husband. But, although the husband could not be sued, his injuring his wife was a wrongful act on his part, and, again, this case is, to my mind, no authority for a master being liable for an act which it was not wrongful for a servant to do. In *Stapley v. Gypsum Mines, Ltd.* (3) ([1955] 2 All E.R. 478), two miners were in breach of a statutory regulation and one was killed, and it was held that the fault of the other was a contributory cause of the accident. They had agreed together to break the regulation, but the employer did not, and probably could not, plead *volenti non fit injuria*. Whether an action by the widow against the fellow servant would have succeeded, or have been defeated by such a plea or in some other way, I do not know,

but the fellow servant was certainly at fault, and this case, again, is no authority for the master being liable when his servant was not guilty of fault. A

HODSON and ROMER, L.JJ., do not follow DENNING, L.J., on this point, and they appear to me to base their judgments on the crane-driver having been negligent. I think she was negligent. The system was that there were two safety checks. The respondent was supposed to see to the first, centring, and the crane-driver was responsible for the second, pausing after taking the weight of the load. The first was not done but, as I have said, there is insufficient evidence to find that the respondent was guilty of contributory negligence. B
But the fact that the first check was omitted is no excuse for failure to carry out the second, and the crane-driver gave no reason to explain her failure. I am, therefore, of opinion that this appeal should be dismissed. C

LORD TUCKER: My Lords, on June 4, 1951, the respondent met with an accident at the appellant company's iron works at Hollingwood in the county of Derby, where he was employed, whilst assisting in the operation of lifting a large iron pan loaded with cores by means of an overhead crane, as a result of which he suffered injuries to his right hand and arm.

On Oct. 1, 1953, he issued a writ against the appellant company claiming damages for negligence. In his statement of claim, he alleged failure to provide a safe system of work or safe plant and equipment. On this issue he failed at the trial before SELLERS, J., and this finding has been accepted in the Court of Appeal and in your Lordships' House. He further alleged in the alternative that Bertha Howett, a servant or agent of the appellant company, who was the driver of the crane, was negligent in that she—(a) failed to keep a proper look-out; (b) failed to take any or any sufficient steps to ensure that the said crane and/or its hook was directly over the said load before raising the same; (c) raised the said load at a time when by reason of the fact that the said crane and/or hook was not directly over the said load it was unsafe so to do; (d) failed so to manage or control the said crane as to avoid causing or permitting the said load to swing towards and trap the [respondent]. The appellant company in its defence denied the negligence alleged and, in the alternative, pleaded contributory negligence on the part of the respondent, as to which I shall refer in detail hereafter. D E F

The facts are conveniently set out in the judgment of HODSON, L.J., in the Court of Appeal as follows:

"The plaintiff, who is claiming damages for personal injuries from the defendants, his employers, was an experienced workman. He was a core-maker and part of his duty was to move heavy cores from one part of the factory to another. The cores were carried on a pan some six feet by four feet and one and a half feet deep, resting on a bogey which was man-handled along a railway line parallel to another railway line on which stood railway wagons, on to which the cores were loaded with the aid of a crane. The distance between the wagon side and the pan was three feet nine inches. The cabin of the travelling crane was midway between the two lines so that the driver was above but not directly above the centre of the pan. On the day in question the plaintiff, with the assistance of another man, attached a four-hook sling, suspended from the crane, to the four corners of the pan. It was his duty to assist the crane-driver to drop the sling as nearly as possible in the centre of the pan but being at the side himself his centring could only be approximate. The crane-driver hauled away without first taking the strain to see if all four chains were equally taut. In consequence of the sling not being central the pan swung towards the plaintiff and his arm was trapped between the wagon and the pan." G H I

To these facts, I would only add that the crane was brought into position by a lateral movement across the factory, and that there was no evidence whether the

- A position of the crane, when the crab was lowered, was determined by the crane-driver with or without any signal or assistance from the respondent. The crane-driver had brought the crane to the scene of the operation on her own initiative, and it would seem more probable from the evidence as a whole that she had taken up position unassisted. One other fact is worthy of mention—as pointed out by ROMER, L.J. ([1955] 1 All E.R. at p. 11)—namely, that the height of the load of cores in the pan prevented the respondent and Mr. Groves, who was the man assisting him, from seeing each other when they were holding the chains clear of the load after having fixed the hooks to the pan.

- My Lords, facts such as these are of common occurrence and are being investigated by the courts every day, and it may be thought surprising that they should be capable of raising questions of law worthy of consideration in your Lordships' House, but the trial judge and DENNING, L.J., appear to have thought that the Law Reform (Contributory Negligence) Act, 1945, and the Law Reform (Personal Injuries) Act, 1948, whereby the consequences of a finding of contributory negligence were mitigated and the defence of common employment abolished, taken in conjunction with certain observations in this House in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (5) ([1939] 3 All E.R. 722), have resulted in some fundamental alteration in the law of negligence and contributory negligence, or have at least necessitated a re-appraisal of the standard of care imposed on master and servant respectively with regard to the acts of the latter in the course of his employment. My Lords, I do not share this view, but, having regard to the course this case has taken, it will be necessary later to make some reference to these matters.

- E Returning to the facts of this case, I am of opinion that negligence on the part of the crane-driver, for which the appellant company is responsible to the respondent, was clearly established on the evidence of their own witnesses, namely, the crane-driver and the appellant company's works manager, Mr. Howard. The following questions and answers appear in the cross-examination of the latter:

- F "Q.—If you are right, this woman ought not to have moved this crane to lift the load without receiving a signal, ought she? A.—The usual procedure is to take the weight and tighten the chains.

- "Q.—The usual procedure is to take the weight, tighten the chains, and then wait for a signal? A.—Yes, unless the crane-driver sees that the load is safe and central.

- G "Q.—And if she went on lifting without waiting for a signal and without being sure that it was safe and central, she was wrong, was she not? A.—I think if the crane-driver was over the job and tightened the chains and took the weight, it would be all right, she would proceed to do her job.

- H "Q.—If she could not see that it was safe and central she ought not to lift until she got a signal, ought she? A.—Probably not, but the man on the floor is there to give guidance because she cannot see as well as the man on the floor.

- "Q.—What chance has he to give guidance if she lifted it straight away? A.—I was not a witness to these circumstances."

- I And in the evidence of the crane-driver the following appear, also in cross-examination:

- "Q.—You should, of course, have taken the strain on the chain, should you not? A.—Yes.

- "Q.—And then waited for them to see that all was clear? A.—Yes.

- "Q.—Once you take the strain you can see whether your wire from the crane is straight up and down or at an angle? A.—Yes.

- "Q.—If it is at an angle you move your crane until you have got it straight, do you not? A.—Yes.

"Q.—But on this occasion, I suppose, you forgot just for the moment, and you lifted straight up without taking the strain. That is right, is it not?"

A.—Yes.

"Q.—And then the pan swung across? A.—Yes.

"Q.—And the reason you did that was because you had not noticed that Mr. Jones [the respondent] was there. That is right, is it not? A.—Yes, that is right.

"Q.—And the pan went across and almost touched the wagon? A.—Yes."

SELLERS, J., the trial judge, took the view that the conduct of the crane-driver fell short of negligence and amounted to no more than an error of judgment not rendering the appellant company liable in damages. At the outset of his judgment he referred to the increasing number of actions of this kind which, since the abolition of the defence of common employment, came before the courts, and went on to say:

"To my mind it does give rise to a serious question as to whether these acts of carelessness, or inadvertence, which arise in factories in the course of work where people are collaborating together and working in a team should be described, except in exceptional circumstances where the conduct is so excessively bad as to require the description, as acts of negligence or errors of judgment."

The learned judge took the same view with regard to the acts or omissions of the respondent—as to which more hereafter—with the result that he entered judgment for the appellant company.

On appeal, his judgment was reversed. All three lords justices (DENNING, HODSON and ROMER, L.J.J.) agreed that the respondent should not be held to have been guilty of contributory negligence, but that the appellant company was responsible for the acts or omissions of the crane-driver—HODSON and ROMER, L.J.J., on the ground that the crane-driver had been guilty of negligence in the course of her employment for which her employer was liable, and DENNING, L.J., on the ground that the employer's responsibility may be ranked greater than that of the servant who actually made the mistake, and that he remains responsible even though the servant may, for some reason, remain immune. The Court of Appeal, accordingly, entered judgment for the respondent for a sum of damages, which was subsequently agreed at £333 16s. 2d.

My Lords, I agree so completely with the judgments of HODSON and ROMER, L.J.J., on the issue as to the negligence of the crane-driver and the appellant company's responsibility therefor that I am content to repeat and adopt one paragraph from the judgment of HODSON, L.J., in which, after referring to the trial judge's view that the crane-driver was guilty of no more than an error of judgment, he said ([1955] 1 All E.R. at p. 9):

"I am of opinion that this fault ought not to be so regarded. A departure from the normal safe practice of taking the strain when raising heavy loads by crane in a sling is obviously dangerous when anyone is near the load. In my view, in the circumstances of this case, the failure of the crane-driver to take the precaution was an act of negligence which caused the injury to the plaintiff and for this the employer is as liable as if he himself had been sitting in the crane cabin and working the crane. I cannot agree that the act or omission of the employer's servant ought, as the learned judge thought, to be looked at exactly in the same way as the act or omission of the plaintiff."

I do not, however, agree that this result is in any way dependent, as the lord justice seems to have thought, on such cases as *Smith v. Baker & Sons* (8) ([1891] A.C. 325), or *Wilsons & Clyde Coal Co., Ltd. v. English* (9) ([1937] 3 All E.R. 628). Those were both cases dealing with what is sometimes called "personal negligence", where the employer cannot escape responsibility for some duty imposed

A on him personally by delegating the performance thereof to a competent agent or independent contractor. The present is a simple straightforward case of a master's responsibility for the acts of his servant done in the course of her employment.

I turn now to the issue of contributory negligence. It was alleged as follows in the defence:

B "The plaintiff was negligent in that he—(a) failed to pay any or any sufficient regard to the position of the crane crab relative to the position of the pan; (b) failed to ensure that the crane crab was central over the pan; (c) failed, if the crane crab was not central over the pan, to instruct the crane-driver to move the crane crab and/or to indicate to her the place at which the crane crab would be central over the pan; (d) failed, if the pan commenced to swing or lift abnormally, to signal to the crane-driver to lower the pan; (e) failed to stand clear of the pan when it was about to be lifted and/or during the lifting thereof."

The case made against the respondent is really contained in (b), and it was on this ground that the trial judge and DENNING, L.J., found him at fault, albeit without any harmful legal consequences to himself, basing themselves, in the case of DENNING, L.J.—and, I think, also in the case of SELLERS, J., although he does not expressly refer thereto—on what has been called the doctrine of *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (10) ([1934] 2 K.B. 132), as approved in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (5), namely, that

E ". . . it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence."

(See [1934] 2 K.B. at p. 140, per LAWRENCE, J.).

My Lords, let me say at once that, while accepting without question this and other dicta to a similar effect which have been used in this House in relation to cases under the Factories Acts and other statutes imposing absolute obligations on employers or occupiers of premises, I doubt very much whether they were ever intended to be applied, or could properly be applied, to a simple case of common law negligence, such as the present, where there was no evidence of work-people performing repetitive work under strain or for long hours at dangerous machines. However this may be, I am of opinion that the decision reached by all four judges below to the effect that the respondent has not precluded himself from recovering damages in full from the appellant company can be fully justified without resort to the so-called doctrine of *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (5). My reasons for so holding are as follows. I think that the true effect of the evidence as a whole with regard to the respondent's duty in this combined operation was correctly described by HODSON, L.J., when he said:

H ". . . his duty was to assist the crane-driver to drop the sling as nearly as possible in the centre of the pan, but being at the side himself his centring could only be approximate."

I It was for this reason that it was so important for the crane-driver to take the weight before lifting. No questions were put to the respondent suggesting what he did wrong or failed to do which resulted in the crab not being central. It was never suggested that he ought to have stood some distance back between the rail lines so as to get a better view of the exact position of the crab. In the position in which he was at the side of the pan with the pile of cores between him and Mr. Groves, a position which was never suggested as being an improper one, it was, I think, obvious that he could not be expected to "ensure" that the crab was centrally placed, and the evidence was insufficient to justify a finding that his conduct at any stage fell below the standard required from a reasonably careful workman assisting in such an operation.

My Lords, I think I have already sufficiently indicated that I do not consider that recent legislation has in any way altered the standard of care which is required from workmen or employers, or that the standard can differ according to whether the workman is being sued personally or his employer is being sued in respect of his acts or omissions in the course of his employment. It is true that, in accordance with what was said in this House in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (5), there may be cases, such as those involving breach of statutory duty, where an employer who is in breach of his duty cannot be heard, as against his own servant who has been injured thereby, to say that some risky act due to familiarity with the work or some inattention resulting from noise or strain amounts to contributory negligence. In this respect, it is possible the same act may have different consequences when the injured man is the plaintiff suing his employers, and where the employer is being sued by a third party (including another employee) in respect of the same act or omission. This is not so illogical as may appear at first sight when it is remembered that contributory negligence is not founded on breach of duty (cf. *Nance v. British Columbia Electric Ry. Co., Ltd.* (11) [1951] 2 All E.R. 448 and *Lewis v. Denyé* (12) [1939] 1 All E.R. at p. 317, and the cases there referred to), although it generally involves a breach of duty, and that, in cases under the Factories Acts, the purpose of imposing the absolute obligation is to protect the workmen against those very acts of inattention which are sometimes relied on as constituting contributory negligence, so that too strict a standard would defeat the object of the statute. This doctrine cannot be used so as to require any modification in the standard of care required from a workman in relation to his fellow servants or other third parties or the resulting liability of his employers.

Since writing the above I have read in print the speech which has just been delivered by my noble and learned friend, LORD MORTON OF HENRYTON, and I desire to add that I concur in it. I would dismiss the appeal.

LORD COHEN: My Lords, I have had the opportunity of reading in print the speech delivered by the noble and learned lord, LORD TUCKER, and agree with him that the appeal should be dismissed, for the reasons he gives.

Appeal dismissed.

Solicitors: *Bell, Brodrick & Gray*, agents for *Harold Jackson & Co.*, Sheffield (for the appellant company); *W. H. Thompson* (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A KARAMAT v. REGINAM.

[PRIVY COUNCIL (Lord Goddard, C.J., Lord Tucker and Lord Somervell of Harrow), December 13, 14, 1955, January 24, 1956.]

Privy Council—British Guiana—Criminal law—Practice—View by jury.

B *Criminal Law—View by jury—Accused declining to attend.*

A view held in the course of a criminal trial is part of the evidence. It is not a ground of objection to the trial that a witness who has given evidence at the trial has attended the view and taken part at it by indicating places and positions, but the witness should make no communication to the jury apart from demonstrating, and should be allowed to be re-called to be cross-examined, if that is desired. If an accused declines to attend a view which the court thinks it desirable to hold in the interests of justice, he cannot afterwards maintain that his absence rendered the view illegal. It is desirable, particularly where an accused declines to attend a view and the trial and view take place in a country where witnesses may be illiterate, that the judge should be present at, and should take control of, the view.

D Appeal dismissed.

[As to a view by a jury at a criminal trial, see 10 HALSBURY'S LAWS (3rd Edn.) 425, para. 783; and for cases on the subject, see 14 DIGEST 304, 3196-3201.]

Case referred to:

E (1) *R. v. Martin*, (1872), L.R. 1 C.C.R. 378; 41 L.J.M.C. 113; 26 L.T. 778; 36 J.P. 549; 14 Digest 304, 3199.

Appeal.

Appeal by special leave from an order of the Court of Criminal Appeal of British Guiana, dated Feb. 24, 1955, dismissing an appeal from judgment of the Supreme Court of British Guiana (HUGHES, J., sitting with a jury), dated Sept. 16, 1954, whereby the appellant was convicted of murder and sentenced to death. The facts appear in the judgment of the Board.

B. B. Gillis, Q.C., and *J. Lloyd-Eley* for the appellant.
J. G. Le Quesne for the Crown.

G LORD GODDARD, C.J.: This was an appeal by special leave from a judgment of the Court of Criminal Appeal in British Guiana dismissing the appellant's appeal against a conviction for murder after a trial before HUGHES, J., and a jury, which their Lordships were told had lasted some fourteen days. At the close of the argument, their Lordships announced that they would humbly advise Her Majesty to dismiss the appeal, and now give their reasons for the advice which they tendered.

H The appellant was indicted with five other persons, all of whom were acquitted, for the murder of Haniff Jhuman, who occupied land which adjoined that on which the appellant and members of his family and other relations lived and farmed. There had been frequent disputes between the occupants of the two estates arising out of cattle trespass and, undoubtedly, there was much ill-feeling between them. There were a series of events and quarrels during Sept. 26 and the early part of Sept. 27, 1953, and it was alleged by the Crown that, after a fight in the morning of the latter day, the appellant obtained a twelve-bore gun and two cartridges. Later in the day, when the deceased man with others approached a cow pen, the appellant, who was engaged in milking, shot at Haniff and killed him and also shot at and killed the latter's mother. The appellant's defence in the main was that he shot in self-defence, while the others who were indicted with him, rested their case on an alibi, contending they were not present when the shooting took place. The case involved the calling of a large number of witnesses, many, if not all, of whom (other than the police) were, as is evident from

the transcript of their evidence, illiterate and of low intelligence with a very poor command of the English language, a class, no doubt, with whom the judges in the Colony are quite accustomed to deal in their courts. It is unnecessary for their Lordships to deal with the evidence in any detail, because the case before the Board was, in substance, confined to one matter relating to a view which took place during the hearing. Suffice it to say that, not only were there numerous witnesses, but a good deal depended on the locality of the crime and where the various witnesses were at the times to which they spoke in their evidence. During the course of the trial and before the case for the prosecution was finally closed, all counsel concerned applied to the judge to direct a view of the locality. It is quite clear from the record for what purpose a view was desired, and the reason why the learned judge granted the application. It was so that the witnesses might indicate to the jury the positions at which they alleged they were at the material times, and the direction from which others approached the scene of the shooting and to test the opportunity afforded for identification. The Criminal Law (Procedure) Ordinance of British Guiana* provides that the judge, if he considers it to be in the interest of justice, may direct that the jury have a view of any place, person or thing connected with the case on the terms and conditions which seem to him proper. It is also provided† that the practice and procedure in criminal trials, including the practice and procedure relating to juries, should conform as nearly as possible to that which obtains in England. When counsel applied for a view, counsel for the present appellant and counsel appearing for two of the other prisoners submitted that none of the witnesses who had already given evidence should be allowed to attend the view, or to indicate any of the points referred to in their evidence. Counsel for two other of the prisoners did not join in this objection, and it was disallowed by the learned judge. He asked the jury to indicate which of the witnesses they desired to attend and indicate positions, and stated that counsel would have full opportunity to recall and cross-examine any witness on any matter arising from the view. The jury did intimate the witnesses whom they desired should be present, and the learned judge said that the defence might wish some of their witnesses to attend to point out particular places though they had not yet been called. He gave no direction that they were to attend; he only gave permission for them to do so if the defence desired it. Thereupon the appellant's counsel declined to take any part in the view or to cross-examine any of the witnesses who attended, and he informed the court that his client would not attend. The learned counsel himself did go to the view as the appellant's representative but took no active part in the proceedings there, and did not subsequently cross-examine any of the witnesses when they were recalled after the view was held.

The first submission on behalf of the appellant is that a "view" ceases to be a view and is not authorised by the ordinance if witnesses attend and indicate places by pointing or by words. Their Lordships do not accept this submission. In their opinion, the learned judge was perfectly right in deciding that witnesses who had given evidence could attend at the view. In fact, there was every reason why they should, and it was just those witnesses from whom the jury would desire to get ocular demonstration of their positions at the material times. It would, or at least might, enable the jury to understand the evidence they had given. As the chief justice pointed out in giving the judgment of the Court of Criminal Appeal, the average witness in the colony is not as capable of giving intelligible descriptions of places as, generally speaking, are witnesses in the English courts. As already pointed out, these witnesses were illiterate and, no doubt, would have difficulty in explaining themselves, and probably considerable difficulty in following a plan, a difficulty often experienced with witnesses in

* Ch. 18 of the Laws of British Guiana, s. 44.

† See *ibid.*, s. 47.

- A this country if in a humble station of life. To have held a view in their absence would have destroyed its whole value, for it would not have demonstrated to the jury just what they wanted to know. If a view were ordered at some stage of a criminal trial in England, their Lordships are of opinion that it would be no objection to a witness attending and taking part that he had already given evidence. It might well be that it was for that very reason that a view would be
- B valuable. For instance, the evidence of a police constable or other witness who might testify that he was keeping watch on a certain place and saw an incident might be challenged on the ground that, from the place where he was concealed, he could not possibly have seen what he said he had. It might be of the utmost value then to let the jury see the place with the witness in the position to which he had spoken; he might well be able to demonstrate that, while a shorter man
- C would not have been able to see the incident or a taller man might have been exposed to view, he could, though concealed, have seen what he said he did. If a witness at the view put himself in a position different to that which he had described in his previous evidence, that would naturally expose him both to cross-examination and comment, but, as the Court of Criminal Appeal observed, this would go to the weight, but not to the admissibility, of his evidence. In
- D *R. v. Martin* (1) (1872) (L.R. 1 C.C.R. 378), a view was directed and two constables went to it to point out where they stood when observing the acts complained of. The court did not quash the conviction, but would not go into the question of whether questions were asked of the witnesses in the absence of the judge and the prisoners, as there had been no inquiry into this below. Their Lordships are of opinion that witnesses who had already given evidence took part in the
- E view in the sense of placing themselves in the positions in which they said they had been at the material times, or indicating the positions of others, and that this was unobjectionable. That ground of appeal, therefore, fails.

- It is now necessary to deal with what took place at the view. When giving special leave to appeal, their Lordships asked to be supplied with an agreed statement of what took place at the view and one prepared by the respective counsel
- F engaged has been before them. A marshal and constables having been sworn to keep the jury, they were taken in motor cars to the scene of the shooting where they were joined by the judge, counsel and court officers. At their destination, the jury were checked by the marshal, and were also checked at any other place where they stopped during the day. Any juror who wanted to ask a question
- G put it through the judge, and the witness gave a demonstration as the answer, and counsel were invited by the judge to ask questions through him, but no cross-examination was allowed. Owing to the nature of the locality, at some points small boats had to be used to cross or get along trenches and cuts, and at some points it was inevitable that jurors, counsel and witnesses got into the same boat or had to walk together along a dam, but no witnesses were then asked to show anything. It seems that, on one occasion, a juror and a witness were in
- H the same boat as one of the counsel for some of the accused who has stated that there was no conversation relating to the case. It is to be specially noticed that the learned judge was present the whole time so that he could observe and control the proceedings. That a view is part of the evidence is, in their Lordships' opinion, clear. It is in substitution for, or supplemental to, plans, photo-
- I graphs and the like. In such a view as took place here and the purpose for which it was held, there can, in their Lordships' opinion, be no objection to the judge asking a witness to place himself at a particular spot which he has mentioned in his evidence, or to show to the jury the place where someone else stood, or the direction from which someone came. There is nothing to show that any more than this took place. The chief justice in the Court of Criminal Appeal observed that, in the Colony, views are far more frequent than in England, for the reasons that have been mentioned above, and the learned judges of that court, who are doubtless thoroughly accustomed to this procedure, saw nothing wrong in it,

nor does this Board. So long as the witnesses taking part are recalled to be cross-examined if desired, their Lordships are unable to see that the accused person is in any way prejudiced, but they would observe that it is essential that every effort should be made to see that the witnesses make no communication to the jury except to give a demonstration. In *R. v. Martin* (1), it is clear from the report that neither the judge nor the prisoner attended the view which was held a view, though such precautions as may seem to the court necessary ought to be taken to secure that the jury should not improperly receive evidence out of court. Here everything was done in the presence of the judge, who throughout was in control of the proceedings. It was eminently desirable that he should be present, and it is possible that, had he not been, a different result would have followed. It was, however, strenuously argued before this Board that, as the appellant was not present, this is a fatal objection. A short answer to this point was made by counsel for the Crown, who pointed out that, under the Criminal Law (Procedure) Ordinance, it is competent for the court to allow the accused to be absent during a part of the trial. The holding of a view is an incident in, and, therefore, part of, the trial and, as the court, on being informed that the appellant did not desire to attend, did not insist on his presence, this is equivalent to allowing him to be absent. But, in addition to this, their Lordships desire to say that, if an accused person declines to attend a view which the court thinks desirable in the interests of justice, he cannot afterwards raise the objection that his absence of itself made the view illegal and a ground for quashing the conviction if one follows, though he could, of course, object if any evidence were given outside the scope of the view as ordered. He had the opportunity of attending and declined it. Their Lordships would further observe that the absence of the appellant was not made a ground of appeal to the Court of Criminal Appeal, and does not appear to have been raised at all in that court.

One further ground of appeal was raised before the Board. It was said that there was misdirection by the learned judge in that he did not point out, or at least sufficiently stress, to the jury that the unsworn statements of the various accused persons were only evidence against the maker of the statement and not against the others. Their Lordships have considered the various passages in the summing-up to which their attention was directed, and are satisfied that there is no substance in this objection and for the same reasons as were given by the Court of Criminal Appeal.

On all grounds, therefore, this appeal failed.

Appeal dismissed.

Solicitors: *Henry S. L. Polak & Co.* (for the appellant); *Charles Russell & Co.* (for the Crown).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A FAIREY v. SOUTHAMPTON COUNTY COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Stable, JJ.), January 24, 1956.]

Highway—Dedication—Footpath—Enjoyment by public for twenty years—Users orally informed that no right of way existed—Whether right of public brought into question—Termination of period of twenty years prior to passing of Rights of Way Act, 1932—Retrospective operation of Act—Rights of Way Act, 1932 (22 & 23 Geo. 5 c. 45), s. 1 (1) (6).

Easement—Right of way—Bringing right of way into question—Public footpath—Rights of Way Act, 1932 (22 & 23 Geo. 5 c. 45), s. 1 (1) (6).

C From 1885 until 1931 a footpath leading from a public highway to a railway station and to a village was used by members of the public without interference from the landowner. From 1931 onwards the landowner made no attempt to prevent local residents from using the path, but if any other member of the public was seen thereon, he was told that he had no right to be there. There was no evidence that any member of the public questioned the right of the landowner to prevent the path being used.

D **Held:** (i) the right of way was brought into question within s. 1 (6)* of the Rights of Way Act, 1932, in 1931 when the landowner first attempted to prevent persons using the footpath, and

(ii) (STABLE, J., dissenting) the public had a right of way over the footpath by virtue of the Rights of Way Act, 1932, s. 1 (1), because the way had actually been enjoyed by the public as of right and without interruption for a full period of twenty years next before the time when the right was so brought into question, it being immaterial that the period of twenty years terminated before the passing of the Act of 1932 because that Act was retrospective in effect.

A.-G. & Newton Abbot Rural District Council v. Dyer ([1946] 2 All E.R. 252) applied.

F [As to evidence of the dedication of a footpath as a highway, see 16 HALSBURY'S LAWS (2nd Edn.) 223-232, paras. 269-279; and for cases on the subject, see 26 DIGEST 294-297, 257-278.

For the Rights of Way Act, 1932, s. 1, see 11 HALSBURY'S STATUTES (2nd Edn.) 217.]

G Cases referred to:

(1) *A.-G. & Newton Abbot Rural District Council v. Dyer*, [1946] 2 All E.R. 252; [1947] Ch. 67; 115 L.J.Ch. 232; 175 L.T. 387; 2nd Digest Supp.

(2) *Re Hale's Patent*, [1920] 2 Ch. 377; 90 L.J.Ch. 35; 124 L.T. 261; 36 Digest (Repl.) 844, 1928.

Case Stated.

H Case Stated by the Appeal Committee of Hampshire Quarter Sessions.

On May 3 and 4, 1955, an application was made by the appellant, Sir Charles Richard Fairey, pursuant to the National Parks and Access to the Countryside Act, 1949, s. 31, for a declaration that on May 11, 1953, no public right of way existed over a path at Bossington in the county of Southampton which was delineated on a provisional map prepared by the respondents, Southampton County Council, pursuant to s. 30 of the said Act. It was contended by the appellant that a public right of way over the said path should not be deemed to have been dedicated under the Rights of Way Act, 1932, s. 1, in that (i) the said right was not brought into question within the meaning of s. 1 (6) of the Act of 1932 until 1953 when the appellant objected to the inclusion of the path in the draft map prepared by the respondents under the National Parks and Access to the Countryside Act, 1949, s. 27, and (ii) during the period of twenty years

* The terms of s. 1 (6) are printed at p. 212, letter I, post.

immediately preceding 1953 the owners of the land for the time being had shown an intention not to dedicate. It was contended by the respondents that (i) the right of the public to use the path was brought into question by John Deverell (the appellant's predecessor in title) in 1931 when he told users other than local residents that they had no right to use the path; (ii) during a period of more than twenty years immediately before the time in 1931 when the public right to use the path was so brought into question, (a) the public at large used the said path as of right and without interruption, and (b) there was no sufficient evidence that there was no intention to dedicate the said path as a highway; (iii) therefore, the said path must in accordance with s. 1 of the Act of 1932 be deemed to have been dedicated as a highway. The court was of opinion that the period of twenty years referred to in the Rights of Way Act, 1932, s. 1 (6), was the period immediately preceding the first occasion in 1931 when (as was proved to its satisfaction) the owner for the time being had objected to the use of the path by persons who were not local residents, and determined that a public right of way was deemed to have been dedicated, and dismissed the appellant's application. The facts appear in the judgment of LORD GODDARD, C.J.

Percy Lamb, Q.C., and J. P. Widgery for the appellant, the landowner.

Scott Henderson, Q.C., and M. G. Polson for the respondents, Southampton County Council.

LORD GODDARD, C.J.: This is a Case Stated by the Quarter Sessions for the county of Southampton, to whom the appellant, Sir Charles Richard Fairey, applied for a declaration that on May 11, 1953,

"no public right of way existed over a path at Bossington in the county of Southampton which path was delineated and numbered 1 upon a provisional map prepared by the respondent county council pursuant to s. 30 of the said Act."

It is unnecessary to say more than that under the National Parks and Access to the Countryside Act, 1949, the county council have to prepare a map on which is shown what they consider to be rights of way, and the landowner or any other person aggrieved can object that a path or road shown on the map as a public right of way is not a public right of way. If the county council do not accept his contention, the matter goes to quarter sessions. The facts found by quarter sessions were these: The footpath in question is near Horsebridge in Hampshire, and is a most convenient short cut from the public road across to Horsebridge station and would save a wayfarer who wanted to get from the road to the station a very considerable detour. Quarter sessions found that

"since the year 1885 the path has been used by members of the public without interruption both (i) to obtain access to Horsebridge station and Horsebridge village and beyond and to places beyond the western end of the said path or vice versa and (ii) for purposes of recreation, such as for example, a circular walk from Houghton in the evenings through the meadows and round by the highways. Some of the persons so using the path were strangers to the locality, but many were known to the owner for the time being either as his tenants or his employees or as neighbouring residents. Persons in the last three categories are hereinafter referred to as 'local residents'. In so far as the said path was used for recreation it was so used mainly by such local residents: user in category (i) above was also more frequent by local residents than by strangers to the locality."

The term "local residents" even limited in the way quarter sessions have said it was understood, i.e., tenants, employees and neighbouring residents, is a very wide term, and some day it might have to be decided, if people in so large a

A category as that were allowed to use the path without interruption, whether that was not a user by the public. Quarter sessions also found that:

B “Between 1885 and 1931 the public use of the said path was nec vi nec clam nec precario nor was it interrupted and during that period the owners for the time being of the land raised no objection to the use of the path by the persons and in the manner referred to . . . above; nevertheless we were not satisfied, on the evidence before us, that an intention to dedicate on the part of such owners could be presumed at common law nor had we sufficient evidence of an intention on their part prior to 1931 not to dedicate such path as a highway. From 1931 until 1937 . . . John Deverell [the appellant’s predecessor in title], and at all material times since 1937 the appellant, made no attempt to prevent local residents from using the said path but if any other member of the public was seen thereon by the said John Deverell or the appellant he was told that he had no right to be there. The said John Deverell and the appellant thereby showed an intention not to dedicate the said path as a highway for the use of members of the public at large. There was no evidence that any member of the public questioned the right either of John Deverell or of the appellant to prevent the use of the said path as aforesaid.”

Quarter sessions finally held that this footpath was a footpath under the Rights of Way Act, 1932.

I now turn to the Rights of Way Act, 1932. Section 1 provides:

E “(1) Where a way . . . upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way, or unless during such period of twenty years there was not at any time any person in possession of such land capable of dedicating such way . . .

F “(3) A notice by the owner of the land over which any such way passes inconsistent with the dedication of the way as a highway, placed before or after and maintained after the commencement of this Act in such a manner as to be visible to those using the way, shall, in the absence of proof of a contrary intention, be sufficient evidence to negative the intention to dedicate such way as a highway, and where a notice has been placed in the manner provided in this sub-section and is subsequently torn down or defaced, notice in writing by the owner of the land to the council of the county and of the borough or urban or rural district council in which the way is situate that the way is not dedicated to the public shall, in the absence of proof of a contrary intention, be sufficient evidence to negative the intention of the owner of the land to dedicate such way as a highway . . .

H “(6) Each of the respective periods of years mentioned in this section shall be deemed and taken to be the period next before the time when the right of the public to use a way shall have been brought into question by notice as aforesaid or otherwise.”

I Those are all the provisions of the Act which need be mentioned. The justices found that it was not until 1931 that an attempt was made to prevent persons using the land by the then owner of the land. If he saw people on the land whom he did not want there, people whom he called strangers, he challenged their right to be there. Such people accepted what he told them and went away. The first question, therefore, is whether quarter sessions were right in holding that 1931 was the time when the right of the public to use the way was brought into question. Counsel for the appellant contended that one could only bring a matter into question if the assertion on one side was disputed by the other, but I do not think that that is so. It is not necessary in order to bring the right into

question that when the owner denies to a person a right of way, that that person should thereupon assert his right orally, and perhaps by using the way, or registering otherwise his disagreement with the owner. It seems to me that the owner raises the question by challenging the right of a person to walk along the way. He can certainly do it by putting up a notice, but it seems to me he can raise the question not only by a notice but by saying to a person: "You must get off this land".

The position with which we have to deal is that for more than twenty years, in fact for over forty years, the public used this way. In 1931 and thereafter the question was raised whether the public had the right, because the owner not only endeavoured to, but did, turn people back. By so doing the owner brought the right of the public to use the way into question. I do not think it is necessary for the member of the public to say: "I will bring an action against you", or "I will force my way or assert it in some other way". The landowner brings it into question by refusing to allow the public the right to use what they had used for forty years. I think the sessions were right in holding that the material time in this case was some time in 1931. No one attempts to give an exact month, nor does it matter; 1931 is the critical year, and if sessions were right in that, counsel for the landowner agrees that he fails, subject to the question whether the Act is retrospective.

We have listened to an interesting discussion whether this Act is retrospective or not. It is said that although the twenty years may begin before the Act came into force, that period must determine after the Act has come into force, because it is said one must not construe the Act in any way retrospectively as it is affecting the rights of the landowner. Speaking for myself, I agree with the decision of *EVERSHED, J.*, in *A.-G. & Newton Abbot Rural District Council v. Dyer* (1) ([1946] 2 All E.R. 252). In that case *EVERSHED, J.*, held that the Act was retrospective, i.e., the fact that the time both began and ended before the Act came into force was immaterial. It has always been held that what is known as a procedural Act does or may act retrospectively, and one test whether an Act is procedural is whether it is an Act which mainly deals with evidence. This Act is in many respects very like the Prescription Act, 1832. That was an Act which, as its preamble shows, owing to the difficulties of proving user from time immemorial, provided for changes in the law and, instead of a person who was asserting that he was entitled to an easement over land or of light or water having to give evidence from which the court could infer a grant or user from time immemorial, the prescriptive periods of twenty years in some cases and forty years in others were substituted. The present Act has a similar object. The long title, I think, does not help. It is: "An Act to amend the law relating to public rights of way; and for purposes connected therewith". There is no preamble, but it seems to me that the main object of the Act is to substitute a definite period, viz., twenty years' user by the public, for long user as the period of public user necessary to raise the presumption of dedication at common law. That being so, I think, it is no objection to say that when the law has laid down that twenty years is the period over which the public are to be deemed to have acquired a right of way, that the twenty years would have terminated before the Act came into force. Section 1 (6) provides:

"Each of the respective periods of years mentioned in this section shall be deemed and taken to be the period next before the time when the right of the public to use a way shall have been brought into question . . ."

That is the material time, the period next before the time when the right of the public shall have been brought into question. The Act does not say "when the right of the public to use the way shall have been brought into question after the commencement of this Act". It simply says that when it has to be determined whether there is a way or not, it has to be found only whether for twenty

A years before the landowner in one way or another asserted that there was no right of way, the public had used it as of right.

Considerable argument has been based on s. 2 (1) of the Act, which provides:

B “Nothing in this Act shall affect any proceedings pending at the commencement of this Act, and where in respect of any way a court of competent jurisdiction decides in proceedings so pending, or has before the commencement of this Act decided, that the way is not a highway, this Act shall not apply except as respects enjoyment of the way after the date of the decision.”

C I dare say one can give illustrations of the way the Act may act unevenly, it might perhaps be said hardly, against some people and not against others. I think, however, that s. 2 is designed to give landowners before the Act came into force—an Act passed on July 12, 1932, which was not to come into operation till Jan. 1, 1934—the opportunity of beginning an action to have the question of the existence or non-existence of a right of way determined. If they chose then to bring an action for a declaration or an action for damages for trespass on the footing that no right of way existed over the land, and could get a decision that at the time they issued the writ there was no right of way, then this Act was not to take away that right which they established in the action; but if D they did not bring the action, then it seems to me that the Act applies and they have to take their chance whether it can be proved, as it was proved in this case, that the public had, for twenty years before the matter was raised, established a right of way. For these reasons, I think the court of quarter sessions came to a right decision.

E HILBERY, J.: I am of the same opinion and for the same reasons.

STABLE, J.: I agree with the judgment delivered by my Lord on the first point whether, by warning people off as he did, the landowner was bringing the right of the public to use the way into question, and I have nothing to add on that. As regards the retrospective effect of the Act, I have come to an F opposite conclusion, and as the matter is one of far-reaching importance, I think that I should state reasons for the conclusion at which I have arrived.

As I understand the law, it is as stated by SARGANT, J., in *Re Hale's Patent* (2) ([1920] 2 Ch. 377 at p. 386) where he says:

G “No doubt the general law is that, while rights are not statutorily altered retrospectively, procedure is, apart from indications to the contrary, altered retrospectively; but where rights and procedure are dealt with together in the way in which s. 8 of the [Patents and Designs Act, 1919] deals with them, the intention of the legislature would seem fairly clear . . .”

H On the findings of the justices in this case, on some date in 1931 when Mr. Deverell was the owner of the land, he took steps to assert that there was no public right of way over this land. It is agreed that if this matter had been litigated in 1931 on the findings of the justices here, Mr. Deverell would have been successful and would have established that he was entitled to the enjoyment of his park without any interference whatsoever by the public. In 1932 the Rights of Way Act, 1932, was passed and the successful contention of the local authority here is that the passing of that Act destroyed the right the owner I enjoyed in 1931 to use his land without interference by the public and created a new right in the public to pass over that land. Section 1 (1) of the Act of 1932 provides:

“Where a way, not being of such a character that user thereof by the public could not give rise at common law to any presumption of dedication, upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, such way shall be deemed to have been dedicated as a highway . . .”

Section 1 (6) provides the terminal date of that twenty years, and it is on the construction of that sub-section that this matter depends. The sub-section says:

"(6) Each of the respective periods of years mentioned in this section shall be deemed and taken to be the period next before the time when the right of the public to use a way shall have been brought into question by notice as aforesaid or otherwise."

If Mr. Deverell's and his successor's prohibition of the public to use this land was regarded as a continuing matter which was in operation after the Act came into force the twenty years could date back from then. But what is said here is that one must go to 1931 when the prohibition was first in force; in other words, the terminal date may be a date prior to the existence or passing of this Act. Section 1 (3) provides:

"A notice by the owner of the land over which any such way passes inconsistent with the dedication of the way as a highway, placed before or after and maintained after the commencement of this Act . . .",

is a notice which brings the right into question. That postulates that a notice brought into operation before the Act is maintained after the Act comes into operation. If the only notice given by the owner in this case was the notice referred to in sub-s. (3) and if he had been sufficiently astute to pull it down immediately before the Act was passed into law, there would have been no terminal date to which the twenty years could run.

The other matter which appears to me to be remarkable is that s. 2 provides that nothing in the Act shall affect any proceedings which have been taken before the Act came into force or where proceedings are so pending. The result of that is that if when Mr. Deverell warned the public off somebody had said: "You cannot do that, we have a right here", and he had brought his action, he would be protected by that section. The only reason, presumably, why he did not bring his action was (as found by the justices) that no member of the public asserted the existence of a right. It seems to me an extraordinary result to arrive at that, where a number of landowners are in identical situations, those who do not choose to litigate, because nobody asserts a contrary right, should lose their rights, whereas those against whom the contrary right is asserted and who do start litigation are protected.

It seems to me that the conclusion which I have reached is reinforced by s. 1 (1) and (5) and also by s. 4 of the Act, which provides:

"The person entitled to the remainder or reversion immediately expectant upon the determination of a tenancy for life or pour autre vie in land shall have the like remedies by action for trespass or an injunction to prevent the acquisition by the public of a right of way over such land as if he were in possession thereof."

I understand that that is an entirely new right conferred on reversioners, and one asks oneself what is the use of giving them that right if retrospectively any rights they had had been extinguished in 1931 when (a) there was no right and (b) there was no machinery by which the reversioners could have asserted their rights if they had any.

For these reasons, in my view, the Act operates in this way: the starting-point of twenty years can be, of course, any time before the coming into force of the Act; the terminal date must be a date after the Act came into operation.

Appeal dismissed.

Solicitors: *Ashurst, Morris Crisp & Co.* (for the appellant); *Theodore Goddard & Co.*, agents for *G. Andrew Wheatley*, Winchester (for the respondents).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A Re TENNANT'S APPLICATION.

[CHANCERY DIVISION (Upjohn, J.), January 17, 18, 19, 1956.]

Bankruptcy—Property—Covenant to make maintenance payments to divorced wife—Wife adjudicated bankrupt—Suspended discharge—Whether payments to be made to bankrupt or trustee in bankruptcy—Bankruptcy Act, 1914 (4 & 5 Geo. 5 c. 59), s. 51 (2).

B By deed dated May 21, 1940, the applicant covenanted to pay to his divorced wife, the covenantee, a monthly sum of £50 by way of maintenance during her life. In or about April, 1952, the covenantee was adjudicated bankrupt and on Apr. 29, 1955, she obtained her discharge subject to a suspension of two years. By an interpleader summons the applicant sought the direction of the court how, as between the covenantee and her trustee in bankruptcy, he should dispose of the monthly sum payable under the deed.

C **Held:** the monthly sum remained payable to the covenantee until on the application of the trustee in bankruptcy the court should make an order under s. 51 (2)* of the Bankruptcy Act, 1914, for payment of the sum to him, because, although the right to the monthly sum vested in the trustee under s. 18 and s. 38 of the Act of 1914, yet s. 51 (2) controlled that vesting and the monthly sums were income within s. 51 (2).

D *Re Landau, Ex p. Trustee* ([1934] Ch. 549) and *Ex p. Huggins, Re Huggins* (1882) (21 Ch.D. 85) applied.

[As to the payment of salary or income of a bankrupt to his trustee by order of the court, see 2 HALSBURY'S LAWS (3rd Edn.) 456, para. 903.

E For the Bankruptcy Act, 1914, s. 51 (2), see 2 HALSBURY'S STATUTES (2nd Edn.) 387.]

Cases referred to:

(1) *Re Shine, Ex p. Shine*, [1892] 1 Q.B. 522; 61 L.J.Q.B. 253; 66 L.T. 146; 5 Digest 927, 7594.

(2) *Re Landau, Ex p. Trustee*, [1934] Ch. 549; 103 L.J.Ch. 294; 151 L.T. 190; Digest Supp.

F (3) *Ex p. Benwell, Re Hutton*, (1884), 14 Q.B.D. 301; 54 L.J.Q.B. 53; 51 L.T. 677; 5 Digest 928, 7600.

(4) *Re Garrett*, [1930] 2 Ch. 137; 99 L.J.Ch. 341; 143 L.T. 402; Digest Supp.

(5) *Ex p. Huggins, Re Huggins*, (1882), 21 Ch.D. 85; 51 L.J.Ch. 935; 47 L.T. 559; 5 Digest 928, 7598.

G Interpleader Summons.

The applicant, David Francis Tennant, by originating interpleader summons, sought the direction of the court how, as between the debtor and her trustee in bankruptcy, he should dispose of the monthly sum of £50 payable by him under a deed of May 21, 1940, to the debtor.

H By a deed dated May 21, 1940, the applicant covenanted to pay to his divorced wife, known professionally as Miss Hermione Baddeley, the monthly sum of £50 during her life. The deed contained provision for security and for the realisation of that security if the applicant failed to make the monthly payments. The applicant continued to make the payments. On Apr. 3, 1952, a receiving order was made against Miss Baddeley and she was duly adjudicated bankrupt. On Apr. 29, 1955, she obtained her discharge subject to a suspension of two years.

I On her adjudication in 1952 the debtor had agreed with her trustee in bankruptcy that he should receive the maintenance payments for the benefit of her creditors. By June, 1955, the debtor's financial position had deteriorated and she gave her trustee notice of revocation of that arrangement which he refused to accept.

D. H. M. Davies for the applicant.

E. Grayson for the debtor.

P. R. Oliver for the trustee in bankruptcy.

* Section 51 (2) is printed at p. 426, letter E, post.

UPJOHN, J., stated the facts and continued: The question is, as between Miss Baddeley and her trustee in bankruptcy, who is entitled to these maintenance payments at any rate until the discharge takes effect and possibly for the rest of her life ? A

The trustee's claim is a perfectly simple one. He submits that under s. 18 and s. 38 of the Bankruptcy Act, 1914, all the property of the bankrupt is vested in him, and that, having regard to the very wide definition of property contained in s. 167 the right of Miss Baddeley to receive for the rest of her life the monthly sum which the applicant has covenanted to pay vests in him. The trustee, therefore, claims to be able to give a good receipt for it; to sell and realise it to the best advantage for the benefit of the creditors. The claim put forward by Miss Baddeley is that under s. 51 (2) of the Bankruptcy Act, 1914, the property in question, that is the right to receive these monthly payments, vests in the trustee subject only to the right of the trustee to make an application for payment to him under that section. I must consider that section. Section 51 (1) provides: B

"Where a bankrupt is an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the civil service of the Crown . . .", C

the salaries payable are inalienable; provision is made, nevertheless, for the payment of those salaries, or part of those salaries, as the case may be, "with the consent of the chief officer of the department" employing the officer or clerk, to the trustee for the benefit of the creditors. Sub-section (2), which is the relevant enactment, is in these terms: D

"Where a bankrupt is in receipt of a salary or income other than as aforesaid, or is entitled to any half-pay, or pension, or to any compensation granted by the Treasury, the court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income, half-pay, pension, or compensation, or of any part thereof, to the trustee, to be applied by him in such manner as the court may direct." E

The question to be determined is whether the monthly sums payable under the deed of 1940 can properly be described as "a salary or income" for the purposes of s. 51 (2). F

I shall not attempt to define what is "salary or income" for the purposes of that section. It is clear that the phrase has a somewhat limited meaning. Indeed, LORD ESHER, M.R., in *Re Shine, Ex p. Shine* (1), said this ([1892] 1 Q.B. 522 at p. 527): G

"We have held that the word 'income', as used in this section, [the predecessor of s. 51 (2)] does not mean all income, or all that property of a man which is generally called his income; for, in most cases, income of that kind would vest in the trustee on his bankruptcy, and thus go to the creditors. But the Act assumes that there is some income of a bankrupt which is not part of his property so as to vest in the trustee in his bankruptcy." H

However, it seems to me that the matter is concluded in this court by the judgment of the Court of Appeal in *Re Landau, Ex p. Trustee* (2) ([1934] Ch. 549). In that case, which again concerned a payment made on a divorce (made under an order of court which was made by consent), a substantial sum of about £1,800 per annum was payable by the respondent to the petitioner, and it was held that that sum was "income" for the purposes of s. 51 (2). ROMER, L.J., said ([1934] Ch. at p. 560): I

"The only other question which remains is whether the payments in question in this case can properly be described as income within the meaning of s. 51 (2). I confess that, even after hearing Mr. Tindale Davis's interesting argument, I have not the least idea now why this annual sum paid by the husband to the wife under the direction contained in the order of the Divorce Court is not her income."

- A He then deals with the judgment of BRETT, M.R., in *Ex p. Benwell, Re Hutton* (3) (1884) (14 Q.B.D. 301), and continues:

"... in the passage read by the Master of the Rolls the learned lord justice said (14 Q.B.D. at p. 308): 'In my opinion s. 90* points to some definite annual amount which is coming to the bankrupt'. This £1,800 a year, free of tax, without any question whatsoever is a definite annual amount coming to the bankrupt. That being so, it follows from the decision of *Ex p. Benwell* (3), if one wanted any authority for the proposition, that this sum is income within the meaning of s. 51 (2)."

That seems to me to cover this case. For this purpose it cannot make any difference that the monthly sum is paid under an agreement in lieu of an application to the court for maintenance rather than under an agreement made in pursuance of an application to the court where the sum is agreed and contained in a consent order. Therefore, it seems to me that this is income within the meaning of s. 51 (2).

- C If the matter were *res integra*, it would seem to me that there would be something to be said for the view that s. 51 (2) was dealing with the case where the "income" or "salary", did not vest in the trustee in bankruptcy under the provisions of the Bankruptcy Act, 1914: such, for instance, as a contract for personal services or possibly something so vague as future earnings. Indeed, that was the view taken, I think, in some of the earlier authorities and if that were so s. 51 would not avail Miss Baddeley for, *prima facie*, at all events, the right to this monthly sum vested in the trustee under s. 18 and s. 38. It is plain, however, that the later authorities take a different view, and that s. 51 (2) applies equally to a case where the income or salary in question vests in the trustee as to the case where it does not. The authority for that is to be found in *Re Landau* (2). In that case the argument, curiously enough, was that sub-s. (2) applied only to property which vested in the trustee and did not include property which did not vest in the trustee. That argument was rejected by the Court of Appeal. SLESSER, L.J., said ([1934] Ch. at p. 558):

"... yet nevertheless I am of opinion that later authorities show quite clearly that even in the case of salary or income which is not within ss. 18 and 38, the court has jurisdiction to make an order under s. 51 where it is salary or income within that section."

- G That implies a *fortiori* that it did apply to cases where the property vested under s. 18 and s. 38. It was put more succinctly by ROMER, L.J., in this way (*ibid.*, at p. 560):

"Now it was held by FARWELL, J., in *Re Garrett* (4) ([1930] 2 Ch. 137) that s. 51 of the Bankruptcy Act, 1914, applies to property whether or not vested in the trustee. I entirely agree with him. FARWELL, J., said, and said truly, that that conclusion was amply justified by the decision of this court in *Re Shine* (1). I agree with that too, but I would add this, that even in the absence of authority I should have arrived at the same conclusion without any hesitation whatsoever."

- I The question is: how does s. 51 (2) work in any case where the trustee would *prima facie* seem to be in a position to claim the property in question on the bankruptcy and ask the person bound to make these monthly payments to pay all future sums to him? I think the answer to that is to be found partly in a decision to which I will refer in a moment, and partly in the section itself. If I may read the sub-section again in the light of the authorities establishing that it does apply to income vested in the trustee in bankruptcy, it is this: Where

* I.e., s. 90 of the Bankruptcy Act, 1869, now superseded by s. 51 (2) of the Bankruptcy Act, 1914.

a bankrupt is in receipt of a salary or income or is entitled to any part of it, the court, on the application of the trustee, shall make such order as it thinks fit for the payment of the salary to the trustee. That would seem to indicate that, although the right to the income vests in the trustee, yet, in order to reduce it into possession, he must obtain some order of the court in bankruptcy ordering that it, or some part of it, be paid to him. I think it is noteworthy that it is only the trustee that can make the application. The bankrupt has no such right. That view is, I think, confirmed by the decision of the Court of Appeal in one of the earlier cases, *Ex p. Huggins, Re Huggins* (5) (1882) (21 Ch.D. 85). In that case the trustee in bankruptcy made an application under the section which is the predecessor of s. 51 of the Bankruptcy Act, 1914. It was in respect of a salary payable to the bankrupt as a retired judge of a Crown Colony; and it was held that that pension vested in the trustee. SIR GEORGE JESSEL, M.R., having held that the property vested in the trustee, said this (21 Ch.D. at p. 91):

"My view of the meaning of the provisions of the Bankruptcy Act is this. Sections 15 and 17 [the predecessors of ss. 18 and 38 of the Act of 1914] vest all the 'property' of the bankrupt in the trustee, but this vesting is subject to exceptions such as that which is made by s. 23 of leases and onerous contracts which the trustee is authorised to disclaim. The 'property' vests by virtue of ss. 15 and 17, but subject to the exceptions made by subsequent sections of the Act. The series of sections beginning with s. 87 and ending with s. 95, is prefaced by the words 'As to property devolving on trustee'. The proceeds of executions, which are dealt with by s. 87, would clearly vest in the trustee but for the provisions of that section."

He then deals with the case of a beneficed clergyman who may have the misfortune to become bankrupt. He then deals with s. 90, which is the predecessor of s. 51 (2), and says this (*ibid.*, at p. 92):

"In such cases s. 15 is controlled by s. 89, and a person who holds such a position and who becomes a bankrupt, is not necessarily to be left to starve, however improvident he may have been, but a discretion is given to the court to fix how much of his pay and salary is to be made available for the payment of his creditors. If this be so, why do not the cases which are dealt with by s. 90 stand in a similar position? Section 90 applies to a bankrupt 'who is in the receipt of a salary or income other than as aforesaid'. The present appellant's income is not a 'salary', but it is 'income'. The word 'income' is as large a word as can be used. It is not the less 'income', because it has to be voted every year by the Colonial Legislature. The court is empowered to 'make such order as it thinks just for the payment of such salary or income, or of any part thereof, to the trustee'. That means that, though the salary or income would vest in the trustee by virtue of ss. 15 and 17, the court may order that only a part of it shall be set aside for the benefit of the creditors. This is a specific provision which to that extent controls the operation of ss. 15 and 17. I think, therefore, that the trustee in this case applied to the court for the right order, i.e., for a declaration that the bankrupt's pension had vested in him, and then a direction what proportion of it should be set aside for the payment of the creditors."

In my judgment s. 51 (2), therefore, controls the vesting of the property under s. 18 and s. 38, and payment must necessarily be subject to an application by the trustee in bankruptcy for that purpose. The only way of giving effect to that, as it seems to me, although the result is curious, is this. Although the property vests in the trustee, nevertheless it remains payable to the bankrupt unless and until the trustee makes some application under the section. Therefore, I propose to declare that the monthly sum of £50 continues to be payable to the bankrupt subject always to an application under s. 51 (2) of the Bankruptcy

- A Act by the trustee asking for payment to him of the monthly sum or some part thereof.

Declaration accordingly.

Solicitors: *Vizard, Oldham, Crowder & Cash* (for the applicant); *C. Butcher & Simon Burns* (for the debtor); *Stafford Clark & Co.* (for the trustee in bankruptcy).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

C HERDMAN v. WALKER (TOOTING), LTD. AND OTHERS
(CITY PLANT HIRERS, LTD. Third party).

[QUEEN'S BENCH DIVISION (Pearce, J.), January 23, 24, 25, 26, 27, 1956.]

- D *Master and Servant—Loan of servant—Hire of crane and driver—Hirer to be responsible for driver's action as though the driver were in the hirer's direct employ—Accident due to negligence of driver—Whether owner entitled to be indemnified.*

- E In an action for damages for personal injuries arising out of an accident involving a crane, the plaintiff was awarded damages and costs against C.I., Ltd. The crane had been driven by M., who was in the general employment of C.I., Ltd., but the crane had been hired by C.I., Ltd. to C.P.H., Ltd., who had sub-hired it to the plaintiff's employers. The contract of hire contained the following clause. "Handling of plant. The driver or operator (if any) supplied by owners shall be responsible for driving or operating the plant but shall use it and be under the direction and supervision of the hirer who shall be responsible for his action as though the driver were in hirer's direct employ". The contract of sub-hire did not contain such a clause. C.I., Ltd. claimed an indemnity under this clause against C.P.H., Ltd., in respect of damages and costs which they were ordered to pay to the plaintiff.

- G **Held:** when the driver was working the plant "under the direction and supervision of the hirer" within the meaning of the clause in the contract of hire the circumstances would be such that the hirer would be vicariously liable for the negligence of the driver, and accordingly, as such circumstances existed in this case, C.I., Ltd. were entitled to the indemnity which they sought.

- H [As to liability for tort of independent contractor and his servants, see 22 HALSBURY'S LAWS (2nd Edn.) 238-243, paras. 419-422; and for cases on the subject, see 34 DIGEST 155-160, 1216-1247.]

Case referred to:

- (1) *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool), Ltd.*, [1946] 2 All E.R. 345; [1947] A.C. 1; 115 L.J.K.B. 465; 175 L.T. 270; 2nd Digest Supp.

I **Third-Party Proceedings.**

The plaintiff, Ralph Armstrong Herdman, claimed damages against the three defendants, Walker (Tooting), Ltd., Chamberlain Industries, Ltd., and City Plant Hirers, Ltd., in respect of personal injuries which he had suffered on Dec. 23, 1951, when the jib of a crane fell on him. The plaintiff was employed by the first defendants; the crane was owned by the second defendants who had hired it to the third defendants. The third defendants had sub-hired it to the first defendants. The second defendants had on July 16, 1954, issued a third-party notice to the third defendants (referred to hereafter as the third party)

under R.S.C., Ord. 16A, r. 12. On Jan. 25, 1956, PEARCE, J., gave judgment for the plaintiff against the second defendants for £7,500 with costs and ordered them to pay the costs of the first and third defendants. He found that the plaintiff's injuries were caused by the negligence of one McManus who was the driver of the crane and that the second defendants were vicariously liable for the negligence of Mr. McManus who was in their general permanent employment while driving the crane. In the third-party proceedings the second defendants claimed an indemnity and/or contribution against the third party in respect of the judgment for £7,500 and the order for costs given in the main action. They claimed that by an agreement made in or about August, 1951, between them and the third party the third party had agreed to hire from them the crane in question on certain terms and conditions. These terms and conditions were set out on the back of a printed form used by the second defendants for their contracts of hire under the heading "General Conditions of Hire". They included the following clauses:

"Subletting. Hirer shall not sublet the plant or any part of it without first receiving the written permission of owners.

"Handling of plant. The driver or operator (if any) supplied by owners shall be responsible for driving or operating the plant but shall use it and be under the direction and supervision of the hirer who shall be responsible for his action as though the driver were in hirer's direct employ.

"Insurance. Drivers and operators where supplied by the owners. Liability under the Workmen's Compensation Act is insured by a policy in the joint names of the owners and the hirers. Where insurance is provided it is in accordance with the usual conditions applicable in each case. In all cases the hirer for the time being is jointly insured with the owners, and must observe the conditions and take all reasonable precautions for the safety of the plant and its safe use. All plant is insured against fire, and where other insurance is provided it will include indemnity for liability for injury to persons and damage to property of third parties (which does not include persons in the employ of the hirer or property owned by him or in his custody and control)."

On the front of the printed form there was set out the article hired, namely, the crane, and the rate of payment for the hire which was stated to be "Less ten per cent. re-hire discount". The third party re-hired the crane to the first defendants using a printed form similar to that used by the second defendants but the first defendants had crossed out the indemnity clause relating to "Handling of plant". The case is reported only on the third-party proceedings.

F. W. Beney, Q.C., and *G. R. F. Morris* for the second defendants.

N. E. Wiggins for the third party.

PEARCE, J., stated the result of the main action and reviewed the contentions and evidence in the third-party proceedings, and found that the printed terms formed part of the contract of hire between the second defendants and the third party. HIS LORDSHIP continued: Counsel for the third party argues that the material clause* does not amount to an indemnity. It has, he says, two limbs dealing with different situations and is not to be read as dealing with one general situation. The first limb is:

"the driver or operator (if any) supplied by owners shall be responsible for driving or operating the plant."

The second limb is:

"but shall use it and be under the direction and supervision of the hirer who shall be responsible for his action as though the driver were in hirer's direct employ."

* The clause "Handling of plant", see letter D, *supra*.

A In other words, first, the driver shall be responsible for the driving, i.e., how he drives, but, secondly, he shall be under the direction and supervision of the hirer as to what he is to do, and only when that direction or supervision causes disaster, the hirer is to be responsible for the driver's action.

B Counsel for the second defendants' answer to that is that the hirer would be liable anyhow if the driver properly followed a negligent instruction by the hirer, and there is no need to put the words in at all unless they are intended to apply to cases (as this) where a driver negligently follows a proper instruction by the hirer. Moreover he argues that, if counsel for the third party's argument is correct, the words "as though the driver were in hirer's direct employ" are otiose, since there is no need to import the notion of a vicarious responsibility in a matter in which the hirer has by his own direction, intervention and supervision caused the damage. Counsel for the third party claims that even if his construction is not correct it is at least sufficiently plausible to make the clause ambiguous. The fact that it was known that the crane was to be re-hired makes it still more ambiguous and inapplicable and, as the second defendants are the proferentes, the document should in case of doubt be construed against them.

C In my opinion, the fact that the crane was to be re-hired does not prevent the clause from being applicable. The terms themselves envisage the possibility of re-hire by imposing the necessity for written leave—leave which is by implication given by the second defendants typing the words "Less ten per cent. re-hire discount" in the column devoted to the hiring rates. If any term is meaningless or absurd in relation to the position on re-hire, then it could not be applied, but in my view that is not so in this case. There are various terms in which the hirer has duties and liabilities which, if he sub-hires, he will in practice have to carry out vicariously through the sub-hirer. It is for him to see that his agreement provides for these and compels the sub-hirer to undertake them. Unfortunately, as we know, in this case the sub-hirer crossed out the clause relating to indemnity by him to the hirer in the sub-hire contract.

D Counsel for the third party contends that the conditions say that insurance is provided and that they indicate, at least by inference, that it covers any third-party matters, and, therefore, it would be an improbable inconsistency for the agreement to provide an insurance while claiming an indemnity. But I think the normal reading of the words relating to insurance does not bear this inference. The document does not say that complete third-party insurance is provided, and I do not believe that the third party was misled. The third party is not ignorant of the nature of insurance in these transactions, seeing that it has carried on this business itself for years. Nor do I think that the references to insurance affect the question whether the disputed clause is an indemnity.

E When I first read the words they seemed to me a clear expression of intention that when the driver is using or working the plant under the direction and supervision of the hirer, as Mr. McManus was in this case, the hirer shall be responsible for the driver's action (including, of course, his negligence) as though the driver were in his direct employ. In such a case the hirer, who is making use of his services, will be vicariously liable for them as a master is. I still think that that is its clear meaning. Any other reading of the clause is straining its meaning. This is an ordinary business document meant to be intelligible to businessmen; it is not an artistic document, but it has, I think, only one normal construction. That construction is consistent with the intention of the parties as collected from the whole agreement.

I If it means what I understand it to mean, does it constitute an indemnity? In *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool), Ltd.* (1) ([1946] 2 All E.R. 345), the facts of the case were not wholly dissimilar to this. The regulations of the harbour board who hired out cranes with drivers laid down regulations that were binding on applicants for the use of such cranes. They prescribed that the drivers provided with the cranes should be the servants of the

applicants. The issue in that case was whether this contractual condition could affect the board's liability to a plaintiff who was injured, and it was held that it could not; but in his opinion LORD PORTER pointed out ([1946] 2 All E.R. at p. 350):

"A contract of this kind may of course determine the liability of the employers inter se, but it has only an indirect bearing upon the question which of them is to be regarded as master of the workman on a particular occasion."

In my view the contested clause does determine the liability of the employers inter se, and the second defendants are entitled to the indemnity they claim.

Order accordingly.

Solicitors: *Blount, Petre & Co.* (for the second defendants); *Wildman, Millington & Co.* (for the third party).

[*Reported by A. P. PRINGLE, Esq., Barrister-at-Law.*]

WATERS v. WATERS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Wallington, J.), January 16, 17, 1956.]

Justices—Husband and wife—Cruelty—Persistent cruelty—Natural consequence of respondent's acts—No act of violence—Intention to be cruel—Unwarrantable indifference as to consequences to other spouse—Relationship to constructive desertion.

Justices—Desertion—Constructive desertion—Conduct equivalent to expulsion of other spouse—Intention to disrupt the home—Conduct by husband probably resulting in departure of wife from home—Relationship to cruelty.

The parties were married in September, 1953, and in November, 1954, the wife left the matrimonial home. The wife applied to the justices for an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, complaining that the husband had been guilty of persistent cruelty towards her and had deserted her. At the conclusion of the wife's case, the justices found, according to their reasons, that the husband had no intention of being cruel to his wife, but owing to his limited intelligence and set habits he was not able to conform to the standards of life which his wife expected or provide the companionship which she desired, and that although the wife's mental health showed some deterioration after the marriage there was no wilful misconduct by the husband which caused such deterioration. They also found that there was no proof of wilful ill-treatment of the wife by the husband, and that he had not deliberately conducted himself so as to drive the wife away from the house or bring the matrimonial home to an end. Accordingly, they found that the wife had not proved either complaint and dismissed her application. On appeal by the wife,

Held: (i) just as constructive desertion by a husband might be established where he persisted, in spite of warnings that his wife might leave the matrimonial home, in a course of conduct which a reasonable man would have known would probably have had that result, so cruelty by a husband might be established where he persisted, in spite of such warnings, in a course

- A of conduct which a reasonable man would have known would have an injurious effect on her health (see p. 441, letter C, post);
- and (ii) therefore, both complaints would be remitted for re-hearing, as the justices had misdirected themselves in dismissing the complaints on the grounds that the husband had not intended to be cruel to the wife and had not been guilty of deliberate conduct so as to drive her away from the matrimonial home.
- B *Jamieson v. Jamieson* ([1952] 1 All E.R. 875) and *Lang v. Lang* ([1954] 3 All E.R. 571) applied.
Appeal allowed.
- [As to intention in relation to a charge of constructive desertion, see 12 HALSBURY'S LAWS (3rd Edn.) 248, para. 463; and for cases on the subject, see 27 DIGEST (Repl.) 351, 2899, and SUPPLEMENT.
- C As to the intention to be cruel, see 12 HALSBURY'S LAWS (3rd Edn.) 272, para. 520; and for cases on the subject, see 27 DIGEST (Repl.) 299, 2443-2447, and SUPPLEMENT.
- As to relationship of constructive desertion to cruelty, see 12 HALSBURY'S LAWS (3rd Edn.) 249, para. 464.]
- D Cases referred to:
- (1) *Lauder v. Lauder*, [1949] 1 All E.R. 76; [1949] P. 277; 27 Digest (Repl.) 306, 2537.
 - (2) *Timmings v. Timmings*, [1953] 2 All E.R. 187; 3rd Digest Supp.
 - (3) *Ramsden v. Ramsden*, [1954] 2 All E.R. 623; 118 J.P. 430; 3rd Digest Supp.
 - (4) *Horton v. Horton*, [1940] 3 All E.R. 380; [1940] P. 187; 109 L.J.P. 108; 163 L.T. 314; 27 Digest (Repl.) 307, 2543.
 - (5) *Kelly v. Kelly*, (1870), L.R. 2 P. & D. 59; 39 L.J.P. & M. 28; 22 L.T. 308; 27 Digest (Repl.) 298, 2434.
 - (6) *Buchler v. Buchler*, [1947] 1 All E.R. 319; [1947] P. 25; [1947] L.J.R. 820; 176 L.T. 341; 111 J.P. 179; 27 Digest (Repl.) 350, 2899.
 - (7) *Jamieson v. Jamieson*, [1952] 1 All E.R. 875; [1952] A.C. 525; 116 J.P. 226; 3rd Digest Supp.
 - (8) *Squire v. Squire*, [1948] 2 All E.R. 51; [1949] P. 51; [1948] L.J.R. 1345; 112 J.P. 319; 27 Digest (Repl.) 296, 2415.
 - (9) *Simpson v. Simpson*, [1951] 1 All E.R. 955; [1951] P. 320; 115 J.P. 286; 27 Digest (Repl.) 299, 2447.
 - (10) *Lang v. Lang*, [1954] 3 All E.R. 571; [1955] A.C. 402; 3rd Digest Supp.
 - (11) *King v. King*, [1952] 2 All E.R. 584; [1953] A.C. 124; 3rd Digest Supp.
 - (12) *Watt (or Thomas) v. Thomas*, [1947] 1 All E.R. 582; [1947] A.C. 484; 1947 S.C. (H.L.) 45; [1947] L.J.R. 515; 176 L.T. 498; 2nd Digest Supp.
 - (13) *Marjoram v. Marjoram*, [1955] 2 All E.R. 1; 119 J.P. 291.
 - (14) *Hosegood v. Hosegood*, (1950), 66 (pt. 1) T.L.R. 735; 27 Digest (Repl.) 336, 2798.

Appeal.

- I The wife appealed against an order of the Newbury justices, dated Oct. 14, 1955. The parties were married in September, 1953. On Nov. 17, 1954, the wife left the matrimonial home. On Sept. 5, 1955, the wife caused a summons to be issued against the husband alleging that he had been guilty of persistent cruelty towards her and had deserted her. At the hearing of the summons, before any evidence had been called, the husband objected that the court had no jurisdiction to hear the charge of cruelty as there could have been no act of alleged cruelty within six months preceding the date of the summons. The justices overruled the objection and proceeded to hear the wife's evidence and

that of one of her daughters and of a doctor. At the conclusion of the wife's case *Lauder v. Lauder* (1) ([1949] 1 All E.R. 76) and *Timmins v. Timmins* (2) ([1953] 2 All E.R. 187) were cited to the justices who ruled that there was no case for the husband to answer and dismissed the complaints. The wife appealed.

F. W. I. Barnes for the wife.

J. K. Wood for the husband.

LORD MERRIMAN, P.: The justices' reasons assume that the wife was telling the truth, but that as a matter of law neither the charge of cruelty nor the charge of desertion was made out. I have said several times before (e.g., in *Ramsden v. Ramsden* (3) [1954] 2 All E.R. 623), that I have no doubt whatever that justices have a perfect right, like any other tribunal, to throw a case out if they think there is nothing in it, without waiting to hear the other side. I repeat the caution, however, that I have coupled with that on previous occasions ([1954] 2 All E.R. at p. 624, letter D), that, generally speaking, particularly in cruelty cases, it is not wise for justices to do so; and I do not limit that only to justices, because it has been repeatedly emphasised by higher authority that the whole story in these matters is all important, particularly in cases which may be described as border-line. In all such cases it is very important to get the whole atmosphere from both sides.

I am proposing to deal with the present case on the basis that the justices ruled that there was no case to answer, though not on the ground of lack of jurisdiction which had originally been propounded. On that basis, and particularly in a border-line case, as I think this is, and as it has been fairly described by the husband's own counsel, it is of the essence of the matter that, assuming the wife's story, as one must assume it to be, to be more or less true in substance and in fact, the justices should direct themselves properly as to the issue before they rule that there is no case. From the very first counsel for the wife has said that he is asking us not to decide this matter, but to send it back for a re-hearing with a proper direction from this court as to the points to which the justices ought to direct themselves. As I take the view that that is the right result in the present case, it is very desirable that I should not say anything which would seem to suggest a concluded opinion on any fact, and I must not be taken to be expressing any opinion, when I refer to the case which the wife put forward, as to its veracity or otherwise; I am assuming, for the purposes of the ruling of "no case", that in substance her case is taken at its face value.

It is a case of extreme boorishness, of, as she says, unbearable taciturnity, deliberate refusal to co-operate over the running of the house, the finance, the small-holding, and so on, and personal uncleanness of a very marked character, persisted in, in spite of protests on her part, to the extent that it became, in effect, nauseating. She alleges a complete indifference to her own state of health, to her own protests that what was happening was "getting her down", a callous neglect of her when she had an accident while driving the pony-cart and was in hospital, and then, on her return home, at first an indifference, no making welcome of her or anything of that sort, but, when the husband finally went to see her in her bedroom, she alleges that he made a most opprobrious and offensive remark which suggested that the accident was due to her having taken too much to drink, for which, I gather, it is not suggested that there was any foundation at all. The result was that she was heading, so she says, for a nervous breakdown; in this she was to some extent corroborated by the doctor. She left home on Nov. 17, 1954, and put her case as it stood at that time into a note which she left behind, in which she said that she had told him many times how she felt and that he did nothing to help her, and so forth, and she complained of the various matters to which I have alluded. Her note ended in this way: "My absence may make you alter towards me and be more

- A what I expected when I married you". One of the things which is said in the present case is that the husband's conduct was due to his natural disposition, which, I suppose, was a reflection of a remark made in *Horton v. Horton* (4) ([1940] 3 All E.R. at p. 384) about conduct being a manifestation of character acting in its own sphere. It was an excuse which was put forward, but did not succeed, in *Lauder v. Lauder* (1), and a long way further back than that, in the leading case of *Kelly v. Kelly* (5) (1870) (L.R. 2 P. & D. 59) which was the first reported case depending solely on mental cruelty, where the excuse was put even higher, namely, that the conduct was due to the clerical husband's response to the call of a Higher Authority, and actuated, so it was said, by the best possible motives. Nevertheless, it was an excuse which did not prevail.

- C I have read the last sentence of the wife's letter about what she expected when she married the husband. They were both people with previous experience of marriage, they had known each other for the best part of a year before they married, they had been seeing each other regularly, and her description of him was that she found him a pleasant suitor. She says:

- D "During the time I met him until the time we were married I found him to be very nice, lonely, as I was. He appeared to be rather unhappy. He was owing his mother-in-law money on the house. He treated me very nicely before we were married. He was perfectly clean and quite normal."

- In other words, he could be nice if he chose, and it is remarkable that the wife's complaints of the change in the husband's behaviour actually began with the very first day of the marriage. I mentioned the fact that he owed his mother-in-law money on the house. One of the things which he asked the wife to do before marriage was to save the house, "Roundwood Cottage", and if she could save it they would live there. The wife found £1,500 to pay off the husband's mother-in-law, with the result that the cottage and the small-holding became the matrimonial home. She says that from the very day of the marriage the whole situation changed. Although they had no sexual intercourse at all, according to her story, he spent the first three days in bed because he liked being in bed, and he would not get up. She had no experience of farming herself, and although a sow had a litter the very first day he would not go and help, despite the fact that she begged him to do so. There was another litter a day or two later, and the same thing happened; he made her do all these things without offering the slightest help. Naturally enough, according to her case, it worried her considerably, because it was so remarkable a change from the man he had been before marriage, so much so, indeed, that she accused him of having married her simply to get the £1,500, and that is one of the points which may have to be considered in light of the later incident to which I am about to refer. I am not expressing any opinion about it, but it is certainly one of the things which ought to be considered as a possibility in connection with the husband's conduct towards her.

- H In July, 1955, the wife went to the matrimonial home to try to have a talk with the husband, according to her case, to see if things could not be got on to a better footing. She found on arrival that the lock on the front door had been changed. The husband arrived shortly afterwards on his bicycle. She had had to walk a mile and a half or thereabouts from the 'bus on a hot July day, and would have to walk back again. There was no 'bus for an hour and a half or so, and she asked, not unnaturally, to be allowed to go into the house. I He refused to allow her in and said that there was not a chair for her to sit on because she had taken them all, which was quite untrue. According to her, she had taken the things which belonged to her, but she had not denuded the house of furniture, and, indeed, he was living in it. However, in the most crude and callous way, according to her, he refused to let her into the house, and refused even to discuss matters. He picked up a sickle and went off to

cut thistles, or some other weed, and left her there, with a remark to this effect, pointing to the key: "I have won", or "I have come out on top". I do not know what precisely he meant, but it is certainly one of the things, one would have thought, that any court would want explained. One possible interpretation is that he had got everything he wanted; he had got the house, to save which she had paid £1,500, and he had got her out of it. I do not say that it is the meaning, but it is a possibility, and nobody can, I think, regard that incident as entirely separable from that which is alleged to have gone before, or, taking it as part of the story, can ignore the significant light that it throws on the husband's attitude during this comparatively short time that they were living together.

That brings me to the justices' reasons. In finding the complaints not proved and dismissing the application, they say:

"The husband and wife were ill-suited to each other owing to the wife's superior intelligence and the husband's mode of life particularly in matters of cleanliness. The wife immediately after the marriage realised that the marriage was a ghastly mistake by reason of his habits, lack of intelligence and physical condition—(a disease affecting both legs)."

I have not mentioned the disease. It is one of the things on which the wife lays some stress, but it is impossible to know precisely what it was that was complained of; she merely talked about it as some horrible disease of the legs. The point really, as I think, is that she begged him to be treated for it, and he simply refused. In that sense it is more or less in the same category as his personal uncleanness, which, according to her, consisted of such things as washing in the kitchen sink, in spite of the fact that there was a bath in the house, cutting his toe-nails while the dinner was being put on the table in the room, and that sort of thing, and absolutely declining ever to have a bath. To put it plainly she says, and so does the daughter, that whereas he was quite nice and clean before marriage, his aroma in married life was nauseating. It is true that she did lay stress on the lack of cleanliness and on this disease, and that she did say that she realised the marriage was a ghastly mistake, but I do not think that it was only his habits or lack of intelligence which caused her to say that. I think that it was, as she puts it, the whole treatment to which she was being subjected.

Then there comes the first of three corresponding statements about the justices' approach to the matter, and it is here that I think one has to consider whether they have not misled themselves by that approach. They say:

"The husband had no intention of being cruel to his wife, but owing to his limited intelligence and set habits was not able to conform to the standards of life which his wife expected, or provide the companionship which she desired."

That I think may be said, on the evidence as it stands, to do less than justice to the contrast between the husband's behaviour before marriage and his alleged behaviour after marriage. However that may be, that is all put to illustrate the fact that the husband is said to have had no intention of being cruel. Then there is the passage, to which I have already referred, that:

"There had been no violent quarrels between the parties, and the husband's silence was due to his natural disposition",

about which I will not repeat myself. They then deal with the medical aspect of the matter:

". . . that having considered carefully the evidence of Dr. [M.] the wife's mental health showed some deterioration after the marriage, due to various

A causes, particularly the physical troubles to which she was subjected, and her disappointment on finding her husband to be an unsuitable companion, but there was no wilful misconduct by the husband which caused such deterioration."

Then, finally,

B "that there was no proof of wilful ill-treatment of the wife by the husband, and that he had not deliberately conducted himself so as to drive the wife away from the house or bring the matrimonial consortium to an end";

and there they refer to *Buchler v. Buchler* (6) ([1947] 1 All E.R. 319). They say:

C "For these reasons the justices decided that neither of the two grounds of complaint had been proved."

I am not going to attempt the task, which would be difficult if not impossible, of reconciling all the recent cases in the Court of Appeal on these topics, or of reconciling some of them with some of the older cases. I propose to deal with this matter by reference solely to decisions of the House of Lords, or of members of the House of Lords sitting in the Privy Council. I will begin with the statement that the husband had no intention of being cruel. The importance, in certain cases, of intention to injure, was dealt with in *Jamieson v. Jamieson* (7) ([1952] 1 All E.R. 875), and the way in which it was dealt with there is not the less important because, in what was acknowledged to be a thin case of alleged cruelty, the case had not been allowed to go to proof. It was a Scottish case. It was emphasised over and over again that the whole matter must be taken together, that one must not deal with this allegation and that allegation and say that neither of them could possibly amount to cruelty; one had to take the whole story, having regard to the character and susceptibilities of the parties, and so forth. Admittedly the averments were very near the line, but what was held to be decisive in that case was that the whole of the alleged misconduct was conditioned by the intention of the husband to bend the wife to his will; that was the decisive averment. LORD NORMAND said (*ibid.*, at p. 877):

G "The Lord President [LORD COOPER], I think, reaches the crux of the case when he says that 'where the cruelty is of the type conveniently described as mental cruelty, the guilty spouse must either intend to hurt the victim or at least be unwarrantably indifferent as to the consequences to the victim' . . . I do not propose to go into that because I wish to avoid the discussion of hypothetical cases and because I am of opinion that actual intention to hurt may have in a doubtful case a decisive importance and that such an intention has been averred here. Actual intention to hurt is a circumstance of peculiar importance because conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference. My noble and learned friends have discussed the averments in the opinions which they will deliver and which I have had the advantage of reading, and they have shown that the appellant has averred a case of actual intention to hurt, wilfully persisted in after the injury to the appellant's health was apparent to the respondent. These averments are, in my opinion, relevant, and they are, I think, supported by sufficiently specific instances of the respondent's alleged cruelty. I, therefore, agree that the action should go to proof."

I That is a long way from saying that actual intention is necessary to a charge of cruelty, even to a charge of mental cruelty, for although he found that actual intention was alleged, as, indeed, did all the other Lords who sat on the case, he approved what the Lord President said, that the guilty spouse in a mental

cruelty case must either intend to hurt the victim or at least be unwarrantably indifferent as to the consequences to the victim. LORD NORMAND went on to say (*ibid.*, at p. 878) that

“ . . . it does not do justice to the averments to take up each alleged incident one by one and hold that it is trivial or that it is not hurtful or cruel and then to say that cumulatively they do not amount to anything grave, weighty or serious. The relationship of marriage is not just the sum of a number of incidents, and in this case it has been overlooked that all the incidents averred are said to have been inspired by the respondent's intention to impose his will on his wife without consideration of her feelings or health.”

I will not refer to my own opinion beyond saying that I called particular attention (*ibid.*, at p. 881) to *Kelly v. Kelly* (5) and pointed out that LORD PENZANCE in the full court had said of the husband (L.R. 2 P. & D. at p. 72):

“ He says that he does not desire to injure her, and it has never been asserted that he does.”

Nevertheless, they all held that what is now called mental cruelty had been proved. Generally speaking I took what may be called the *Squire v. Squire* (8) ([1948] 2 All E.R. 51) line. I refer to it by that description for a particular reason, and I ventured to requote a phrase of my own in *Simpson v. Simpson* (9) ([1951] 1 All E.R. 955) which, as will appear shortly, has had the meed of approval of the Privy Council in *Lang v. Lang* (10) ([1954] 3 All E.R. 571). It is right to say that LORD REID, dealing with the *Squire v. Squire* (8) line of authority, said ([1952] 1 All E.R. at p. 886):

“ What I have said is only intended to apply when a deliberate intention such as I have described was the cause of the defender's conduct. Such an intention need not be proved by direct evidence. It may be inferred from the whole facts and atmosphere disclosed by the proof. I do not doubt that there are many cases where cruelty can be established without it being necessary to be satisfied by evidence that the defender had such an intention, but I do not intend to decide anything about such cases. If the defender did not, in fact, intend to ill-treat the pursuer, I desire to reserve my opinion whether or to what extent it is necessary or proper to impute an intention which did not exist by invoking a legal presumption that everyone must be supposed to intend or foresee the natural and probable consequences of his acts, and I also wish to reserve my opinion on the question whether or in what circumstances it can be enough in such cases to prove that a series of comparatively minor incidents has caused injury to the health of the pursuer if the defender was not guilty of deliberately ill-treating the pursuer.”

LORD REID made a similar reservation in *King v. King* (11) ([1952] 2 All E.R. at p. 593), but he was also a party to the decision in *Lang v. Lang* (10).

Before I cite *Lang v. Lang* (10) I should like to refer to what LORD TUCKER said in his short opinion in *Jamieson v. Jamieson* (7). After pointing out the wisdom of judges' having, as they always have, refrained from attempting a comprehensive definition of cruelty, he says ([1952] 1 All E.R. at p. 887):

“ It is, in my view, equally undesirable—if not impossible—by judicial pronouncement to create certain categories of acts or conduct as having or lacking the nature or quality which render them capable or incapable in all circumstances of amounting to cruelty in cases where no physical violence is averred. Every such act must be judged in relation to its surrounding circumstances, and the physical or mental condition or susceptibilities of

A the innocent spouse, the intention of the offending spouse, and the offender's knowledge of the actual or probable effect of his conduct on the other's health (to borrow from the language of LORD KEITH) are all matters which may be decisive in determining on which side of the line a particular act or course of conduct lies . . . In the present instance I think that the averments of knowledge, intention, and persistence remove this case from the area of doubt in which it might otherwise have lain in the absence of such averments."

I do not think that it is necessary to multiply citations on the point which LORD TUCKER expressed so clearly, that every act must be judged in relation to its surrounding circumstances, and the rest. The same thing, or words to the same effect, will be found in LORD REID's speech in *King v. King* (11), where, after analysing the report in 1947 S.C. (H.L.) 45 of *Watt (or Thomas) v. Thomas* (12), which, as he pointed out, was only partially reported in [1947] A.C. 484, he says ([1952] 2 All E.R. at p. 593):

D "What was said by the majority in *Watt (or Thomas) v. Thomas* (12) may not be novel though it may make necessary a re-examination of the reasoning in *Squire v. Squire* (8) [that is, on the question of intending the natural consequences of a man's acts]. But it does, in my opinion, show that it is not right first to ask whether the wife's conduct was cruel in fact, and then to ask whether it can in any way be justified. The question whether the wife treated her husband with cruelty is a single question only to be answered after all the facts have been taken into account."

E On that basis, he examined the details of the particular case. One of the dicta in *Watt (or Thomas) v. Thomas* (12) to which he had alluded ([1952] 2 All E.R. at p. 592) was an observation of LORD SIMONDS, who said (1947 S.C. (H.L.) at p. 61):

F "... there is in them [that is, in what the learned judge had said] the clear recognition, which I find elsewhere in the judgment of the Lord Ordinary [LORD PATRICK], of the fact that the picture of the domestic lives of this man and woman must be surveyed as a whole, before a true judgment can be formed of their possible future relations."

G It is not necessary to multiply citations to that effect, but on these authorities I suggest to those who have to re-hear the present case that it is not sufficient, and that the justices misdirected themselves in thinking that it was sufficient, to dismiss the matter by saying that the husband had no intention of being cruel. His conduct is just as reprehensible, be it remembered, if he can be said at least to be unwarrantably indifferent as to the consequences to the wife.

H I do not think it necessary to refer further to reason No. 5, on the medical aspect. No doubt, as in most of these cases, the doctor had done his best to get from the wife herself her own view of what was causing the trouble, but it was not his business to say what *was* the cause. What he did say, and it is important, is that these other matters to which the justices refer under the head of "various causes" were not in themselves sufficient to account for the mental condition in which he found the wife, and that plainly leaves it open to the inference that the wife is right in saying that it was the domestic trouble which was at the root of the matter.

I That brings me to the last reason, and here my task is simpler, because counsel for the husband, in the course of his admirable argument, admitted that as a direction on the topic of constructive desertion this direction would not hold water, where the justices say

"... there was no proof of wilful ill-treatment of the wife by the husband, and that he had not deliberately conducted himself so as to

drive the wife away from the house or bring the matrimonial consortium to an end." A

As this court has already said in *Marjoram v. Marjoram* (13) ([1955] 2 All E.R. 1), authority on the topic of what is the proper approach to expulsive intention in a case of constructive desertion is to be found in the decision of the Privy Council in the Australian case of *Lang v. Lang* (10). After a review of what DENNING, L.J., in *Hosegood v. Hosegood* (14) (1950) (66 (pt. 1) T.L.R. at p. 738) called two rival schools of thought about a man being taken to intend the probable consequences of his own act, they say ([1954] 3 All E.R. at p. 579): B

"Prima facie, a man who treats his wife with gross brutality may be presumed to intend the consequences of his acts. Such an inference may, indeed, be rebutted, but if the only evidence is of continuous cruelty and no rebutting evidence is given, the natural and almost inevitable inference is that the husband intended to drive out the wife. The court is at least entitled and, indeed, driven, to such an inference unless convincing evidence to the contrary is adduced. In their Lordships' opinion, this is the proper approach to the problem and it must, therefore, be determined whether the natural inference has been rebutted in the present case." C D

I may, perhaps, be permitted to say that a passage from my judgment in *Simpson v. Simpson* (9) in which I said ([1951] 1 All E.R. at p. 962):

"... I venture to suggest that in this jurisdiction, at any rate, we may continue to use the time-honoured maxim [i.e., a man must be taken to intend the natural consequences of his acts], provided always that we remember that it does not express an irrebuttable presumption of law and that it is only to be applied in connection with conduct which can fairly be described as ill-treatment", E

is quoted ([1954] 3 All E.R. 579, at letter E) with apparent approval. I am not going to read the whole of the next two pages, which contain the root of the matter, but after drawing the distinction between intention and desire, the judgment continues ([1954] 3 All E.R. at p. 580): F

"What, then, is the legal result where an intention to bring about a particular result (be it proved directly or by inference from conduct) co-exists with a desire that that result should not ensue? That is the substantial point raised by this appeal. The issue may be put more concretely. What legal inference is to be drawn where the whole of a husband's conduct is such that a reasonable man would know—that the particular husband must know—that in all human probability it will result in the departure of the wife from the matrimonial home? Apart from rebutting evidence this, in their Lordships' opinion, is sufficient proof of an intention to disrupt the home: but suppose, further, a husband's hope is that in some way his actions will not produce these natural consequences, that the wife will stay and that the home will not be disrupted. Where a man's own actions are concerned and not their effect on another, the answer is easy. If he desires to resist temptation but yields to it his intention is evidenced by his acts. His better self is, it may be, overborne, yet, in the end, his intention is to yield. Where, however, the effect of his actions on other people is concerned, and there is no certainty but only a high degree of probability as to what the result will be, is a court to say that, if he did entertain an unjustified hope that his wife would stay, the intention normally to be inferred from his acts is rebutted, and is the correct conclusion that he did not intend to drive her out? In their Lordships' opinion, no such conclusion is justified. If the husband knows the probable result of his acts and persists in them, in spite of warning that the wife will be compelled to G H I

- A leave the home, and indeed, as in the present case, has expressed an intention of continuing his conduct and never indicated any intention of amendment, that is enough, however passionately he may desire or request that she should remain. His intention is to act as he did, whatever the consequences, though he may hope and desire that they will not produce their probable effect. To say that it is not enough unless he knows that separation must inevitably result from his actions is to ask too much. Men's actions and judgments are not founded on certainty—in most cases certainty is unascertainable—but on probabilities. No doubt a high degree of probability is required but no more."
- B

C That, in my opinion, plainly shows that in saying that there was no proof of wilful ill-treatment of the wife by the husband, and that he had not deliberately conducted himself so as to drive the wife away from the home, and making that the test, the justices have misdirected themselves, and on any view of this matter I think that the present case must go back on the issue of desertion.

- D Although these observations were directed to cases of constructive desertion I know of no reason why precisely the same considerations should not be applied to mental cruelty. If a reasonable man would know, as this husband did know, that continuance in the course of conduct complained of would have an injurious effect on his wife's mental health, what more is necessary? In what way does that differ from the test which LORD NORMAND adopted in *Jamieson v. Jamieson* (7) ([1952] 1 All E.R. at pp. 877, 878), that the spouse must either intend to hurt the victim or at least be unwarrantably indifferent as to the consequences to the victim? It seems to me that essentially the two phrases convey the same idea, and I do not think that there is any reason here for distinguishing between the two charges which are made. Plainly, there is a misdirection; indeed, it is not disputed that there is a misdirection as regards constructive desertion, and I think that it would be idle to send the one complaint back without the other, and that the two must be considered in light of the considerations which I have based on recent decisions of the highest authorities.
- E
- F For these reasons I think that this appeal succeeds, and that the order dismissing the wife's complaints must be set aside, and her complaints be referred back to be dealt with by a fresh panel of justices.

- G WALLINGTON, J.: I agree entirely with the judgment which LORD MERRIMAN, P., has just delivered, both in substance and in detail, and if it were not that this is a case of some little difficulty and with some peculiarities, I would not attempt to add another word, for I think my Lord has covered it completely. In my opinion, it must be assumed that the justices did not disbelieve the evidence given on behalf of the wife. Their reasons seem to me to be consistent only with the inference that they believed that evidence. If they had decided the case in the way in which they did decide it without any
- H misdirection as to the effect of the evidence, it follows that this court could not disturb their decision, for it must always be remembered that this court is not, and the magistrates' court alone is, the court which has the duty and the jurisdiction to try the case. They took the somewhat drastic course of throwing out the case without calling on the husband to answer it, and in my opinion it is plain that they did that because they misdirected themselves as to the effect of the evidence. This court, therefore, is bound, in my opinion, to make the
- I order proposed by my Lord.

The misdirection to which, in my opinion, their decision was subject, has been fully dealt with by my Lord in his judgment, and all I desire to say is that in my opinion the justices regarded it as essential to the wife's case that they should be satisfied that there was a wilful intention on the part of the husband to be cruel to the wife, and, as to the desertion, that there must have been a deliberate intention on the part of the husband so to act as to drive his wife

away. In my view that was erroneous. A man may be cruel to his wife, especially perhaps in mental cases, if he says to himself, and acts on what he says, "Now I am going to be physically and otherwise cruel to my wife. I will do this or that to her, and I intend to hurt her"; or he may be cruel to his wife (especially, as I repeat, in mental cases), if he says to himself, and acts on what he says, "I am going to live my own life in my own way, whatever the consequences to my wife", and if day after day he does the kind of thing which he must know would have a serious effect on her health—and in the present case, on the evidence, it may be said that the justices might have found that he knew, because there is evidence that she told him so. In either of these classes of acts, if there is proof also of danger or reasonable apprehension of danger to life, limb or health, bodily or mental, a case of cruelty might, in my opinion, be made out.

It seems to me that on the evidence to which I have referred it would be open to the justices to find, and it is for them to decide whether they so find or not, that the husband has brought himself within the second notion of cruelty to which I have referred, and that his conduct exhibited throughout an unwarrantable indifference to any consequences that might ensue to the wife from the life which he was determined to live and to impose on her. Further, it seems to me that the justices must have overlooked, or under-valued, the evidence of the wife as to the capacity of the husband before marriage to be a very nice fellow, not only a suitable suitor but very nice in his manners and habits. This evidence, if believed, appears to me to be in conflict with their view expressed in their reasons that his conduct was owing to his limited intelligence and set habits and his resulting inability to conform to the standards of life which his wife expected, or provide the companionship which she desired. He had done that before marriage. Why did he cease to do it after marriage? It may possibly be that, after marriage, he had got his house and he liked the sort of life that he had been in the habit of living before the courtship, and that therefore he did not care what might happen to his wife in consequence of his so pleasing himself. He determined to do as he liked, although he knew that that would have an element of danger and cause a reasonable apprehension of danger to her physical or mental health, or both. He had on the evidence more than sufficient intelligence to know this, and on the doctor's evidence there may well have been that element of danger or cause for apprehension. If I am right in my opinion that the justices were wrong in the view which they took as to the requisites for an order in favour of the wife, then, in my opinion, this court is bound to send the case back to the justices as my Lord has indicated.

Appeal allowed.

Solicitors: *Leader, Henderson & Leader*, agents for *Gardner, Leader & Co.*, Newbury (for the wife); *Field, Roscoe & Co.*, agents for *Collins, Dryland & Thorowgood*, Reading (for the husband).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

A PRESTON AND ANOTHER v. HUNTING AIR
TRANSPORT, LTD.

[QUEEN'S BENCH DIVISION (Ormerod, J.), January 30, 1956.]

B *Carriage by Air—Carriage of passengers—International carriage—Limitation of carrier's liability—Irregularity of passenger ticket—Failure to set out agreed stopping places—Carriage by Air Act, 1932 (22 & 23 Geo. 5 c. 36), Sch. 1, art. 3 (1), (2), art. 17, art. 22 (1).*

Carriage by Air—Carriage of passengers—International carriage—Measure of damages—Death of passenger in air accident—Passenger a widow leaving infant children—Whether damage limited to financial loss—Carriage by Air Act, 1932 (22 & 23 Geo. 5 c. 36), Sch. 1, art. 17.

C The mother of the infant plaintiffs was killed while she was a passenger carried for reward in the defendants' aeroplane under a contract of international carriage as defined in art. 1 (2) of Sch. 1 to the Carriage by Air Act, 1932 (i.e., art. 1 (2) of the Warsaw Convention of 1929). The passenger ticket which had been delivered to the deceased did not contain the particulars of the agreed stopping places, as required by art. 3 (1) (c)* of the convention. The plaintiffs, who were then three and four years old, respectively, were dependent on the deceased, who was a widow. In an action by the plaintiffs for damages against the defendants in respect of the death of the deceased, the defendants admitted their liability under art. 17† of the convention and claimed that, under art. 22 (1)‡, their liability was limited to the sum of 125,000 francs. It was contended on behalf of the plaintiffs that, as the document purporting to be a ticket did not contain the details required by art. 3 (1) (c), it was not a ticket within the meaning of art. 3, and, therefore, by art. 3 (2), the defendants, having accepted the deceased as a passenger without a passenger ticket having been delivered, were precluded from availing themselves of the provisions of art. 22 (1) limiting their liability.

F **Held:** (i) the defendants' liability under art. 17 was limited by art. 22 (1), because art. 22 (1) was excluded by art. 3 (2) only if no ticket had been delivered and in the present case a ticket had been delivered although it was deficient in certain respects.

G (ii) on the true construction of art. 17, the damage which the plaintiffs had sustained by reason of the death of the deceased was not confined to financial loss, but included the loss which they had sustained by reason of the fact that they had lost their mother's care at an age when they needed it.

[As to the Warsaw Convention, see 5 HALSBURY'S LAWS (3rd Edn.) 205, 208, paras. 478, 482, 483.]

H As to the absence or irregularity of a passenger ticket, see 5 HALSBURY'S LAWS (3rd Edn.) 214, para. 498.

As to limitation of liability for passengers and loss of carrier's right to limit liability, see 5 HALSBURY'S LAWS (3rd Edn.) 236, 238, paras. 553, 556.

For the Carriage by Air Act, 1932, Sch. 1, arts. 3, 4, 8, 9, 17 and 22, see 2 HALSBURY'S STATUTES (2nd Edn.) 69-73.]

I Case referred to:

(1) *Grey v. American Airlines, Inc.*, (1950), 95 F. Supp. 756.

Action.

The plaintiffs, two infants suing by their next friend, claimed damages against the defendants under the Carriage by Air Act, 1932, in respect of the death of

* The terms of art. 3 are set out at p. 445, letter B, post.

† The terms of the article are set out at p. 444, letter H, post.

‡ The relevant terms of art. 22 (1) are set out at p. 444, letter I, post.

their mother while she was a passenger for reward in an aircraft owned and operated by the defendants. The plaintiffs alleged that they were wholly dependent on the deceased. The contract, pursuant to which the deceased was travelling in the defendants' aircraft, was a contract of "international carriage" as defined in art. 1 (2) of the Warsaw Convention as set out in Sch. 1 to the Act of 1932, and the defendants admitted their liability under art. 17, as limited by art. 22 (1). The plaintiffs claimed that the defendants were not entitled to avail themselves of the provisions of the convention which limited liability, because the document purporting to be a passenger ticket, which was delivered to the deceased as a travel voucher entitling her to make the journey, was not a "passenger ticket" as defined by art. 3 of the convention, in that it did not contain particulars of the agreed stopping places.

By their writ the plaintiffs claimed, alternatively, damages under the Fatal Accidents Act, 1846, but this claim was excluded by s. 1 (4) of the Carriage by Air Act, 1932.

The facts appear in the judgment.

C. A. M. Blake for the plaintiffs. •

Rodger Winn for the defendants.

ORMEROD, J.: In this case the plaintiffs are Deirdre Evelyn Antoinette Preston and Nigel Philip Preston, who are both infants of tender years. They are bringing this action by their next friend, Jerome Charles Eugene Dusseau, under the Warsaw Convention which is set out in Sch. 1 to the Carriage by Air Act, 1932. The action arises in this way. The two infant plaintiffs were the children of Mrs. Sophie Marguerite Preston, who was a widow who lived in Kenya where her husband, prior to his death in 1951, was engaged in the development of a tea estate. After his death she came to England with one of her children for the purpose of dealing with her husband's affairs, and on Feb. 16, 1952, she was flying back to Kenya in an aeroplane, the property of the defendants, Hunting Air Transport, Ltd. The aeroplane was flying to Kenya from London Airport by way of Nice, Malta and other stops. Unfortunately the aeroplane, having stopped at Nice and taken off again with the intention of flying to Malta, flew off course and struck a mountain in Sicily, with the result that the aeroplane was wrecked and all the occupants were killed. As a consequence, the two infant plaintiffs were left as orphans and have suffered a very considerable loss, in that they have lost not only their mother, but also whatever financial assistance she would have been able to give them.

The action is brought under art. 17 of the convention, as set out in Sch. 1, art. 17, to the Carriage by Air Act, 1932. Article 17, which is in ch. 3 of the convention, provides:

"The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

Counsel for the defendants agrees that the legal position here is that, in the absence of positive evidence of certain matters, the defendants are, under art. 17, *prima facie* liable to compensate the plaintiffs for the loss which the plaintiffs have sustained; and he has not disputed that, in this case, there is that liability. Counsel for the plaintiffs submits, however, that, not only are the defendants liable to pay damages to the plaintiffs, but, by reason of the provisions of the convention, the amount which the court may award in damages is unlimited and entirely at large.

Article 22 (1), which is also in ch. 3 of the convention, provides:

"In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 125,000 francs . . ."

A The parties agree that, at the present time, that sum is equivalent to £2,939 13s. 4d., and therefore, on the face of it, having regard to the provisions of art. 22 (1), the limit which can be awarded to the infant plaintiffs as their combined damages is the sum of £2,939 13s. 4d. Counsel for the plaintiffs submitted, however, that art. 22 (1) does not apply in this case because of the provisions of art. 3, which is in ch. 2 of the convention. Article 3 provides:

B “(1) For the carriage of passengers the carrier must deliver a passenger ticket which shall contain the following particulars . . . (c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the carriage of its international character . . . (2) The absence, irregularity or loss of the
C passenger ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.”

D It was contended on behalf of the plaintiffs that, as the ticket in question did not contain the names of the agreed stopping places, it did not comply with art. 3 (1), and that it was, therefore, not a ticket at all and art. 3 (2) applied, with the result that there was no limit in regard to the defendants' liability to the plaintiffs. It is admitted on behalf of the defendants that, for some reason or other, be it carelessness or be it intention—I do not think anybody knows,
E there is no evidence about it—the names of the agreed stopping places were not inserted on the ticket. The first question which I have to decide, on the interpretation of art. 3 (2), is whether this is a case where the liability is limited in accordance with art. 22 (1), or whether it is a case where liability is not limited because no ticket was, in fact, delivered to the passenger in respect of the contract of carriage.

F Counsel for the plaintiffs contended that, if a ticket did not contain the particulars which art. 3 (1) said that it should contain, then it was not a ticket and could not be regarded as a ticket. In answer to that, the contention of counsel for the defendants was to this effect. In the first place, according to counsel's submission, the natural meaning of the words is simply this: art. 3 (2) deals with three matters, the absence of a ticket, the irregularity in a ticket, and the
G loss of a ticket, and says that none of those things shall affect the

“validity of the contract of carriage, which shall none the less be subject to the rules of this convention.”

Article 3 (2) then goes on to deal with one of those three matters only, that is, the absence of a ticket, and says:

H “Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of”

the provisions limiting liability. Counsel for the defendants contended that that was the obvious and natural meaning of the words and was the interpretation which should be put on them. The second part of art. 3 (2) does not deal with irregularity or loss of a passenger ticket; it deals only with the absence of a passenger ticket.

I In support of that contention art. 4, art. 8 and art. 9 of the convention were cited to me. Article 4 is under the heading “Luggage Ticket”, and art. 4 (1) provides that the carrier must deliver a luggage ticket. Article 4 (3) reads: “The luggage ticket shall contain the following particulars”, and then sets out a list of particulars from (a) to (h). Article 4 (4) reads:

“The absence, irregularity or loss of the luggage ticket does not affect the existence or the validity of the contract . . . Nevertheless, if the carrier accepts luggage without a luggage ticket having been delivered, or

if the luggage ticket does not contain the particulars set out at (d) (f) and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.” A

Counsel for the defendants points out that art. 4 (3) also provides that certain particulars must be stated on the ticket, and that art. 4 (4) contains a provision dealing with “The absence, irregularity or loss of the luggage ticket . . .”; but the second part of art. 4 (4) then deals, not with one, but with two of these matters—absence or irregularity—and says that, if there is no ticket, or if the ticket is deficient, not in all the particulars set out in art. 4 (3), but in some of the particulars set out therein, then the carrier shall not be entitled to avail himself of the limitation of liability. B

Similarly, art. 8, which deals with air consignment notes, sets out a long list from (a) to (q) of the matters which should be contained in the consignment note. But again it is provided, in art. 9, that the carrier C

“ . . . shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability ”

if the goods are accepted

“ . . . without an air consignment note having been made out, or if the air consignment note does not contain all the particulars set out in art. 8 (a) to (i) inclusive and (q) . . . ” D

In other words, art. 9 specifies the essential matters which must be included in the consignment note if the consignment note is to be one which is sufficient to allow art. 22 (2)* to come into play.

On that argument it was submitted on behalf of the defendants that, although, admittedly, the passenger ticket in this case was defective in that it did not contain the names of the agreed stopping places, nevertheless the provisions of art. 22 (1) still applied because the exclusion of limitation of liability only came into play if, in fact, there was no ticket—if the ticket were absent. It was contended that, in this case, there was a ticket: the ticket may have been deficient, but it was there. E

There appears to be no English authority on this matter and the only authority which was cited to me was *Grey v. American Airlines, Inc.* (1) (1950) (95 F. Supp. 756), which was decided in the United States of America in the District Court in the Southern District of New York, where exactly the same point was taken. The original convention was in French, and in the American case there is a different translation from that which appears in Sch. 1 to the Carriage by Air Act, 1932, but the words are substantially the same. In that case, on very similar facts, the court decided that there was limitation of liability in spite of the fact that the ticket did not contain the names of the agreed stopping places. F

Having regard to the arguments which I have heard, I have no doubt in coming to the conclusion that the fact that the passenger ticket was deficient, in that it did not contain the names of the agreed stopping places, did not mean that no ticket had been delivered, and did not mean that the plaintiffs could take advantage of art. 3 (2) so as to pursue this action without any limitation on the amount which is set out in art. 22 (1) of the convention. Therefore, the largest amount of damages which I can award, under art. 22 (1), is the sum of £2,939 13s. 4d., which is the equivalent of the sum of 125,000 francs as set out in the article. G

The question then arises: What figure not larger than that sum should I award for the loss which the infant plaintiffs have sustained? It was submitted by counsel for the defendants that I must deal with this matter purely on the basis of financial loss, that I cannot take into account any matters other than the actual financial loss which the plaintiffs have sustained by reason of the death of their mother in these circumstances. Article 17 provides: H

* Article 22 (2) provides for the limitation of the carrier's liability in the case of goods. I

- A "The carrier is liable for damage sustained in the event of the death . . . of a passenger . . . if the accident which caused the damage so sustained took place on board the aircraft . . ."

B The article does not refer to financial loss in particular; it refers to "damage"; and the question, which is probably a very important one in this case, arises whether that damage should be calculated purely on what may be estimated as the financial loss which the plaintiffs have sustained, or on the broader basis of the loss which they inevitably must have sustained beyond the actual financial loss, by the fact that, as young children aged three and four years, respectively, who were already deprived of a father, they lost their mother. As I interpret the words of art. 17, it seems to me that that is an item of damage for which the plaintiffs are entitled to be compensated, and that, in calculating the sum

C which should be awarded to them, I must take into account something more than the purely financial loss and must award some sum, though it is a sum which is extremely difficult to calculate, for the loss which the plaintiffs have sustained by reason of the fact that they have lost the care of their mother at an age when probably they needed it most. [After reviewing the evidence, His LORDSHIP continued:] I think the proper figure that I should award is the sum of £2,420 and I give judgment for that sum. [His LORDSHIP ordered that sum to be apportioned equally between the infant plaintiffs.]

Judgment for the plaintiffs.

Solicitors: *Leonard Tubbs & Co.* (for the plaintiffs); *Barlow, Lyde & Gilbert* (for the defendants).

- E [Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

F

CORRIGENDUM

HOWELL v. FALMOUTH BOAT CONSTRUCTION, LTD.

[1951] 2 All E.R. 278; [1950] 1 All E.R. 538.

- G The headnotes in these reports state that "On being presented with an account for work done, the appellant refused to pay on the ground that the work done was illegal". The plea of illegality was raised in fact by an amendment of the appellant's defence and counterclaim, and the appellant's refusal to pay was based, before the amendment of the defence and counterclaim, on grounds
- H other than that of illegality, e.g., that the sum sued for was excessive. The headnotes should accordingly be amended by substituting for the last sentence preceding the holdings, the following sentence—"By his amended defence and counterclaim the appellant alleged that until Oct. 11, 1947, the respondents had no written licence from the Admiralty authorising them to carry out the alterations and repairs, and that so much of the claim as related to alterations and repairs carried out before that date was illegal and irrecoverable by virtue of the
- I Restriction of Repairs of Ships Order, 1940, art. 1."

A

PRACTICE NOTE.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., and Byrne, J.), February 10, 1956.]

Quarter Sessions—Committal for sentence or for Borstal training—Documents to be sent to quarter sessions—Criminal Justice Act, 1948 (11 & 12 Geo. 6 c. 58), s. 20, s. 29—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), s. 28 (1), s. 29.

Quarter Sessions—Appeal to—Appeal against conviction—Documents to be sent to quarter sessions.

LORD GODDARD, C.J., read the following statement: The Society of Chairmen and Deputy Chairmen of Quarter Sessions has called our attention to the diversity of practice which obtains among clerks to justices with regard to what should be sent by them to quarter sessions when there is an appeal from a magistrates' court and when the latter commit* a prisoner for sentence under s. 29 of the Criminal Justice Act, 1948, or for Borstal training under s. 20. While this court has no power to give directions on the matter, as it is obviously desirable that there should be uniformity in practice, we think we may properly express an opinion in the hope that it will be generally followed. In the case of committal for sentence or Borstal training it is really essential that all the information that was before the committing justices should be before the Appeal Committee of Quarter Sessions, and, accordingly, any notes of evidence taken by the clerk and any documents put in at the hearing should be sent, as no doubt they generally are. Our opinion on this matter was, we think, made clear in the case of *R. v. Dorset Quarter Sessions, Ex p. O'Brien*†, heard before the Divisional Court in February, 1953.

As to appeals, the case of *R. v. Grimsby Borough Quarter Sessions, Ex p. Fuller* ([1955] 3 All E.R. 300) has caused some difficulty. All that we meant was that it was undesirable that, while trying an appeal, the justices should always have the notes taken below before them unless it became necessary to see what a witness had said or what had transpired in the court below. But we had not in mind that it may often be necessary for the chairman to have access to the notes before the hearing to enable him to decide an application for legal aid, to estimate the length of an appeal when he is settling the day's list and perhaps for other matters. This had in effect been said in *R. v. Dorset Quarter Sessions, Ex p. O'Brien*. We hope therefore that clerks to justices will send their notes to the clerk of the peace when there is an appeal, so that he can show them to the chairman or recorder if he requires them before the hearing for such purposes as those we have mentioned, and also will give them to the court during the hearing if it becomes necessary or desirable for the court to see what happened below.

ORMEROD, J., and GLYN-JONES, J., who sat with me in *R. v. Grimsby Borough Quarter Sessions, Ex p. Fuller*, agree with what I have just said, as does BYRNE, J., who is sitting with me today.

F.G.

* i.e. commit under s. 29 of the Magistrates' Courts Act, 1952, or for Borstal Training under s. 28 (1) of that Act.

† See p. 449, post.

A

NOTE.R. v. DORSET QUARTER SESSIONS, *Ex parte* O'BRIEN.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Lynskey and Pearson, JJ.), February 2, 1953.]

B *Quarter Sessions—Committal for sentence—Documents to be sent to quarter sessions—Criminal Justice Act, 1948 (11 & 12 Geo. 6 c. 58), s. 29—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), s. 29.*
Quarter Sessions—Appeal to—Appeal against conviction—Documents to be sent to quarter sessions

C [As to the hearing of appeals by an appeal committee of quarter sessions outside London, see 21 HALSBURY'S LAWS (2nd Edn.) 711, para. 1237.

For the Magistrates' Courts Act, 1952, s. 29, see 32 HALSBURY'S STATUTES (2nd Edn.) 449.]

Motion for Order of Certiorari.

D The applicant moved for an order of certiorari to bring up and quash an order made by the Appeal Committee of Quarter Sessions for the County of Dorset, dismissing her appeal against conviction by the judges at Wareham in that county for stealing from the person, and sentencing her to six months' imprisonment.

H. J. C. Stovin for the applicant.

E *R. Stock* for the respondents.

LORD GODDARD, C.J.: The applicant was convicted by the Wareham justices of stealing from the person. The facts showed that she must have been a woman of bad character, using that expression in the widest possible sense, and the justices at Wareham, hearing that she had eight previous convictions, committed her for sentence* to quarter sessions, viz., to the Appeal Committee of Quarter Sessions for the County of Dorset. The papers, of course, went to the chairman, and a list was prepared of the cases. The applicant applied to the chairman for legal aid. Naturally the chairman wished, before he decided to give legal aid, to see the notes of evidence in order to ascertain what the case was about. For myself, I cannot see any reason why the notes of evidence should not have been supplied to quarter sessions because, when a person committed for sentence appeals against the conviction, the question often arises whether the appellant has said something to the court below which contradicts the appellant's evidence. It is said that the conviction is in some way invalidated because the justices had before them the ordinary papers, which they must have before them in order to deal with sentence. In my opinion that does not invalidate the conviction, because Parliament has determined that persons committed for sentence in such cases are to be dealt with not by the full court of quarter sessions but by the appeal committee†. The appeal committee is now the only body that can hear appeals from justices, and it happens over and over again that a person who has been committed for sentence also desires to appeal against conviction. Parliament might have provided that if an appeal were entered, the determination of the sentence ought to be made by a different body, but it has not so provided; it has determined that the question of sentence shall go to the same body. It is obvious that every justice who is sitting on the appeal must at that time know that the appellant has been committed for sentence, and I am sure that justices can be trusted to try an appeal fairly. In

* I.e., under the Criminal Justice Act, 1948, s. 29 (1), now replaced by s. 29 of the Magistrates' Courts Act, 1952.

† See the Criminal Justice Act, 1948, s. 29 (2) (a); 14 HALSBURY'S STATUTES (2nd Edn.) 1013.

this case the court cannot see any reason for saying that justice was not done in a proper way. The application fails and must be refused. A

LYNSKEY, J.: I agree.

PEARSON, J.: I also agree.

Motion dismissed.

Solicitors: *Kinch & Richardson*, agents for *H. C. N. Lambert*, Bournemouth (for the applicant); *Booth & Blackwell*, agents for Clerk of the county council, County Hall, Dorchester (for the respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

MOYNES v. COOPPER. C

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Stable, JJ.), January 27, February 3, 1956.]

Criminal Law—Larceny—Taking—Accepting delivery in ignorance of mistake—Subsequent appropriation—No animus furandi at time of taking—Whether larceny. D

On Apr. 29, 1955, M., who was employed by a firm of contractors, asked for, and was given, an advance of wages amounting to £6 19s. 6½d., the full amount of his wages being £7 3s. 4d. On the same day the employers' wages clerk, being unaware of the advance of pay, put £7 3s. 4d. into a wages packet which, on May 2, 1955, he handed to M. When he received the packet, M. did not know that it contained £7 3s. 4d., and first discovered this when he opened the packet later that day, whereupon he appropriated the whole amount, thus keeping £6 19s. 6½d. more than that to which he was entitled. He was charged with stealing £6 19s. 6½d. On appeal by the prosecutor against the quashing of M.'s conviction of larceny, E

Held (STABLE, J., dissenting): M. was not guilty of larceny, since in order to constitute a "taking" within the meaning of the Larceny Act, 1916, s. 1 (2) (i) (c), there must be animus furandi at the time of the taking, and at the time when M. took the wages packet with the money in it, the taking was not animus furandi as he did not know that there was the £7 3s. 4d. in the packet. F

Principle of *R. v. Middleton* (1873), L.R. 2 C.C.R. 38, considered.

R. v. Prince (1868) (L.R. 1 C.C.R. 150) distinguished. G

R. v. Hudson ([1943] 1 All E.R. 642) considered.

Appeal dismissed.

[As to the theft of goods delivered by mistake, see 10 HALSBURY'S LAWS (3rd Edn.) 773, para. 1492; and for cases on the subject, see 15 DIGEST 876, 877, 9624-9630.]

For the Larceny Act, 1916, s. 1, see 5 HALSBURY'S STATUTES (2nd Edn.) 1012.] H

Cases referred to:

- (1) *R. v. Prince*, (1868), L.R. 1 C.C.R. 150; 38 L.J.M.C. 8; 19 L.T. 364; 33 J.P. 21; 15 Digest 871, 9568.
- (2) *R. v. Middleton*, (1873), L.R. 2 C.C.R. 38; 42 L.J.M.C. 73; 28 L.T. 777; 37 J.P. 629; 15 Digest 873, 9585. I
- (3) *R. v. Ashwell*, (1885), 16 Q.B.D. 190; 55 L.J.M.C. 65; 53 L.T. 773; 50 J.P. 181, 198; 15 Digest 877, 9627.
- (4) *R. v. Hudson*, [1943] 1 All E.R. 642; [1943] K.B. 458; 112 L.J.K.B. 332; 169 L.T. 46; 107 J.P. 134; 2nd Digest Supp.
- (5) *R. v. Riley*, (1853), Dears. C.C. 149; 22 L.J.M.C. 48; 20 L.T.O.S. 228; 17 J.P. 69; 169 E.R. 674; 15 Digest 878, 9634.
- (6) *Ruse v. Read*, [1949] 1 All E.R. 398; [1949] 1 K.B. 377; 2nd Digest Supp.

A Case Stated.

- This was a Case Stated by justices for the county of Kent, sitting in respect of their adjudication as the West Kent Appeal Committee at Maidstone on Aug. 5, 1955. On June 25, 1955, the appellant, George William Moynes (hereinafter called "the accused"), gave notice of his intention to appeal against his conviction by the magistrates' court sitting at West Malling on June 13, 1955, for having, on May 2, 1955, at Watlingbury, stolen the sum of £6 19s. 6½d. in money, the moneys of M. J. Gleeson (Contractors), Ltd. The following facts were found. On Apr. 7, 1955, William Henry Ridgers, acting as site agent for and on behalf of M. J. Gleeson (Contractors), Ltd., engaged the accused to work at the Royal Air Force Station, West Malling. On Apr. 29, 1955, the accused requested Mr. Ridgers to pay him an advance of pay, and, on the same day, Mr. Ridgers paid the accused £6 19s. 6½d., being part of the wages earned and due to him, for which he signed a receipt. In consequence of this payment, there would become due to the accused 3s. 9½d. (being £7 3s. 4d., the total of wages earned and due to him, less £6 19s. 6½d., paid in advance). On Apr. 29, 1955, John William Buchanan, a wages clerk employed by M. J. Gleeson (Contractors), Ltd., put £7 3s. 4d. into a wages packet in order that he might hand it in that packet to the accused, and, later that day, placed the packet in a safe for the week-end. On May 2, 1955, Mr. Buchanan, acting for and on behalf of M. J. Gleeson (Contractors), Ltd., without any notice or knowledge of the payment of the £6 19s. 6½d., or any representation made to him by the accused, or any mistake as to the accused's identity, handed over to him the wages packet containing £7 3s. 4d. Mr. Buchanan, as duly authorised agent of M. J. Gleeson (Contractors), Ltd., parted with the £7 3s. 4d. under the mistaken belief that it was then due and owing to the accused. The accused did not know that the wages packet contained £7 3s. 4d. at the time he received it, and he first discovered that it contained £7 3s. 4d. when he opened it later the same day at his home. When he opened the packet, he knew that he had been paid £6 19s. 6½d. twice by mistake. With this knowledge, he decided dishonestly to appropriate to his own use, and did appropriate dishonestly to his own use, the whole of the second payment of £6 19s. 6½d.

- It was contended on behalf of the prosecutor that, on these facts, the accused's dishonest appropriation of the second payment of £6 19s. 6½d. amounted to larceny as defined by the Larceny Act, 1916, s. 1, in that the accused, without the consent of the owner, took the money under a mistake on the part of the owner with knowledge on the accused's part that possession had been so obtained. It was contended on behalf of the accused that, on the facts, the £6 19s. 6½d. was paid to him with the owner's consent, and that, accordingly, the appropriation could not amount to larceny. The justices allowed the accused's appeal by quashing the conviction of larceny, and the prosecutor now appealed.

E. L. Gardner for the prosecutor.

- H** The accused did not appear and was not represented.

Cur. adv. vult.

- I** Feb. 3. **LORD GODDARD, C.J.:** The judgment I am about to read is that of **HILBERY, J.**, and myself. [His LORDSHIP stated the facts, and continued:] The problem whether dishonest appropriation in cases where money has been paid under a mistake amounts in law to larceny has been the subject of many cases and much difference of judicial opinion. The appeal committee were of opinion that this case is indistinguishable from *R. v. Prince* (1) (1868) (L.R. 1 C.C.R. 150), where the cashier of a bank, who had authority to pay cheques, was deceived by the presentation of a forged cheque by the prisoner. He paid the amount of the cheque and the prisoner was indicted for stealing the proceeds. It was held that this did not amount to larceny. **BLACKBURN, J.**, lamenting, as we also may, that this was the law, said (*ibid.*, at p. 155):

"... if the owner intended the property to pass, though he would not so

have intended had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny . . .” A

It was held that the prisoner's offence amounted to obtaining the money by a false pretence, but, in the present case, no question of false pretences arises as the accused made no representation of any sort.

The next case which bears on the subject is *R. v. Middleton* (2) (1873) (L.R. 2 C.C.R. 38), and, in 1885, there came the much discussed case of *R. v. Ashwell* (3) (1885) (16 Q.B.D. 190), in which, unfortunately, the court was equally divided. We do not propose to discuss these or any subsequent cases on the subject in detail because, in our opinion, the matter is now concluded by s. 1 (2) of the Larceny Act, 1916. It will be remembered that there have been, in the last hundred years, two codifications of the law of larceny. The first was the Larceny Act, 1861 (24 & 25 Vict. c. 96), the long title of which is: B

“An Act to consolidate and amend the Statute Law of England and Ireland relating to larceny and other similar offences.” C

While that Act, in s. 1, defined a considerable number of terms, such as “document of title” and “valuable security” among others, it did not contain a definition of larceny or any of the necessary constituents of that crime. D The Larceny Act, 1916, which is now the governing statute is entitled:

“An Act to consolidate and simplify the law relating to larceny triable on indictment and kindred offences”,

and does contain an elaborate definition of larceny*. This Act was not intended to alter the law and, as has often been said, it has not done so; but, while the Act of 1861 consolidated, and to some extent amended, the statute law, the later Act consolidates and simplifies the whole law, which includes the common law as expounded by judicial decision. What amounts to a “taking” sufficient to amount to larceny was much discussed in *R. v. Middleton* (2), and, in our opinion, it is the effect of that decision which is reproduced and enacted as the law. Section 1 (2) (i) of the Act provides: E

“the expression ‘takes’ includes obtaining the possession— . . . (c) under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained.” F

This, in our opinion, is affirming the common law that the taker must have animus furandi at the time when he takes the property. In *R. v. Middleton* (2), the wrong amount of money was paid by the post office clerk, the prisoner picked it up knowing of the clerk's mistake and so took it animo furandi. In the present case, it is found that the accused did not know of the mistake when he took the money, so the taking was not animo furandi. We prefer to base our decision on this ground, namely, that there was no taking here within the section. The decision in *R. v. Prince* (1) depended on the fact that the bank, acting through its authorised clerk, did intend to pass the property in the money, though it was induced to do so not by its own or his mistake, but by fraud. Where a transfer of property is obtained by fraud, there is no doubt but that the property does pass, subject, however, to the right of the defrauded party on discovering the fraud to disclaim the transaction and reclaim his property. In the present case, the action would be for money had and received to the company's use as paid under a mistake of fact. G

For these reasons, while the accused was guilty of grave dishonesty, in our opinion he was not guilty of larceny and, in the present state of the law, he was not guilty of any criminal offence. H

Before parting with the case, we ought to refer to *R. v. Hudson* (4) ([1943] 1 All E.R. 642), on which the prosecutor placed reliance. That case has been the subject of a good deal of criticism (see, for instance, RUSSELL ON CRIMES I

* See s. 1; 5 HALSBURY'S STATUTES (2nd Edn.) 1012.

A (10th Edn.), Vol. 2, pp. 1158-1161) on the question whether the charge ought not to have been for obtaining an altered cheque by false pretences. The appellant had certainly been guilty of some crime. He was charged with stealing a cheque which had come to him by post and was intended for another person of the same surname, but there was no initial either on the envelope or cheque. The appellant, knowing that the cheque was not intended for him, got the drawer to insert his initial on the cheque, which he kept and cashed. This would seem to be closely akin to stealing by finding, as, when he found the cheque in the envelope, he could easily have discovered the true owner. In our opinion *R. v. Hudson* (4) is not an authority for the present case, as, in *R. v. Hudson* (4) neither the cheque nor the envelope was intended by the sender for the appellant. Here, there is no doubt that the pay packet was intended for the accused, and was so delivered to him.

The appeal is dismissed.

STABLE, J., read the following judgment in which he stated the facts and continued: It is clear that the actual handing over and receipt of the pay packet was the result not of a mutual mistake but of two separate mistakes. There are few words in the English language susceptible to more meanings than the word "mistake" and the word is frequently misused. To take but three examples, which are far from being exhaustive, A shoots at a pigeon and kills a crow "by mistake": A shoots at a crow believing it to be a pigeon and kills it "by mistake": A, not intending to fire his gun, lets the gun off "by mistake". In the first case, the mistake was simply a bad shot, in the second, a failure to distinguish a crow from a pigeon, and in the third, gross carelessness.

In the present case, the "mistake" was twofold. In the case of the wages clerk it consisted of, or arose from, his ignorance that the accused had received a substantial advance on account of his wages; in the case of the accused his erroneous belief that the packet contained the sum to which he was entitled, namely, 3s. 9½d., and no more.

The grounds on which it was contended on behalf of the accused before the appeal committee that he could not be convicted of larceny were two, namely, (i) that the pay packet, having been handed over to him by the employer or his duly authorised agent intending to pass the possession and property in its contents to him, no subsequent mis-use of the money by him could, in law, be larceny, and (ii) that, to constitute the offence of larceny, the taking and the animus furandi, the dishonest intent, must be contemporaneous. These two grounds are, in my judgment, wholly separate and distinct and are considered separately.

As regards the first of the two grounds, the appeal committee held that they were bound by *R. v. Prince* (1) (L.R. 1 C.C.R. 150). The facts of that case were very different from those now under consideration, but there can be no doubt that if, in the present case, the accused had obtained his pay packet by falsely and fraudulently telling the wages clerk that he had not received any advance on account of wages but was entitled to be paid the full amount, that case is a clear authority that he should have been indicted for false pretences and, if indicted for larceny, could not properly have been convicted. In the light of the later authorities to which I am about to refer, *R. v. Prince* (1), though it goes a long way in the accused's favour, is not, in my judgment, decisive of the present case.

The decision which, in my opinion, disposes of the first point is *R. v. Middleton* (2) (L.R. 2 C.C.R. 38), where *R. v. Prince* (1) was among the authorities considered. The facts were shortly as follows: The prisoner had applied at a post office for payment of a sum of 10s. to which he was entitled. The clerk in error had referred to the wrong advice note which authorised a payment of £8 16s. 10d. to someone else, had placed that sum on the counter

for the accused who, knowing that he was not entitled to it, had dishonestly picked it up and had gone off with it. The court, by a majority of eleven to four, held that he was properly convicted of larceny. A close perusal of the judgments shows that, even where two or more of the judges reached the same conclusion, their process of reasoning and the grounds on which their conclusions were based were not invariably identical. The distinction between that case and this, namely, that in *R. v. Middleton* (2) the animus furandi was contemporaneous with the handing over the money, is, for the point now under immediate consideration in my judgment, immaterial. The relevance of the authority to the present case is the decision that, in certain circumstances, consent given in error and under a misapprehension of the true facts is not a consent of the true owner. It seems that the decision of the majority of the court was partly based on the fact that the post office servant was not the owner of the money, and only had a qualified authority to dispose of it. The wages clerk in the present case was, in my judgment, in an identical situation; he was not the owner of the money, and his only authority was to pay over the correct amount of wages, no more and no less. In this context, I would refer to the dissenting judgment of BRETT, J., where he clearly indicates (L.R. 2 C.C.R. at p. 64) his view that the decision did not turn on the fact that the money was handed over by a clerk and not by the Postmaster-General in person. In my judgment, the decision in *R. v. Middleton* (2) disposes of the contention that the employers consented to the present transaction.

Turning to the second ground, in my judgment the decision of the appeal committee was erroneous for two reasons, namely, that, on the facts proved, the animus furandi was contemporaneous with the taking and, secondly, even if it was not, having regard to the fact that, when he received the pay packet, the accused did not know that the packet contained the sum of money to which he had no legal or equitable right, the time lag between his first getting possession of the pay packet and the animus furandi is immaterial. Inevitably in human affairs events occur in a time sequence, and, even if the accused had opened his pay packet in the hut or office, or wherever it was that he received payment, some time must have elapsed between the actual possession of the packet and his discovery of its contents. Since, when he got home on the same day, immediately on opening the packet he formed the felonious intent, in my judgment the whole sequence should be regarded as one transaction, and the taking and the animus furandi as contemporaneous; see *R. v. Ashwell* (3) (16 Q.B.D. 190), per STEPHEN, J. (*ibid.*, at p. 216), where he says:

"If a man finds a purse, picks it up, opens it, finds money in it, and thereupon determines to keep it for himself, it appears to me that the whole process ought to be regarded as one action, taking place at one time, as for many purposes the fractional parts of a day are not regarded by the law."

This passage was referred to and approved in *R. v. Hudson* (4) ([1943] 1 All E.R. at p. 644). Applying that passage to the present case, at the moment when the accused discovered that this pay packet contained a sum of money to which he knew he had no right, he misappropriated it and was consequently, in my judgment, then and there guilty of larceny. If the accused, immediately on being handed the envelope, had opened it and, on discovering that it contained money he was not entitled to, had decided to misappropriate it, on the authority of *R. v. Middleton* (2) he would have been guilty of larceny, and I cannot see that the fact that he postponed opening the envelope till he got home—a perfectly normal course to pursue—can affect the legal position. Assuming, however, that that view is wrong and that the whole process ought not to be regarded as one action taking place at one time, the question still remains whether the taking of the money was complete when the envelope containing it was handed to the accused, or whether the real taking was when, on opening the envelope, he discovered for the first time what it really contained.

- A In *R. v. Riley* (5) (1853) (Dears. C.C. 149), a farmer inadvertently and innocently drove off a lamb that did not belong to him in a flock of twenty-nine of his own lambs. When he came to sell his lambs, he discovered for the first time the presence of the stranger in the flock and dishonestly sold it as his own. He was convicted at quarter sessions of larceny of the one lamb, and the conviction was upheld by a court consisting of POLLOCK, C.B., PARKE, B., and WILLIAMS, B.
- B TALFOURD and CROMPTON, JJ. POLLOCK, C.B., decided the case on the grounds that either until the discovery of the "stranger" there was no taking, or, if there was an antecedent taking, it was, though inadvertent, unlawful. PARKE, B., rested his judgment on the second ground only, namely, that the original taking was a trespass. In my judgment, this case is a strong authority in favour of the prosecutor. Both in the case of the flock of sheep and the pay envelope, the
- C accused man honestly took away something which he did not know was there, and, therefore, in relation to which he was then incapable of forming an intention, honest or otherwise. Whatever the appropriate form of action might be, the accused man in the case of the lamb had no legal right to it. In the present case, in the light of the true facts, which is the light in which legal rights are ascertained, neither had the accused in this case any right to the money which he
- D misappropriated.

In his judgment in *R. v. Ashwell* (3), LORD COLERIDGE, C.J., says (16 Q.B.D. at p. 225):

"In good sense it seems to me he did not take it till he knew what he had got; and when he knew what he had got, that same instant he stole it."

- E This passage is cited with approval in the judgment of the court in *R. v. Hudson* (4), where this passage appears ([1943] 1 All E.R. at p. 644):

"That is what [the appellant] did in this case. As soon as he saw what he had got, he made up his mind to steal it . . ."

LORD COLERIDGE discusses *R. v. Riley* (5) in his judgment in *R. v. Ashwell* (3) (16 Q.B.D. at p. 226), where he expresses the view that the result would have

- F been the same if the owner of the lamb had been present when it was driven off. The point may be stated in another form, namely, that, as the taking is a necessary ingredient in the crime of larceny and is governed by the word "fraudulently", that must connote that there cannot be a taking within the section unless the taker knows what he is taking, or at least whether what he is taking belongs to him or not. Put more shortly, the taking must be an act of the mind as well as of the hand. *R. v. Riley* (5) does not touch on the first point raised by the
- G prosecutor on the subject of consent as, on the facts, that question did not arise.

Ruse v. Read (6) ([1949] 1 All E.R. 398), a case where the original taking though not felonious was a trespass, reaffirmed the validity of the decision in *R. v. Riley* (5), but it is also to be observed that (ibid., at p. 402), the decision in *R. v. Hudson* (4) was referred to with approval.

- H Notwithstanding the meticulous care which the appeal committee applied to the hearing of the appeal and the preparation of this case, both on principle and in accordance with the authorities, in my judgment for the reasons stated above they were wrong to quash the conviction. It would seem a strange anomaly that, if the wages clerk had inadvertently dropped the envelope and its contents and the accused had chanced to find it and, on picking it up and finding what was
- I inside misappropriated the money, he would have been guilty of larceny, but, on the present facts, having been equally dishonest, gets off scot free.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *R. P. Tunstall*, Maidstone (for the respondent).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

REARDON SMITH LINE, LTD. v. AUSTRALIAN WHEAT BOARD.

[PRIVY COUNCIL (Viscount Simonds, Lord Oaksey, Lord Radcliffe, Lord Keith of Avonholm and Lord Somervell of Harrow), December 1, 5, 6, 7, 1955, January 26, 1956.]

Privy Council—Australia—Shipping—Charterparty—Safe port or wharf—Ship damaged at unsafe port or wharf nominated by charterer—Liability of charterer.

By a charterparty dated Mar. 19, 1951, the respondent chartered the m.v. Houston City, which was owned by the appellant, to load a cargo of wheat from Western Australia. The charterparty provided that the ship should proceed, "as ordered by the charterers, to one or two safe ports in Western Australia, or so near thereunto as she may safely get" and should there load. The ship was directed by the respondent to load at Port Geraldton, where there was only one berth suitable for loading grain. On July 7, 1951, the ship arrived at Port Geraldton and berthed. At the time, one of two hauling-off buoys was missing and some fifty feet in the centre of a waling piece or fender was also missing, both the buoy and the waling piece being to obviate the danger to a ship at berth from northerly winds. On July 12, 1951, while loading was being carried out, the wind freshened from the north and soon increased to gale force, and the ship damaged herself. In an action for damages, it having been found that the port or wharf was unsafe and that the master of the ship acted reasonably and that the damage to the ship flowed from the breach of the charterparty if there had been such a breach,

Held: the respondent, as charterer, was liable for the damage caused to the ship, since, on the true construction of the charterparty the charterer undertook to nominate a safe port for loading, and the respondent had, in fact, nominated an unsafe port.

Per CURIAM: the port was unsafe at the time of the nomination and remained unsafe until the damage occurred. What the position might be if a port were safe, so far as could be foreseen at the time of nomination, for the ship when loading but were to become unsafe later through circumstances unforeseeable by the charterer would be a question of the construction of the charterparty (see p. 462, letter E, post).

Dicta of DEVLIN, J., in *Compania Naviera Maropan S.A. v. Bowaters Lloyd Pulp & Paper Mills, Ltd.* ([1954] 3 All E.R. at p. 568) approved.

Appeal allowed.

[As to the consequences of naming an unsafe port, see 30 HALSBURY'S LAWS (2nd Edn.) 518, para. 670; and for cases on the subject, see 41 DIGEST 521, 3497-3500.]

Cases referred to:

- (1) *Limerick S.S. Co. v. Stott*, [1921] 1 K.B. 568; *affd.* C.A., [1921] 2 K.B. 613; 90 L.J.K.B. 865; 125 L.T. 516; 41 Digest 521, 3496.
- (2) *Ogden v. Graham*, (1861), 1 B. & S. 773; 31 L.J.Q.B. 26; 5 L.T. 396; 121 E.R. 901; 41 Digest 522, 3509.
- (3) *Hall Brothers S.S. Co., Ltd. v. Paul (R. & W.), Ltd.*, (1914), 111 L.T. 811; 19 Com. Cas. 384; 41 Digest 523, 3515.
- (4) *Axel Brostrom & Son v. Louis Dreyfus & Co.*, (1932), 44 Lloyd's Rep. 136; 38 Com. Cas. 79; Digest Supp.
- (5) *West (Samuel), Ltd. v. Wrights (Colchester), Ltd.*, (1935), 51 Lloyd's Rep. 105; 40 Com. Cas. 186; Digest Supp.
- (6) *The Pass of Leny*, (1936), 155 L.T. 421; 54 Lloyd's Rep. 288; Digest Supp.

- A (7) *Lensen Shipping Co., Ltd. v. Anglo-Soviet Shipping Co., Ltd.*, (1934), 50 Lloyd's Rep. 62; *affd.* C.A., (1935), 52 Lloyd's Rep. 141; 40 Com. Cas. 320; Digest Supp.
- (8) *Grace (G. W.) & Co., Ltd. v. General Steam Navigation Co., Ltd.*, [1950] 1 All E.R. 201; [1950] 2 K.B. 383; 2nd Digest Supp.
- B (9) *Compania Naviera Maropan S.A. v. Bowaters Lloyd Pulp & Paper Mills, Ltd.*, [1954] 3 All E.R. 563; *affd.* C.A., [1955] 2 All E.R. 241; [1955] 2 Q.B. 68; 3rd Digest Supp.

Appeal.

Appeal by special leave by shipowners from an order of the High Court of Australia, dated June 2, 1954, reversing an order of the Supreme Court of Western Australia (WOLFF, J.), dated Jan. 30, 1953. The facts appear in the judgment of the Board.

A. A. Mocatta, Q.C., and J. F. Donaldson for the appellant.

Sir Garfield Barwick, Q.C. (of the Australian Bar), and M. R. E. Kerr for the respondent.

D LORD SOMERVELL OF HARROW: This is an appeal by special leave from a judgment of the High Court of Australia. The appellant, as owners of the m.v. *Houston City*, sued the respondent, as charterer under a voyage charter, for damages for breach of contract. The respondent, it is alleged, ordered the *Houston City* to an unsafe port and unsafe berth and, as a result, the vessel suffered damage. The case proceeded on the issue of liability only. In the Supreme Court of Western Australia, WOLFF, J., found for the appellant. On appeal, the High Court by a majority, SIR OWEN DIXON, C.J., dissenting, found for the respondent.

The charterparty was dated Mar. 19, 1951. The relevant provisions are as follows:

F "It is this day mutually agreed . . . 1. That the said vessel, being in every way fitted for the voyage shall, with all convenient speed, after completion of her present voyage and discharge of her outward cargo (if any) proceed, as ordered by the charterers, to one or two safe ports in Western Australia, or so near thereunto as she may safely get, and there load according to the custom of the port, always afloat, at such safe dock, pier, wharves, and/or anchorage, as ordered . . . a full and complete cargo of wheat in bulk, ex silo, which the said charterers bind themselves to provide . . .

G "7. If proceeding in ballast, the master shall apply to charterers . . . for loading port orders by wireless ninety-six hours before arrival at the loading area . . . and orders for loading port shall be given by charterers by wireless within forty-eight hours of receipt of master's application."

H The question whether the port or wharf was unsafe within the meaning of the clause is logically the first issue. All judges below decided that it was. The main issue then argued was one of construction as to the liability, if any, of the charterer for damage to the ship which flowed from the non-safety of the port or wharf. There was a further issue whether, assuming the charterer's liability for damage, the damage on the facts of this case flowed from the breach.

I After summarising the facts, it will be convenient to deal first with the issue of construction. On July 3, 1951, in accordance with cl. 7, the master sent a radio message to the respondent's office at Perth for orders. The relevant words in the reply were "Loading Port Geraldton full and complete cargo wheat in bulk." The master had loaded grain at Geraldton on two previous occasions. There was only one berth suitable for loading grain, and it is immaterial in this case whether one treats the allegation as coming under the words "safe port" or "safe wharves". In the judgments below, reference is made to the safety of the berth. In considering the principle, it seems right to use one or other of the words contained in the relevant clause, either of which in the present case

would apply. The vessel arrived on July 7, and was met by the pilot and harbour master, Captain Sweett. After a short wait for another vessel to get out of the way, the Houston City berthed shortly after 5 p.m. The weather was fine. The berth is exposed to northerly winds, but the evidence did not establish that it was ordinarily unsafe for a vessel such as the Houston City. Two defects are relied on. One of two hauling-off buoys was missing and had been missing since the previous May. The master noticed the absence of the buoy and Captain Sweett informed him that its return was imminent. Further, in the centre of a waling piece or fender some fifty feet was missing and had been missing for some months. There was no suggestion when it was likely to be replaced. Both the buoy and the waling piece were to obviate the danger to a vessel at the berth from northerly winds. There was a suggestion below that the master should have laid out an additional anchor. This was rejected by all the learned judges and was not pursued before the Board.

July 7 was a Saturday. Loading began on July 9 and continued till July 12. About 11.45 a.m. on that day the wind freshened from the north, and soon increased to gale force. The ship rolled and damaged herself and the wharf. The learned judge found that the absence of the buoy and of the waling piece contributed to the damage. The vessel with the necessary parts and equipment to repair the buoy arrived on July 12 and repairs began. The buoy was restored on July 13.

Proceeding on the basis that the port or wharf was unsafe, the appellant's case on construction is simple. It submits that, under cl. 1, the charterer has undertaken to nominate a safe port or wharf for the loading. In breach of this provision the port or wharf nominated was unsafe and, if damage to the ship flowed from that breach as a natural and probable consequence, the charterer is liable for it.

The respondent did not, of course, suggest that the owner could be compelled to load at an unsafe port, but contends that, if the charterer nominated an unsafe port, the owner could reject the nomination, as soon, presumably, as he had discovered that the port was unsafe. He might be entitled to damages for delay caused by the nomination. If, however, he accepted the nomination and went to the port the charterer would, it is said, in no circumstances be liable for damage flowing from the want of safety, unless liability arose under some other provision in the contract.

The two rival contentions can be illustrated by two citations, one from the majority judgment ([1954] 2 Lloyd's Rep. at p. 162) and the other from a judgment of BAILHACHE, J., in *Limerick S.S. Co. v. Stott* (1) ([1921] 1 K.B. 568), cited by SIR OWEN DIXON, C.J.:

"Clause 1 of the charterparty appears to us [that is to the majority of the High Court] to be designed to define the obligations of the shipowner with respect to loading ports and to prescribe, consequentially, a limitation upon the charterer's *rights* to designate such ports, though, no doubt, under that clause and cl. 6 and cl. 7 the appellant was bound to give appropriate loading orders and provide the stipulated cargo. There is, of course, ample authority for the proposition that a failure or refusal, pursuant to such a provision, to designate a safe port will sound in damages, and the nominating of an unsafe port may well be involved in such a failure or refusal. But it by no means follows that where the nominating of an unsafe port is involved in such a failure or refusal the shipowner may recover not only the damages which flow from the failure or refusal but also the damages sustained by the vessel after proceeding to the designated port and as the result of its unsafe nature or condition. Such damages do not flow from a refusal to nominate a safe port."

A In *Limerick S.S. Co. v. Stott* (1), the main issue related to ice at Abo. There was a second point. The ship had been ordered to Manchester. After discharge, she was unable to get down the canal without cutting her masts. BAILHACHE, J., said ([1921] 1 K.B. at p. 575):

B “In my judgment the expense of cutting the masts must fall upon the charterers, because they were only entitled to order the Innisboffin to a safe port, which means a port to which a ship can safely get and from which she can safely return. It was therefore a breach of contract for the charterers to order her to proceed to Manchester, and having committed a breach of contract they must pay the damages which flow from that breach of contract.”

C Their Lordships are unable to construe the clause in the way suggested in the passage cited from the majority judgment. That construction, in effect, makes the nomination of an unsafe port equivalent in its legal consequences to a failure to nominate a port at all. This would seem to disregard the words and the realities of the relationship. The words of the clause, in their Lordships' opinion, are an undertaking by the charterers to nominate a safe port and a safe dock, etc.,

D within that port. The charterer is given a choice, within limits prescribed, as to where he will have his cargo available for loading. It seems natural that he should give at any rate some undertaking as to its safety, and that the owners should be entitled to rely on the place nominated being safe. If he breaks this undertaking and nominates an unsafe port and the ship is damaged through going there, he will be liable for the damage, subject of course to possible questions of

E remoteness, or *novus actus interveniens*. This was the construction assumed by BAILHACHE, J., in the passage cited. If there is any doubt in the charterer's mind as to the draught or dimensions of the ship as affecting its power to load safely at a particular port or berth, there is obviously no difficulty in his getting any information he wants from the owners.

F The authorities support the construction submitted by the appellant. In *Ogden v. Graham* (2) (1861) (1 B. & S. 773), the vessel was ordered by the charterer under a voyage charterparty to discharge at a port held to be unsafe. The owners refused to go to the port and claimed damages for detention. The lack of safety arose from the fact that the district was in a state of rebellion, and any ship going to the port would have been confiscated. The defendant argued that “safe” referred only to incidents of navigation. This argument was rejected.

G WIGHTMAN, J., said (1 B. & S. at p. 780):

“... the charterers must pay the damage occasioned by the breach of contract in not naming a safe port, to which they have made themselves liable by the specific terms of the contract.”

H BLACKBURN, J., having held that the port was unsafe, said (*ibid.*, at p. 782):

“That being so, they are liable for damages for not naming a safe port within a reasonable time, and the measure of damages will be regulated by the detention of the ship at Valparaiso beyond that time.”

I In *Hall Brothers S.S. Co., Ltd. v. R. & W. Paul, Ltd.* (3) (1914) (111 L.T. 811), the vessel, under a voyage charterparty, was ordered to King's Lynn. The vessel could not reach the dock without lightening. SANKEY, J., held that, as a result, King's Lynn was not a safe port. It had been argued, *inter alia*, that, as the master had accepted the order to proceed to King's Lynn, no damages could be recovered. This argument was rejected, and the plaintiffs recovered the costs incurred in lightening the vessel.

Limerick S.S. Co. v. Stott (1) has already been referred to. The charter in that case was a time charter under which the vessel was to be employed between good and safe ports or places within the limits of one Baltic round. It also

contained a clause, usual in time charters, that the master should be under the orders of the charterer who should indemnify the owner for the consequences of complying with such orders. The majority in the High Court distinguished that case by reason of the presence of that latter clause. It is clear that that was not the ratio of the learned judge. He relied, and relied only, on the provision that the vessel could only be ordered to a safe port. A

In *Axel Brostrom & Son v. Louis Dreyfus & Co.* (4) (1932) (44 Lloyd's Rep. 136), a question of law as to the meaning of a safe port came before ROCHE, J., on an award in the form of a special case. Under a voyage charter, the charterer had ordered the vessel to Londonderry. Owing to her length she required tug assistance to negotiate the bends of the River Foyle. There were no tugs at Londonderry and one had to be obtained from Glasgow. The charterer argued unsuccessfully that the port was a safe port, but neither before the arbitrator nor before the judge was it suggested that the charterer was not responsible for the cost of obtaining the tug if he had ordered the vessel to an unsafe port. B

In *Samuel West, Ltd. v. Wrights (Colchester), Ltd.* (5) (1935) (51 Lloyd's Rep. 105), BRANSON, J., made some observations which are cited and relied on by the majority of the High Court. A study of the facts makes it clear that the observations were not necessary to the decision. The owners of a motor barge claimed damages from the defendant as consignee on the ground that their vessel had been injured at a wharf to which she had been ordered by the defendant. There was no evidence that the defendant had ordered her there. The words to be construed were different, and the learned judge apparently construed them as leaving open the question which party had to decide on safety. He added words to the effect that, in his opinion, it was the owners or their master. He referred to the fact that the draught and structure of the ship would be within the knowledge of the master. C D E

In *The Pass of Leny* (6) (1936) (155 L.T. 421), the port, Boston, was named in the charterparty. The damage was done at the berth, and the owners of the vessel sued the owners and managers of the wharf as first defendants and the charterers as second defendants. The charterparty provided that the loading place or dock should be "indicated" by the charterers. These words were construed by BUCKNILL, J., as not amounting to an express promise of safety, and he refused to imply such an obligation. In their Lordships' opinion, neither of these cases lends any effective support to the respondent's construction. F

In *Lensen Shipping Co., Ltd. v. Anglo-Soviet Shipping Co., Ltd.* (7) (1934) (50 Lloyd's Rep. 62), questions of law came before the court on a special case. The charter was a time charter. The berth was unsafe and the ship had been delayed and damaged. Facts and issues had become involved. In the Court of Appeal, GREER, L.J., at the end of his judgment (52 Lloyd's Rep. at p. 148) used words which suggest that the claim for ordering to a port which was not safe succeeded under the employment and indemnity clause which is not, of course, ordinarily found in a voyage charter. There are other passages in his judgment which suggest that he was treating this as an alternative to the case made under the "safe ports" clause. Where a time charter contains, as it did in *Lensen Shipping Co., Ltd. v. Anglo-Soviet Shipping Co., Ltd.* (7), an undertaking by the charterer that the vessel is to be employed between good and safe ports, the liability of the charterer is, at any rate in all ordinary circumstances, the same as where, under a voyage charterparty, the charterer undertakes to nominate a safe port. G H I

In *G. W. Grace & Co., Ltd. v. General Steam Navigation Co., Ltd.* (8) ([1950] 1 All E.R. 201), DEVLIN, J., reviewed the authorities. He disagreed with BRANSON, J.'s dictum and doubted the existence of the distinction suggested by GREER, L.J., between time charters and voyage charters in "safe port" cases. The case arose out of a time charter.

A After the hearing of the present case in the High Court, the issue under consideration came before DEVLIN, J., and the Court of Appeal (*Compania Naviera Maropan S.A. v. Bowaters Lloyd Pulp & Paper Mills, Ltd.* (9), [1954] 3 All E.R. 563, [1955] 2 All E.R. 241). It was held that, under the charterparty, the charterer was under an obligation to nominate a safe loading place for the ship chartered. The loading place being unsafe and the master having acted

B reasonably, the charterer was held liable for damage to the ship. Substantially the same argument was put forward as in the present appeal and rejected. The decision of the High Court in the present case was cited, and the court felt unable to adopt the majority decision and approved the Chief Justice's dissenting judgment. It was argued, as here, that it was for the master to decide and that, if he accepted the nomination, the charterer was under no liability for damage

C arising out of the absence of safety. On the general and difficult question as to the position of the master if and when he realises or suspects danger or the possibility of danger, their Lordships would adopt the following passage from the judgment of DEVLIN, J. ([1954] 3 All E.R. at p. 563):

D "I think, therefore, that the real question is not so much whether a distinction can be drawn between a voyage and a time charter, as whether any charterparty, whether for voyage or for time, is exempt from the application of the ordinary law of contract. I see no reason in principle why it should be, and I do not think that business convenience requires it. Indeed, I think business, whether maritime or otherwise, might be gravely impeded if the ordinary principle were not allowed to operate freely—

E and by the ordinary principle I mean that, generally speaking, a man is entitled to act in the faith that the other party to a contract is carrying out his part of it properly. It does not lie in the mouth of the promisor to say that a promisee has no right to assume that a promise has been faithfully carried out and should make his own inquiries to see whether it is or not. If everything done under contract has to be scrutinised and tested

F by the other party before he can safely act on it, many transactions might be seriously held up—in doubtful cases, perhaps indefinitely. Even if the breach is clear, it is vital to the proper conduct of business that the promisee should be able, if he considers the breach a minor one, to proceed without sacrificing his right to be indemnified. That is just as important in a voyage charterparty as in any other sort of business. Suppose that the

G master thinks that the nominated berth is barely large enough and that he might scrape his vessel's sides and damage her paintwork. If, as is the case here, it is the only berth that can be nominated, is he to throw up the voyage? I am not asked to assess the damages in this case, so I do not know what was the cost of repairing the *Stork*. But it is certain that if the ship had sailed away from Tommy's Arm without carrying her freight, the cost of the

H time lost would have been considerable. It is possible even in this case that a prudent master, without knowing for certain whether he was right or not and so acting in the interests of all concerned, might have felt that the risk of damage to the vessel's bottom was outweighed by the certainty of time lost. A master under a voyage charterparty is often confronted with this sort of problem, as, for example, when he has to decide whether to accept or

I reject cargo that may be dangerous, and there are, of course, many cases in which the ship has recovered for damage done to her by dangerous cargo.

"To deny the defendants' proposition does not mean that a master can enter ports that are obviously unsafe and then charge the charterers with damage done. The damages for any breach of warranty are always limited to the natural and probable consequences. The point then becomes one of remoteness of damage; or, if it is thought better to put it in Latin, the expressions *novus actus interveniens* and *volenti non fit injuria* are

ready to hand. There is also the rule that an aggrieved party must act reasonably and try to minimise his damage. A master who entered a berth which he knew to be unsafe (and which perhaps the charterer had nominated in ignorance of its condition) rather than ask for another nomination and seek compensation for any time lost by damages for detention, might find himself in trouble. So might a master who sought compensation for the time lost in sailing back across the Atlantic because he had not cared to risk damage to his paintwork."

On the question of construction, both in principle and on authority, their Lordships are of opinion that the appellant succeeds.

Certain subsidiary submissions were made by the respondent. It was argued that the danger was likely to be of such short duration that the Board should reverse the finding that the port was not safe. This was put forward on the assumption that if the buoy, the repair of which was expected at any time, had been in order, the absence of the waling piece would not have rendered the berth unsafe. There is no finding to this effect, nor does the point appear to have been raised. It would seem that the learned trial judge took the opposite view. The master seems to have thought the waling piece would not have mattered if the buoy was back, but a marine surveyor called by the appellant said the wharf would not be safe with a substantial part of an upper waling piece missing. In any event, there was no certainty when the buoy would be repaired. This submission fails.

In the present case, the port was unsafe at the time of the nomination and remained unsafe until the damage occurred. There was discussion in the argument as to the position if, at the time of nomination, the port would, so far as could be foreseen, be safe for the vessel when loading but became unsafe later through circumstances unforeseeable by the charterer. The point does not arise here, and it is unnecessary to decide it. It would be a question of construction. There are no grounds, in their Lordships' opinion, for disturbing the findings that the port or wharf was unsafe, or the further finding that the master acted reasonably and the damage, therefore, flowed from the breach.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal be allowed and the order of WOLFF, J., restored. The respondent will pay the costs in the High Court and of this appeal.

Appeal allowed.

Solicitors: *Holman, Fenwick & Willan* (for the appellant); *Coward, Chance & Co.* (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A PILCHER v. PILCHER (No. 2).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Davies, J.), January 30, 1956.]

B *Justices—Husband and wife—Maintenance order—Arrears—Remission of part—Considerations governing exercise of power to remit—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), s. 76.*

In March, 1952, the wife obtained a maintenance order in the Gibraltar magistrates' court. In November, 1953, a domestic proceedings court in England purported to revoke that order. In May, 1955, the Divisional Court held that the purported revocation was invalid and that the order was still effective. On a complaint by the wife in the magistrates' court to enforce the arrears which then amounted to £396 17s. 10d., the question arose whether the whole or any part of that sum should be remitted under the Magistrates' Courts Act, 1952, s. 76.

C **Held:** for the purpose of determining this question the magistrates' court (i) should have regard to the fact that much of the arrears had accrued during the time when the maintenance order had been apparently, albeit ineffectively, revoked, so that the husband had been led to suppose that he was under no obligation to make any payment, (ii) ought, as a matter of practice, to impose a retrospective time limit, such as a year (as was the custom in the Divorce Division), beyond which the husband would not be required to pay arrears, and (iii) ought to enforce only such a sum as the husband would pay rather than go to prison; in the circumstances the arrears should be remitted in part and the figure of £100 substituted for that of £396 17s. 10d.

E [As to enforcement of justices' maintenance orders, see 12 HALSBURY'S LAWS (3rd Edn.) 499, para. 1101; and for cases on the subject, see 27 DIGEST (Repl.) 719, 720, 6884-6893.]

F As to recovery of a year's arrears in the Divorce Division, see 12 HALSBURY'S LAWS (3rd Edn.) 472, para. 1056, note (e).

For the Magistrates' Courts Act, 1952, s. 76, see 32 HALSBURY'S STATUTES (2nd Edn.) 480.]

Case referred to:

(1) *Pilcher v. Pilcher*, [1955] 2 All E.R. 644; [1955] P. 318.

G **Appeal.**

The husband appealed against an order of the West London magistrate, dated June 21, 1955.

H On Mar. 17, 1952, the Gibraltar magistrates' court made an order that the husband should pay maintenance to the wife for herself and for the child of the marriage. On July 13, 1953, the order was registered at West London Magistrates' Court pursuant to s. 1 (1) of the Maintenance Orders (Facilities for Enforcement) Act, 1920. On Nov. 3, 1953, the Chelsea Domestic Proceedings Court purported to revoke the registered order. On Feb. 23, 1954, and on Nov. 30, 1954, the West London magistrate declined to enforce the registered order and on each occasion dismissed the wife's complaint for enforcement. On May 24, 1955, the Divisional Court held ([1955] 2 All E.R. 644) that the purported revocation of the registered order by the Chelsea Domestic Proceedings Court was ineffective and remitted the wife's complaints for enforcement of that order to the West London court for re-hearing. On June 21, 1955, the arrears under the registered order amounted to £396 17s. 10d. and the West London magistrate made an order committing the husband to prison for default in paying that sum.

Scott Henderson, Q.C., and Eric Stockdale for the husband.
Melford Stevenson, Q.C., and Joseph Jackson for the wife.

LORD MERRIMAN, P.: To avoid repetition I refer to the full history of this matter which is set out in *Pilcher v. Pilcher* (1) ([1955] 2 All E.R. 644). I say "to avoid repetition" because an extremely confused history was, I hope, to some extent elucidated by the combined efforts of DAVIES, J., and myself on that occasion. The upshot was that the original order, made by the Gibraltar magistrates' court, was held to have been revoked without jurisdiction by one of the courts in London (the Chelsea Domestic Proceedings Court)—I expressly avoid using the contentious word "metropolitan" court in that context—and that two attempts to enforce that order before the West London Magistrates' Court were still alive. Both complaints were remitted to the West London court and our judgment concluded with these words (*ibid.*, at p. 653):

"The two complaints by or on behalf of the wife for the enforcement of arrears will be remitted to the West London Magistrates' Court for re-hearing. We wish, however, to make it plain that we do not seek to give any indication of the course that should be taken on the re-hearing of those complaints."

In connection with these complaints we had referred in express terms to the power given by s. 76 of the Magistrates' Courts Act, 1952, to remit the whole or any part of the arrears. Our judgment continued (*ibid.*):

"It will be a matter entirely for the magistrate's discretion in the light of the evidence before him whether to enforce or to remit as he thinks proper the whole or any part of the sum due under the registered order."

If those words mean anything they mean that he could either enforce the whole or enforce part, or remit the whole or remit part, and that is what we intended should happen. But on an application to enforce the whole Mr. GUEST, in effect, held that he had no option but to enforce the whole, and he has done so for a reason which neither counsel has attempted to justify, that if he were to remit the arrears, either wholly or in part, he would pro tanto be revoking the original order by an indirect method. The fallacy of that argument is apparent, because it is perfectly certain and clear, on the face of the section, that by remitting arrears one does not revoke an order. The two things are entirely distinct.

The question in the circumstances is, what should we do? This litigation has already been considerably protracted, and I gather that it is now in process of being further protracted by a suit, at the instance of the husband, for a divorce on the ground of alleged desertion by the wife. I merely say that, if and when that suit terminates in his favour, it may be a very potent matter to be brought before any court which has to deal with any further stages of this Gibraltar order for maintenance on the ground of wilful neglect to maintain. At the moment we have to deal with the fact that having remitted the order for enforcement or remittance of arrears, nothing, in fact, has happened, and we have the right, indeed, the duty, to deal with the matter either by remitting it further to the magistrate or by making any order which we think that the magistrate ought to have made. It is common ground that during a period of time which amounted to about eighteen months in all, the order, albeit wrongly, had been in form revoked, and it is clear on any view of the matter that this large figure of arrears includes, amongst other things, the arrears at £3 a week which, once it is held that the revocation was of no validity, have accrued due during that time. Nevertheless, when deciding what should be done about a figure of £396 in respect of which, without any question of payment by instalments, the husband has been committed to prison for non-payment, it is clearly a matter for consideration that that sum does include a large amount of money which has accrued during a period when he supposed he was under no liability to pay at all.

A Moreover, as a matter of practice but not of law, courts which are asked to enforce orders of this sort, usually consider that there should be a time limit retrospectively. The custom in this Division is not to enforce arrears for more than a year backwards.

Either of these two considerations in the present case illustrates another overriding principle which should always be borne in mind in considering these questions of enforcing arrears, and, indeed, in connection with the amounts of the orders themselves, viz., that it is always better to have an order in force for a sum which a man will pay rather than go to prison, instead of having one in force for which he will go to prison rather than pay. It is clear that in respect of the sum of £396 17s. 10d. the husband would go to prison rather than pay. I can well understand that that may be so; but he has defied the court by saying **C** very foolishly that nothing would induce him to pay anything. That has been minimised to some extent by his counsel, who, while making it plain that he has no authority to put forward any proposition, has suggested to us that, in effect, it would be reasonable to enforce only those arrears which have accrued in respect of the maintenance for the child, as distinct from the maintenance for the wife.

I am not prepared to deal with it on that basis. The whole order is an order **D** in favour of the wife, as has been explained on more than one occasion by this court*. I think that we should try to find some sum which, in the circumstances of the present case, would enable the order to go forward, from this date at any rate, with some inducement to the husband to keep up his responsibility to the wife until in some way or another, with which it is not at the moment in our power to deal, a different order is substituted for that which is at present in force, **E** or the present order is cancelled altogether. The proper thing to do is to remit all the arrears which had accrued before June 21, 1955, when the matter was before the magistrate, except £100 of such arrears. The committal order will stand, but will be varied by substituting the figure of £100 for £396 17s. 10d. and suspended on the condition that the husband pays 5s. a week off those arrears.

F **DAVIES, J.:** I entirely agree, and do not wish to add anything.

Order accordingly.

Solicitors: *Burton & Son* (for the husband); *Alan, Edmunds & Phillips* (for the wife).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

* See, e.g., *Kinnane v. Kinnane* ([1953] 2 All E.R. 1144).

RUSSELL v. RUSSELL,

[COURT OF APPEAL (Jenkins and Birkett, L.JJ.), January 31, 1956.]

Divorce—Maintenance of wife—Undertaking by husband not to ask for variation of justice's maintenance order—Validity—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 7.

In August, 1947, the wife obtained from the justices a maintenance order for herself and the child of the marriage on the ground that the husband had deserted her. Subsequently the husband presented a petition praying for dissolution of the marriage on the ground of the wife's cruelty and desertion. In her answer the wife denied the charges without cross-praying for any relief. In April, 1952, at the trial it was apparent that the marriage had completely broken down, and that the wife was only concerned with retaining the maintenance order previously made by the justices. The husband gave an undertaking to the court that he would not apply for a variation of the maintenance order unless he was out of work and unable to earn anything, and that the weekly maintenance for the child should be increased from 10s. to £1; and the wife amended her answer, alleging that the husband had deserted her in 1947. On that answer a decree of divorce was pronounced. The husband now asked that the undertaking given by him should be discharged on the grounds (i) that it could not have been validly given because it ousted the jurisdiction conferred on justices by s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, (ii) that a husband could not validly bind himself to pay his wife a certain fixed sum by way of maintenance, (iii) that the Divorce Court had usurped the jurisdiction of the justices.

Held: (i) the husband's undertaking was valid since (a) it was not contrary to public policy for a husband by agreement with his wife, a fortiori in an undertaking to the court, to forgo a right to apply for a reduction in his liability for maintenance for his wife; (b) although it might be that in another case some obligation assumed by a husband by agreement out of court would be contrary to the principle of *Hyman v. Hyman* ([1929] A.C. 601), yet an undertaking to the court, such as was given in the present case, was valid; and (c) jurisdiction of the justices had not been usurped as the amount of maintenance was left to rest on the justices' order with an agreed increase in respect of the child.

(ii) although the court had power to discharge an undertaking the husband had failed to show any real hardship or any essential change in his circumstances such as would warrant the court in discharging the undertaking in the present case.

Observations on the proper practice to be followed where there are divorce proceedings after justices have made an order for maintenance (see p. 471, letters C to E, post); *Kilford v. Kilford*, [1947] 2 All E.R. 381 and *Ross v. Ross*, [1950] 1 All E.R. 654 considered.

Appeal dismissed.

[As to maintenance orders in the Divorce Court where justices' order in existence, see 12 HALSBURY'S LAWS (3rd Edn.) 431, para. 968, note (f); and for cases on the subject, see 27 DIGEST (Repl.) 723, 6910, 6912.]

For the Summary Jurisdiction (Married Women) Act, 1895, s. 7, see 11 HALSBURY'S STATUTES (2nd Edn.) 852; and for the Married Women (Maintenance) Act, 1949, s. 1 (1), see 28 HALSBURY'S STATUTES (2nd Edn.) 736.]

Cases referred to:

- (1) *Hyman v. Hyman*, [1929] A.C. 601; 98 L.J.P. 81; 141 L.T. 329; 93 J.P. 209; 27 Digest (Repl.) 235, 1888.
- (2) *Kilford v. Kilford*, [1947] 2 All E.R. 381; [1947] P. 100; [1948] L.J.R. 447; 111 J.P. 495; 27 Digest (Repl.) 723, 6910.

- A (3) *Ross v. Ross*, [1950] 1 All E.R. 654; [1950] P. 160; 27 Digest (Repl.) 723, 6912.
(4) *Bragg v. Bragg*, [1925] P. 20; 94 L.J.P. 11; 132 L.T. 346; 27 Digest (Repl.) 722, 6907.

Appeal.

- B The husband appealed against an order of Mr. Commissioner BLANCO WHITE, Q.C., dated Nov. 21, 1955.

- The parties were married in 1940 and there was one child of the marriage born in May, 1947. On Aug. 8, 1947, the wife obtained from the Southend justices an order that the husband should pay her £2 (later reduced to £1 10s.) as maintenance for herself and 10s. as maintenance for the child of the marriage, on the ground that he, the husband, had deserted her on July 24, 1947. Subsequently the husband presented a petition for divorce on the grounds of the wife's cruelty and desertion. The wife filed an answer denying the allegations in the petition but did not include a cross-prayer for any relief. The petition came before Mr. Commissioner BLANCO WHITE, Q.C., on Apr. 24, 1952. The husband appeared by counsel and the wife in person. In reply to the commissioner at the beginning of the case the wife said that she did not want to be divorced but that she wished just to defend the case. After the husband had given part of his evidence, the commissioner intervened and suggested to the wife that she should speak privately to the husband's counsel. As a result of the conversation, which took place in the presence of the associate of the court, the husband's counsel, on Apr. 25, informed the commissioner that the wife had amended her answer to include a cross-prayer for a divorce alleging that the husband had deserted her on July 24, 1947. Counsel for the husband then told the commissioner that the wife had been worried about her maintenance and said:

- "She thought if the marriage was dissolved she would probably lose her maintenance. [The husband] has never wished that at all, and he is ready to give an undertaking that he will not apply to have the maintenance of the wife reduced below £1 10s., which she is now getting, unless he is out of work. He will give an undertaking to that effect and he is also willing that the maintenance for the child, which is now 10s., should be £1 a week."

The wife then gave evidence and was not cross-examined. The commissioner found her case proved and said:

- "The prayer of the petition will be rejected, there will be a decree nisi on the answer on the ground of desertion and an order for costs, and the undertaking as to maintenance will be noted on the file."

The undertaking, which was noted on the file and also incorporated in the decree, read as follows:

- "I . . . the husband, hereby undertake that in the event of my marriage to [the wife] being dissolved, I shall not apply to have the existing maintenance order in favour of [the wife] for the sum of £1 10s. weekly reduced unless I am out of work and unable to earn anything; and that I shall forthwith increase the existing maintenance order in favour of . . . the child of the marriage . . . for 10s. weekly to the sum of £1, making a total of £2 10s. in all."

- I The undertaking was dated Apr. 25, 1952, and signed by the husband. On Sept. 18, 1952, the decree was made absolute, and on Mar. 25, 1953, the husband re-married. On May 12, 1955, the husband, who had fallen into arrears in his payments under the maintenance order, was summoned before the Southampton justices on a complaint to enforce the arrears. The husband applied to Mr. Commissioner BLANCO WHITE, Q.C., to discharge or vary the undertaking given by him in the divorce proceedings. In an affidavit in support of his application the husband stated that since Apr. 25, 1952, there had been a change in

his financial circumstances, namely, that he had re-married on Mar. 25, 1953, A
and that there was one child of that marriage born on May 28, 1954, and that he
wished to apply to the justices for a variation of the maintenance order. On
Nov. 21, 1955, the commissioner dismissed the husband's application, saying

"... the undertaking was no doubt the result of conversations with
the wife and a wife whose marriage has been dissolved may very well want B
to be protected, if she can, against the very thing that has happened, namely
that the husband shall re-marry and have some more children by another
woman . . . this undertaking was volunteered to the court on the advice
of very experienced counsel and I see no reason to discharge it, nor indeed
to vary it, if I had power to vary it, which I have not."

The husband appealed; he was now represented by different counsel from that C
in the divorce proceedings.

T. R. Crawford for the husband.

J. G. Wilmers for the wife.

JENKINS, L.J., stated the facts and continued: I must say that I regard D
the history of these proceedings in relation to the undertaking as unfortunate, to
say the least. No doubt both the commissioner and counsel then appearing for
the husband were performing as well as they could the difficult task of looking
after the interests of a wife who was not represented by counsel. No doubt it was
thought that in the long run it might be the best for all parties that the marriage,
which had obviously irretrievably broken down, should be put an end to. It was E
also desirable, indeed, essential, that proper provision should be made for the
wife by the husband who, as clearly appeared from the evidence, was the party
at fault. No doubt they were doing the best that they could. At the same time,
the stage in the proceedings at which the question of the undertaking was mooted
and at which it was said that the husband was ready to give such an undertaking,
was such as to suggest that the undertaking formed part of a bargain to the F
effect that, in consideration of the husband making satisfactory provision for the
maintenance of the wife, the wife would amend her answer by a cross-prayer
for divorce. I am not suggesting that there was in fact anything actually
improper in what was done. It was all done openly and in the face of the court;
but, to my mind, it is much better to make sure that such matters should not
savour of bargaining. Questions of maintenance should be reserved to be dealt G
with after the case has been heard, and not at a stage at which the position in
regard to maintenance may influence one party or the other in the conduct of
the proceedings. Proceedings such as these, of course, concern matters of status,
and it is a truism to say that they should not be made the subject of any bargain-
ing. Unfortunate as I think the course taken to have been, it was in these
circumstances that the undertaking came into existence, and it seems to me H
reasonably plain that if counsel had not intimated the husband's willingness to
give the undertaking, the matter might have taken a very different course. The
wife might have adhered to her original intention not to ask for relief on her
part, but to content herself by defeating the prayer in the petition, thus retaining
her status as a wife and the rights of maintenance which belonged to her as a wife.
It, therefore, seems difficult to resist the conclusion that the wife did irretrievably I
alter her position on the faith of this undertaking. That being so, I would for
my part be reluctant in the extreme now to hold, at the instance of the husband,
that the undertaking should be discharged, at the very time, as the learned
commissioner pointed out, at which an event has happened of the kind against
which the wife may very well have been most anxious to guard, and against
which the undertaking was very likely designed as a protection. Nevertheless,
the matter has to be considered according to law, and if it is right in law that this
undertaking should be discharged, then discharged it must be.

A Counsel for the husband attacked its validity on three grounds. First, he referred us to s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, which gives jurisdiction to justices to vary or discharge orders for maintenance. It reads:

B "A court of summary jurisdiction . . . may, on the application of the married woman or of her husband, and upon cause being shown upon fresh evidence to the satisfaction of the court at any time, alter, vary, or discharge any such order [for maintenance], and may upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made, so that the same do not in any case exceed the weekly sum of £5."*

C Counsel said that that section conferred on the justices a discretionary jurisdiction to vary the amounts payable under maintenance orders made by them, that they had seisin of this matter (viz., the question as to the maintenance which should be paid by the husband to the wife) and the discretion to vary the amount of those payments was theirs, and theirs alone. He said that the undertaking now in question should be held to be void as contrary to public policy because it purports to oust the jurisdiction of the justices. I cannot accept that argument. I find it impossible to hold that it is not open to a husband, against whom an order has been made by justices, to agree with his wife, for reasons that seem good to him and her, that he will not apply to have the maintenance payable reduced below a specified sum. In my view, it would be remarkable if it were not possible for a husband to make a bargain of that sort with his wife. He is forgoing a right to apply for a reduction in his liability, and it does not seem to me that any question of public policy enters into the matter. Surely a husband could agree with his wife, to whom he was making payments by a justices' order, that he would not apply for a reduction in the payments below the amount at which they were currently payable unless his own income sank below the sum of £x a year. It seems to me that it would be quite obvious that an agreement of that sort would not be void as contrary to public policy. If that is so, it seems to me to follow that an agreement embodying the terms of the present undertaking, which is an absolute undertaking not to apply for a reduction below the current amount except in the event of the husband being out of work and earning no money, would, so far as public policy was concerned, be unexceptionable.

I have so far referred to agreements out of court, that is to say, to agreements between husband and wife, depending merely on contract. I see no reason for holding bargains such as I have described to be void as contrary to public policy. A fortiori, it seems to me that a provision of that sort cannot be void on grounds of public policy if it is contained, not in a mere agreement between the parties, but in an undertaking given to the court itself. An undertaking given to and accepted by the court must be taken to have been approved by the court. Furthermore, any undertaking given to the court is capable of being discharged by the court whenever it appears to the court that circumstances have arisen which make that course proper in the interests of justice. It could not, therefore, be said, where an undertaking to the court is concerned, that a husband by giving the undertaking has irretrievably deprived himself of any opportunity at any time of procuring a reduction in the amount of maintenance, however widely different his circumstances may become.

The next point taken by counsel for the husband (which to some extent overlaps the first) is to the effect that this undertaking offends against the doctrine

* The figure of £5 was substituted for that of £2 by the Married Women (Maintenance) Act, 1949, s. 1 (1).

of *Hyman v. Hyman* (1) ([1929] A.C. 601). In that case the House of Lords held that a wife could not bind herself by agreement with her husband to forgo her right of applying to the court for maintenance in matrimonial proceedings between them. The principle has been shortly expressed by saying that a wife cannot contract herself out of her statutory right to maintenance. It is said that the same principle applies in a case like the present, where the wife has not bound herself by any agreement to forgo maintenance or to accept some fixed periodical sum once and for all as the maintenance payable to her. The effect of the present undertaking is not to curtail the wife's rights in the least degree. The effect of it is to assure that the husband undertakes that the wife shall receive by way of maintenance at least the sums now payable under the justices' order. It is argued by counsel for the husband that what is sauce for the goose is sauce for the gander, and that if the wife cannot bind herself once and for all to accept maintenance at a specified rate, by parity of reasoning a husband cannot validly bind himself to his wife to pay her at least a certain fixed minimum sum by way of maintenance. It is said that precisely the same considerations apply to both sides of the bargain. I cannot agree. I think the position of the husband in this matter is very different from that of the wife. It may be that in some circumstances the obligations undertaken by a husband in some form of agreement relating to maintenance in matrimonial proceedings might be so framed or attended with such consequences that it would be proper to hold them contrary to public policy. But I am by no means satisfied that, as a general proposition, the considerations applicable to a wife in this matter apply also to a husband. It is, however, unnecessary to express any concluded opinion on that point, for, however the matter may stand as regards agreements out of court, the present case is concerned, not with an agreement inter partes, but with an undertaking given to the court, and I am clearly of opinion that it is open to a husband to give an undertaking to the court such as the undertaking in the present case, and that there is no rule of public policy preventing him from doing so. The principle in *Hyman v. Hyman* (1), be it remembered, does not apply to any bargain which is brought before and approved by the court. By parity of reasoning, it seems to me that that principle is inapplicable where terms are embodied in an undertaking to the court, tendered to the court by the husband, and accepted by the court and incorporated in its order.

Counsel's third point was that the effect of what took place in the divorce proceedings was that the court arrogated to itself control over a matter of maintenance of which the justices were exclusively seised. He said that indirectly this court had usurped the jurisdiction of the justices by making it impossible for the husband to apply to them for an exercise of their discretionary jurisdiction. Again I cannot agree. The whole point of the course adopted in the present case was that the amount of maintenance payable was left to rest on the justices' order, provided that the weekly sum then payable under the order in respect of the wife was not to be reduced on the application of the husband and that the agreed increase of 10s. was obtained in the weekly sum payable in respect of the child. I wholly fail to see how any question of usurping the jurisdiction of the justices enters into that transaction at all. It seems to me that it was perfectly open to the court here, on being apprised of the fact that there was a justices' order on foot and on being apprised of the amount, to say that as there was an existing order, there was no need for the court to make any separate order of its own or, as would perhaps be strictly correct procedure, to leave it to the wife to apply to discharge the existing order and make an order of the High Court to take effect in substitution for the justices' order. It was unnecessary to complicate matters by taking that step, so long as the justices' order in respect of the wife was not reduced in amount. I see no reason why the

A court should not accept from the husband, if he was willing to give it, an undertaking that he would not apply for a reduction in the justices' order in respect of the wife unless he was out of work and not earning any money.

The case has been very well argued, and we were referred to a number of authorities. I hope I will not be thought disrespectful to the arguments of counsel if I do not go through them all. We were invited to hold that the decision in *Kilford v. Kilford* (2) ([1947] 2 All E.R. 381) and *Ross v. Ross* (3) ([1950] 1 All E.R. 654) were open to criticism in what was said about the relationship between justices' orders and orders for maintenance in the High Court. It appears to have been regarded as settled for more than thirty years (see *Bragg v. Bragg* (4), [1925] P. 20) that where a justices' order for maintenance has been made and divorce supervenes, the justices' order remains in force until it is discharged. It was held in *Kilford v. Kilford* (2), as I understand the position, that an order could not properly be made in the Divorce Court while a justices' order was still on foot, and that the proper course was to apply to discharge the justices' order before any application for maintenance in the High Court; and that view was followed in *Ross v. Ross* (3). These cases are directed merely to the proper practice to be followed and the most convenient course to be taken in cases where there are divorce proceedings after the justices have made an order for maintenance. We were referred to no statutory provision and to no authority to suggest that as a matter of law, as distinct from a matter of practice and of convenience, it would be wrong in all circumstances for the Divorce Court to entertain an application for maintenance without first requiring the discharge of a justices' order. Generally speaking, that would be by no means a convenient course, and I think that the two cases to which I have referred correctly state the course which ought to be taken in all usual circumstances; but exceptional cases may arise, and I only wish to say that, in my view, in an exceptional case there would be no objection, as a matter of law, to the court supplementing the justices' order by an order of its own.

I hope that I have sufficiently referred to the essential features in the argument presented, and I agree with counsel for the wife that, this being an undertaking given to the court and not merely an agreement inter partes, it was not necessary that there should be any consideration to make it binding. I also agree with him that it is always competent to the court to discharge an undertaking given to it, if in its discretion the court comes to the conclusion that that is the proper course in the interests of justice. As to the present case, although the principle to which I have just referred undoubtedly applies, so that the court could in a proper case discharge the undertaking given, yet in my view there is no question of the undertaking not being perfectly valid and it is plain from the evidence, that the husband has wholly failed to show any such change in circumstances as would warrant the court in discharging the undertaking. In order to obtain a discharge of the undertaking, he would have to show a real case of hardship, some essential change in his circumstances, beyond the mere fact of his remarriage and the birth of a child; for, after all, he did voluntarily give this undertaking to the court when it suited him to do so. If he could make out a sufficiently strong case, it would be open to him to apply, and it would be open to the court if satisfied with the case he made out, to discharge the undertaking. As matters stand at present, he has, in my judgment, wholly failed to make out a case. Accordingly, I think the learned commissioner arrived at a right conclusion, and I would dismiss this appeal.

BIRKETT, L.J.: I am entirely of the same opinion. I am glad that we are able to come to this conclusion, because it seems to me that, on a consideration of all the facts in the case, to decide otherwise would be to perpetuate an injustice. It is plain to me that from the beginning of the proceedings before the commissioner the question of maintenance was prominent. Indeed, it says a good deal

for counsel then appearing for the husband that he was concerned about this matter for the woman against whom he was appearing. She was without legal aid and, in accordance with the best traditions of the Bar, he was most anxious that she should not suffer. When the situation was appreciated by the commissioner, it was really at his suggestion that the discussion took place between the wife and counsel for the husband about the matter of maintenance. It was on being assured that she would not be in any worse position that the hearing took the form which it did. I share the view which JENKINS, L.J., expressed as to the unfortunate moment in the proceedings when this matter was dealt with, though I am satisfied that everybody was really determined, in the circumstances, to see that the woman who had no counsel was adequately protected; and I think that there is reasonable ground for the commissioner's saying that he saw no ground to discharge the husband's undertaking.

In view of what my Lord said about the legal matters, I can confine myself to a sentence or two. I can see no reason whatever in law or in common sense why a husband should not make an agreement with his wife to pay certain sums, and I see no reason why he should not undertake not to make any application to vary a maintenance order or reduce a sum below an agreed minimum. Secondly, I do not think that the principle of *Hyman v. Hyman* (1) ([1929] A.C. 601) has any application at all to the present case. I cited in the course of the argument the judgment of LORD ATKIN, who put the pith of the matter in the following words (*ibid.*, at p. 628):

"When the marriage is dissolved the duty to maintain arising out of the marriage tie disappears. In the absence of any statutory enactment the former wife would be left without any provision for her maintenance other than recourse to the poor law authorities. In my opinion the statutory powers of the court to which I have referred were granted partly in the public interest to provide a substitute for this husband's duty of maintenance and to prevent the wife from being thrown upon the public for support. If this be true, the powers of the court in this respect cannot be restricted by the private agreement of the parties . . . In my view no agreement between the spouses can prevent the court from considering the question whether in the circumstances of the particular case it shall think fit to order the husband to make some reasonable payment to the wife, 'having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties'. The wife's right to future maintenance is a matter of public concern, which she cannot barter away."

That is the principle of *Hyman v. Hyman* (1), but I cannot think that it has any application to the facts of the present case, where a husband has given a voluntary undertaking to the court not to make any application to reduce an agreed amount.

Finally, the argument that there was in the present case an attempt by the High Court to usurp the powers of the justices and to claim concurrent jurisdiction has no basis to it. I think that the situation which I ventured to put when the argument was being presented is right, that here, where maintenance was prominent in the minds of everybody from the start, where everybody was concerned to see that the woman without counsel suffered no injury and no wrong in the matter of maintenance, she altered her position on being assured that there was no danger of the husband attempting to reduce the maintenance, and there was, therefore, no need for the commissioner to make any order. Seeing that the question of maintenance was, in his view, satisfactory, the commissioner did nothing. It is clear that the husband had the power to give this undertaking to the court, which differentiates it from the ordinary case of an agreement. The court accepted it, made it a part of the order, and had it filed in the court. The suggestion that it is there for all time, I think, is also not well founded,

A because if there were a real change of circumstances it could be discharged. For these reasons I would dismiss this appeal. *Appeal dismissed.*

Solicitors: *Watkins, Polleyn & Ellison*, agents for *Hepherd, Winstanley & Pugh*, Southampton (for the husband); *Jaques & Co.*, agents for *John W. Richardson*, Christchurch (for the wife).

B [Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

DAVISON v. APEX SCAFFOLDS, LTD.

[COURT OF APPEAL (Singleton, Jenkins and Hodson, L.JJ.), January 19, 20, 23, 1956.]

C *Building—Building regulations—Scaffolding—Coupler of one type provided by employers—Use by employee of coupler not supplied by employers—Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145), reg. 4, reg. 7, reg. 12.*

D The deceased was a chargehand scaffolder employed by the defendants who were engaged in setting up suspended scaffolding for the purpose of cleaning the roof of a railway station. The work had begun at the end of 1951. The defendants were not the only contractors at work on the station. All equipment for the defendants' employees to use for the scaffolding was sent from the defendants' depot, having previously been inspected by N., who was in charge of the defendants' work, and by the deceased; the equipment was listed and was sent to the station where it was kept in a storage place at the end of a platform and was near a storage place used by other contractors. From the time when the equipment arrived at the station the chargehand was responsible for it. Among the equipment were couplers known as "Little Giants" and none but this type of coupler was supplied by the defendants for use by their employees. The scaffolding was suspended from the roof of the station some thirty feet above ground level, and the system was that as one section or bay of the scaffolding was dismantled, the equipment and materials used in that bay were collected and used to erect another. There had been other chargehands at various times and the deceased last became the chargehand shortly before Christmas, 1952. On Feb. 4, 1953, he was engaged in erecting in a new bay the materials that had been used in a bay which previously had been dismantled. He fastened a vertical standard to a transom with a double coupler which was obviously not of the type used by the defendants and which was defective in that one bolt was 5/16ths of an inch too long. The coupler slipped and the deceased fell to the ground and was killed. The coupler was not part of the equipment supplied by the defendants but had come into the deceased's hands as a piece of equipment which had been used already on the job in his absence. After the accident a check showed that there were several such couplers (the property of other contractors) among the equipment in the bay where the defendants' equipment was kept. In an action by the deceased's widow for damages under the Fatal Accidents Acts, 1846 to 1908, the defendants admitted at the trial that they were in breach of the Building (Safety, Health and Welfare) Regulations, 1948,* reg. 7 and reg. 12, and contended, among other defences, that the defendants' duties under these regulations were delegated to the deceased as chargehand at the job. Damages were awarded to the plaintiff, no share of responsibility for the accident being attributed under the Law Reform (Contributory Negligence) Act, 1945,† s. 1, to the deceased. On appeal by the defendants,

* The relevant provisions of reg. 4 are printed at p. 477, letter E, post, and the material words of reg. 7 (1) and reg. 12 (1) are printed at p. 477, letter H, to p. 478, letter A, post.

† The relevant terms of this section are printed at p. 482, letter G, post.

Held (HODSON, L.J., dissenting from (ii), (iii) and (iv)): (i) no delegation of statutory duties to the deceased was established on the facts (see p. 478, letter H; p. 482, letter I, and p. 487, letter A, post), and

(ii) in setting up the suspended scaffolding the deceased was performing an act within the meaning of reg. 4 of the Building (Safety, Health and Welfare) Regulations, 1948, and by incorporating the defective coupler in the scaffolding he was contravening reg. 7 and reg. 12 and thus was in breach of the duty imposed on him by reg. 4 to comply with the requirements of reg. 7 and reg. 12 (see p. 481, letter H, p. 483, letters G to I, post), and

(iii) in using the defective coupler the deceased was (per JENKINS, L.J.; see p. 486, letter H, post), negligent, or (per SINGLETON, L.J.; see p. 481, letter I, post) in breach of reg. 4 by failing to co-operate in carrying out reg. 7 and reg. 12, since the deceased should have recognised the defective coupler as not being of the type supplied by the defendants and knew that selected equipment was supplied by them which alone was to be used for the job, and

(iv) in the circumstances the deceased's share of responsibility for the accident would be assessed as one-fifth and the damages awarded to the plaintiff would be reduced accordingly.

Appeal allowed to the extent stated above.

[For the Building (Safety, Health and Welfare) Regulations, 1948, regs. 4, 7 and 12, see 8 HALSBURY'S STATUTORY INSTRUMENTS 212, 213, 215.

For the Law Reform (Contributory Negligence) Act, 1945, s. 1, see 17 HALSBURY'S STATUTES (2nd Edn.) 12.]

Cases referred to:

(1) *Manuvaring v. Billington*, [1952] 2 All E.R. 747; 3rd Digest Supp.

(2) *Hutchinson v. London & North Eastern Ry. Co.*, [1942] 1 All E.R. 330; [1942] 1 K.B. 481; 111 L.J.K.B. 369; 166 L.T. 228; 2nd Digest Supp.

Appeal.

The defendants appealed from an order of ASHWORTH, J., at Manchester Assizes, dated Oct. 20, 1955, whereby he held that the defendants were in breach of their statutory duty under the Building (Safety, Health and Welfare) Regulations, 1948, reg. 4, reg. 7 and reg. 12, and awarded the plaintiff damages under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934.

The facts are stated in the judgment of SINGLETON, L.J., and are summarised in the headnote.

D. J. Brabin, Q.C., and *A. M. Maguire* for the defendants.

F. Atkinson, Q.C., and *J. L. Addleshaw* for the plaintiff.

SINGLETON, L.J.: Leslie Davison was a chargehand scaffolder employed by the defendants, Apex Scaffolds, Ltd. He was killed on Feb. 4, 1953, when scaffolding on which he was working collapsed, and he fell some thirty feet to the ground. He was twenty-seven years of age and he left a widow and three young children. His widow brought this action against the defendants, alleging that his death was caused through their negligence or breach of statutory duty. The action was heard by ASHWORTH, J., at Manchester Assizes in October, 1955. He gave judgment for the plaintiff for £6,298 10s. damages, the damages being apportioned between the widow and the children. The defendants appeal against that judgment. It is submitted on their behalf, first, that they were entitled to succeed in the action and that judgment ought to have been entered for them and, secondly, that in any event the deceased man was responsible to some extent for the collapse of the scaffold and for his death, and that the damages ought to be apportioned accordingly.

The defendants, who carry out scaffolding work, have their headquarters at Manchester. The work, which commenced about the end of December, 1951,

A was being done to the roof of Exchange Station, Liverpool. There were two other companies besides the defendants engaged on the work. That which the defendants had to do was to erect scaffolding up to the roof, so that the roof itself could be cleaned. One of the other companies engaged had to put up scaffolding at a lower level to protect various things on the station premises. The system which was adopted by the defendants, who were erecting scaffolding on which workmen of other companies would have to work, was that the material required was sent from Manchester to Liverpool. In the first place, an inspection to see what material would be required was made, a list was prepared and material was then selected by Mr. Naylor, an experienced man in charge of the defendants' work who was accompanied by the deceased, and, when the material had been selected and examined, it was sent to Liverpool. From that time onwards a chargehand was responsible for the material and for the erection of the scaffolding at Exchange Station. The scaffolding which was erected by the defendants was not built up from the ground, but was suspended from the main rafters or roof of the station. There is a sketch which was used at the trial, and it is useful to refer to it. ASHWORTH, J., referring to the sketch, described the work in this way:

D "The scaffold was constructed in bays each eleven feet in length but varying slightly in width. As the work on the roof proceeded it became necessary to provide additional bays and it was the defendants' practice, as the need arose, to dismantle a bay or bays at the end of the scaffold at which the roof work had been completed and use the equipment constituting that bay or bays for the purpose of forming an additional bay or bays. It was while one such additional bay was being formed that the deceased met his death . . . The three standards C1, L1 and D1 and the lower transom E1 (all coloured blue) represent one end of the existing scaffold, and on the sketch one must imagine that to the right of these three standards there is in existence an area on which men can stand and work in safety. This area is about thirty feet above ground level. In this area, on what is described as a mat, there is collected the equipment previously used to form the bay at the other end of the scaffold, which has been dismantled. At the material time the deceased started the operation from this area, while his two assistants Davis and one Lawrence were about twelve feet above him on the platforms marked M and N on the left-hand side of P.1. The deceased pushed up to these two men the two standards coloured yellow on P.1 and marked C2 and D2 which were then loosely coupled to upper ledgers A and B respectively. At that moment these two standards would be hanging outside the blue standards C1 and D1 (i.e., to the left of them on the sketch). The deceased then had to fasten the two yellow standards C2 and D2 to the lower transom E2, also coloured yellow on the sketch, and for this purpose he required for each end of E2 a coupler in the form of a double clip designed to fasten both the standard and the transom. When these couplers had been fixed, there would then exist what were described as inverted goal posts and it was the task of Davis and Lawrence to shift them along the upper ledgers A and B until they were a distance of eleven feet from the existing scaffold. The deceased then had to lay in position the ledgers marked F, G, H, I and J and roll into position intermediate transoms on which planks could be rested."

In that way another bay was formed, so that the work could be extended to another part of the roof. The learned judge added:

"I am satisfied that in substance the deceased and his two assistants carried out the procedure thus described. The accident happened because the coupler at the junction between standard D2 and lower transom E2 failed to hold the standard D2, and as a result this portion of the new bay collapsed, precipitating the deceased to his death. I am further satisfied

that the reason why the coupler failed was the presence in the coupler of an over-long bolt. The length of this bolt caused it to foul the lower transom E2 before it had fully tightened the clip around the vertical standard D2. No doubt the deceased tightened this bolt as far as in the circumstances he could, but such tightening was not enough to grip the standard D2 securely." A

ASHWORTH, J., used the words "to foul the lower transom E2 before it had fully tightened the clip around the vertical standard". I am not sure that the word "foul" is wholly accurate, although I think it is clear what the judge meant. As the bolt was too long, the far end of the bolt came into contact with the tubular part before the nut on the top of the bolt had completely or properly gripped the clip of the coupler. Thus the clip was not tightly held, and in the result the coupler slipped down the upright standard, and brought about this accident. ASHWORTH, J., went on: B

"I have no hesitation in reaching the conclusion that the coupler used by the deceased—hereinafter referred to as coupler P.3—was defective and unsuitable, in that one of its two bolts was over-long. The excess in length was 5/16ths of an inch." C

As I have said, the work at Exchange Station, Liverpool, had been in progress for more than a year. It is common ground that when the material was chosen by Mr. Naylor, with the deceased, the material selected was suitable in every respect. No question has been raised as to that. The defendants took care in the selection of their material. They sent all that was necessary, and thereafter for a period the work of erecting the scaffolding and the material were in the hands of the deceased who was the chargehand. There were changes in chargehands. Apart from the deceased, there were two others, each of whom from time to time was or at some time had been in charge of the work and the material. I am not sure how long the deceased was chargehand during the thirteen months or so before the accident. He commenced as chargehand when the work began, and he was chargehand at the time that he met with his death. D

He had, however, been working elsewhere, and he returned to this duty about a week or two before Christmas, 1952. He had been chargehand for five or six weeks before he was killed. It was usual for the chargehand and the two men who were with him to use material from a part of the scaffolding which had been taken down in order to erect a new part, and that was what they were doing when the accident happened. A place was provided at the far end of a platform on which the defendants' material could be stored. It so happened that fairly near that place was another place assigned to other scaffolding contractors, the demolition company, and it may well be that material of one company became mixed with the material of another company. E

The double coupler P.3 which had the bolt which was too long did not belong to the defendants. It belonged to the demolition company. It was of different make from the couplers used by the defendants and the difference was easily seen. It was heavier and there was a difference in the bolt. The couplers which were normally used by the defendants, called "Little Giants", had a fixed bolt and the clip was tightened by turning the nut at the top of the bolt. F

When that was done completely and properly, the clip was firmly held. The coupler P.3 which was defective was of a kind in which the whole of the bolt is moved when the top is turned, and when the bottom end of it reaches the tubular rod, the nut ought to be tight up against the clip, if the bolt is of the proper size. If a workman is screwing it up in a difficult position it is not as easy for him to tell that the nut is up against the clip as it would be in the case of the "Little Giant" in using which he would have turned the nut alone. G

After this accident, a check was made and it was found that there were about twenty of these "foreign" clips of the same type as P.3 among the defendants' material, and there were about nine in one bay. There ought to have been H I

- A none, and the defendants' workmen ought to have kept to the defendants' material. It is not easy to say who was responsible for the change. There were three different chargehands during the thirteen months or so that the work had been in progress. There is nothing to show when the material became mixed. There is no doubt that the defendants had supplied proper material; and a list of the material which was taken was produced. It was the duty
- B of the chargehand, who during the last period was the deceased, to return to the defendants any material or stores which became defective, and they would be replaced. The list shows the changes which took place from time to time; for example there was an issue of 904 double couplers, and before February, 1953, there had been over one hundred more issued. It appears to me from what I have heard and from the list which was produced that the
- C defendants took care over the supply of material. It was agreed that when he was working on that job the deceased, the chargehand, was responsible for the erection of the scaffolding and for the material. If any material was found to be wrong, it was his duty to take it out and return it to his employers if the fault was something which could not be repaired on the site. ASHWORTH, J., was satisfied that the only couplers included in the equipment taken over to
- D Liverpool by the defendants in January, 1952, were of the type known as the "Little Giant", and he was satisfied that the "Little Giant" differed materially in weight and in form from the coupler P.3, which was the defective coupler.

The claim of the plaintiff was considered chiefly on the allegation that there was a breach (or breaches) of the Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145). Regulation 4, which lays down the obligations

E under the regulations, reads:

"It shall be the duty of every contractor and employer of workmen who is undertaking any of the operations to which these regulations apply [it is agreed that the regulations apply to this work of scaffolding] (i) to comply with such of the requirements of regs. 5-30 . . . (ii) to comply with such

F of the requirements of regs. 31-33 . . . and it shall be the duty of every contractor and employer of workmen who erects or alters any scaffold to comply with such of the requirements of regs. 5-30 as relate to the erection or alteration of scaffolds having regard to the purpose or purposes for which the scaffold is designed at the time of erection or alteration . . .

"It shall be the duty of every person employed to comply with the

G requirements of such regulations as relate to the performance of an act by him and to co-operate in carrying out Parts 2 and 7 of these regulations and if he discovers any defect in the scaffolding, plant or appliances to report such defect without unreasonable delay to his employer or foreman, or to a person appointed by the employer under reg. 98."

A number of breaches were alleged on behalf of the plaintiff in the action. The

H defendants admitted that they were in breach of regs. 7 and 12. The learned judge did not think it necessary for him to consider other regulations. Regulation 7 (1) reads:

"Every scaffold and every part thereof shall be of good construction, of suitable and sound material and of adequate strength for the purpose

I for which it is used."

That is the only part of the regulation to which I need refer, for it is that part which the defendants admit that they broke. The scaffold was not of good construction, of suitable and sound material. The coupler which was used was defective by reason of the fact that the bolt was 5/16ths of an inch too long. Regulation 12 (1) reads:

"Every scaffold shall be securely supported or suspended and shall where necessary be sufficiently and properly strutted or braced to ensure stability

and, unless it is properly designed and constructed as an independent scaffold, shall be rigidly connected with the building." A

The scaffold was not securely suspended and was not rigidly connected with the building. The defendants admit that they were in breach of both those regulations, and it is claimed on their behalf that the same applies to the deceased, for the whole of the work was entrusted to him when he was chargehand and he was under the duty laid down at the end of reg. 4. He was a person employed and it was his duty to comply with the requirements of such regulations as relate to the performance of an act by him and to co-operate in carrying out Part 2 of the regulations, in which both regs. 7 and 12 appear. Counsel for the defendants submitted that when the deceased was erecting the new bay, he was performing an act within the words at the end of reg. 4. It was his duty to comply with the regulations; it was his duty, in other words, to see that that which he was erecting was in accordance with the requirements of regs. 7 and 12. Furthermore, counsel submitted that there was a duty on the deceased to co-operate in carrying out those regulations. He added that the defendants had performed their duty in selecting suitable material and in sending suitable material to Liverpool, in putting an experienced chargehand, as the deceased was, in charge of the work, and in instructing him to return any material which became unfit for use. The duty to co-operate involves helping in carrying out the regulations; and if a chargehand, in erecting scaffolding, used something which did not belong to the defendants and which had not been supplied by them, he was not co-operating in helping them to perform their statutory duty, but was in fact making it impossible for them to do so. It is said on behalf of the defendants that it was the duty of the chargehand, whoever he was, to use the defendants' material and stores, and theirs only, and that that is one object of the provision that the person employed must co-operate in carrying out the parts of the regulations to which the latter part of reg. 4 applies. B C D E

The plaintiff's claim was also based on negligence, and there was an answer made on behalf of the defendants that the deceased himself was guilty of contributory negligence. There is one further plea in the defence to which I should refer. In para. 4 of the defence it is alleged: F

"The defendants had delegated to the deceased the duty of selecting safe and suitable materials for the construction of scaffolding from the gear issued to him by the defendants and in his control. Wherefore if there was any breach of statutory duty such was the breach of statutory duty of the deceased and not of the defendants." G

I do not understand that plea on the facts of this case. The deceased was a chargehand, one who was in charge of the work in its early stages and again for some five or six weeks before he was killed. There was no delegation of duties under the statute by the defendants to him. He was the man in charge of the work; he had been supplied with materials, and there cannot often be delegation of duties such as these. In any event, I am satisfied on the evidence that there was no delegation in fact or in law. That does not mean that there is nothing in para. 4 of the defence, for it may be that if both the defendants and the deceased were charged with duties under the regulations and if both were at fault, the defendants may still succeed to some extent on their claim that the damages should be apportioned or decreased according to the measure of the deceased's responsibility. H I

It is necessary that I should say a little more about the facts. It is clear that the materials, including the defective coupler, had been used on a bay which was dismantled. The materials from that bay were taken for use in the construction of the bay on which the deceased was engaged at the time of his death. It may be said that it would be natural for him to use a coupler which did not belong to his employers if it was taken from another bay. It ought not

- A to be so, however, for a chargehand knows of the Building Regulations. He knows that he may put some liability, civil or criminal, on his employers if he uses material which they have not had an opportunity of inspecting; and he must know that if he did that, he might involve himself in some criminal responsibility, some offence against the regulations. Over and above that, however, he is engaged on work of a dangerous character; he is working at a considerable
- B height above ground; his own life is at risk, and so are the lives of other people who are on the ground below. If a chargehand knows that his employers have taken care to select material for him, and if he knows that they have an arrangement by which he must send back any material which becomes defective, he ought at least to keep to the use of their material and not use someone else's material. When he is up on a mat or on planks some height above ground, he
- C has not full opportunity of examining everything which he uses, he is at a disadvantage, and it may not be very easy to see; when he is screwing up the bolt or nut, he often has some portion of the erection in between him and it. The workman, be he chargehand or an ordinary scaffolder, ought not lightly to be found guilty of negligence in failing to find some defect such as the defect in this case. On the other hand, if he thinks it right to use something not provided
- D by his employers, surely he ought to take the greater care to examine it before using it. Herein lies the importance of keeping stores of different contractors separate and apart. That, I believe, was the duty of the chargehand. There had been two other chargehands; the couplers had become mixed, and the deceased, finding that this coupler had been used on one bay, used it on this bay, with a result fatal to himself. I do not think he ought to have done so.
- E Having said that, I would add that I do not think he can be blamed for not seeing the defect. One further fact about the double coupler is that it might have been put in one of four different positions. Had it been in any position, other than the one in which it was placed, the fact that the bolt was too long would not, or might not, have led to an accident.

- F In the course of the evidence before ASHWORTH, J., the defendants, in support of their plea of contributory negligence on the part of the deceased, relied on two matters. First, they said that when this kind of coupling is being done, the upright ought to be secured first, and that that was the "drill". One witness was not sure that it applied to this class of work; it was said that it was the rule in the erection of a scaffold from the ground, because a man who was erecting it would have to go up on to that which was erected and, if the upright
- G was secured first, there could be no fall such as in this case. If the upright had been secured first in this case, the accident would not have happened. For some reason I do not wholly understand, it is said that that is not of the same importance in the erection of a scaffold which is suspended from the roof. I do not know why it should not be of the same importance. The drill is for safety reasons and, although I recognise that it is not a matter on which one
- H can express any firm opinion, I would say on the evidence that the same drill ought to be applied whenever one is erecting a scaffolding. It would have prevented this accident. The next point the defendants raised is that, whenever a coupler of this kind is put on, there ought to be another coupler—a single coupler, I suppose—put just below it as a safety measure to prevent the double coupler from slipping. If that had been done, there would have been no accident.

- I Those two allegations of contributory negligence were made by the defendants on the trial, although they had not pleaded either. The judge thought that perhaps one might be covered by the pleading. I doubt whether it was. However, in the plaintiff's statement of claim, under particulars of negligence, it is said that the defendants were negligent in that they failed to provide a second coupler for use at the top and bottom of each standard. The experienced pleader would not have put that in without a report from an expert; and it is right to say that, when the plaintiff's expert was called, he was clear that there

ought to be a second coupler used, and used before the inverted goal posts are pushed outwards. When the defendants' Mr. Naylor was called he was asked whether in fact, on this job it was not the practice to use safety couplings. "On this job" clearly means "on this kind of job". He answered:

"Yes, in places it was. Q.—In certain places? A.—Yes. Q.—What, at the discretion of the man concerned? A.—Yes."

It is a little difficult to say what he means. At another point he said it was usual to do it after the inverted goal posts had been pushed out the eleven feet. If that is right, it would not have avoided this accident. The position appears to be this, that each side in turn suffered from its own expert witness. It was not the fault of counsel in any sense. There are those two allegations of negligence, for both of which I should think there is considerable foundation, but they are not pleaded. ASHWORTH, J., who was satisfied that there were breaches of statutory duty, said:

"In my judgment, therefore, the claim based upon a breach of statutory duty succeeds and in so far as the claim at common law in substance covers the same ground, it succeeds, too."

He did not find any other negligence, apart from that which is embraced in the breach of reg. 7 and reg. 12. That is why I have thought it right to deal with this case on the claim for damages for breach of statutory duty. The learned judge proceeded to deal with points raised by the defendants:

"(a) that the deceased should have recognised the coupler P.3 as a 'stranger' not supplied by the defendants and should not have used it at all; (b) that the deceased by careful inspection should have discovered that one bolt was too long; (c) that the deceased should have first tightened the clip attached to the vertical standard D2, in which case the excessive length of the bolt would have been no detriment; (d) that the deceased after fixing the coupler P.3 should have attached an additional coupler below P.3 as a safety precaution."

The judge said:

"I have no doubt that the difference between the couplers was easily recognisable. The deceased must have been aware that the coupler P.3 was not a 'Little Giant' when he picked it up. Counsel for the defendants contended that this knowledge was of itself sufficient to compel a man in the position of the deceased to reject the coupler and send for a 'Little Giant'. While it may be true to say that the deceased had no right or title to use the coupler P.3, I do not take the view that he was for that reason negligent in using it. To the deceased's knowledge this coupler had come from the dismantled bay where it had been used in safety and while its 'foreign' character may reasonably be said to have called for a closer scrutiny by the deceased than would be required in the case of a 'Little Giant', I do not think that such character would compel a reasonably careful employee to reject the coupler. Indeed, Mr. Naylor did not say that he would automatically have rejected a foreign coupler but that he would have given it a closer examination than he would give to one of the defendants' couplers. Further, the coupler P.3 was of a type against which no criticism could be levelled, and it would have been perfectly safe but for the over-long bolt. Nor do I think that the excessive length of the bolt was something which a reasonably careful scrutiny would disclose. This particular defect was not to be expected and is in no sense to be compared with more familiar defects such as a twisted bolt or a stripped thread. I therefore hold that the criticisms contained in points (a) and (b) are not made out."

A I am not sure that the learned judge appreciated the difference between the two bolts, one with the nut fixed to the bolt and the other, the "Little Giant", in which the nut only is moved. There is some difference there which is worthy of note. There is this further point to which I ought to draw attention: It appears to me that if a chargehand uses material other than his employers' material when he knows that his employers have taken great care to pick out
B certain material for him and to keep a list of it, he is depriving them of their chance perhaps to avoid a breach of the regulations. He is using something which they have not inspected. He cannot inspect it to the same degree if he is up the scaffold. I do not think he ought to use it. If he does, he is failing to co-operate in performance of the Building (Safety, Health and Welfare) Regulations, 1948, contrary to reg. 4. On point (c) the learned judge said:

C "In my view the evidence established that if the clip attached to the standard D2 had been tightened first (albeit with the over-long bolt), the fastening would have been secure. It is true that in a somewhat vivid demonstration the witness Davis succeeded in showing how even in such circumstances the clip would not have held, but I do not regard that evidence as convincing . . . The evidence further showed that as a matter of routine
D it is safer in the case of a double coupler to tighten the clip on the vertical first. If the coupler is free from defect, there is no special advantage, from the point of view of safety, in following this routine, but it is desirable to have a routine. In the present instance the deceased did not follow the routine, but I am not prepared to hold that this departure from routine constituted negligence on his part. It may be noted that the particulars
E of contributory negligence contained in the defence do not include any specific reference to this point although their wording is probably wide enough to justify the defendants' reliance upon it."

There is much to be said for the view that one must not lightly blame a workman who is employed on difficult and dangerous tasks, as this man was. On
F the other hand, a man who has been brought up to a regular routine for safety reasons ought to follow it. Against that, as HODSON, L.J., pointed out during the argument, the man is dead. You cannot have his explanation. If I could think of any explanation, I would gladly adopt that line, but I cannot. On point (d), the additional coupler—the learned judge pointed out that that would have meant safety. He referred to Mr. Naylor's evidence, which I have
G mentioned, and said, bearing in mind that Mr. Naylor had said the question of an additional coupler ought to be left or could be left to the discretion of the man on the site, he would not find negligence on that.

It appears to me that one must look at the whole of the picture. Either of two courses adopted would have prevented this accident. One is the drill or routine; the upright first. The second is an additional coupler. The
H deceased was using something which he ought not to have used. I have formed the opinion that in so doing he was himself in breach of reg. 4 of the Building (Safety, Health and Welfare) Regulations, 1948. He was not complying with regs. 7 and 12, in that at the time he was performing an act of setting up a scaffold and he used something which meant that there was an offence against each of those regulations. Over and above that, I would say that if a charge-
I hand knowingly uses someone else's material when his employers have provided him with all the material, so as to put themselves within the regulations, he, in using material which turns out not to be suitable, is failing to co-operate in carrying out the regulations. Thus it appears to me that he was in breach of reg. 4. I have tried to look at his position as broadly and as fairly as I can. No one would lightly find a man who is dead guilty of breach of regulations or guilty of negligence. The defendants had done their part, they recognised him as an experienced chargehand and they gave him charge of the work and of the material and stores. He at least (and it may be other chargehands and

well) was content to use someone else's material. That probably arose through the material becoming mixed with other people's stores, and it ought to be part of the chargehand's duty to avoid that. He ought not to use someone else's material if it can be avoided, and it could have been. The other chargehands, or one of them, may have been equally to blame, or even more so, in using this coupler or other couplers belonging to other contractors at an earlier stage. When that began, I do not know, but on Mr. Naylor's evidence there were nine "foreign" couplers found in one bay and twenty altogether. If that is allowed, mistakes may happen. The employers have no knowledge of what is happening from day to day. If the deceased thought it right to use someone else's coupler, he ought to have been very careful about it. I dare say a hand on the clip after he had thought he had screwed it up would have shown that all was not well. I would not expect him to see, when he was up on the stage, that the bolt was too long; but, if he was using someone else's coupler, was there not all the more need to adopt the ordinary safety drill of an additional coupler? I am not thinking so much of contributory negligence as of the duty under the regulations. The employers also might have taken other steps. If they knew there were other contractors working on that site, others who were engaged on a somewhat similar type of work, they ought to have given instructions to their employees to keep the materials separate and to use only theirs, although I think under the regulations it was a matter which a chargehand ought to have known himself.

On the whole of the facts of this case, and giving full consideration to the arguments on both sides, I find it impossible to say that there was not some responsibility on the deceased in respect of the accident which most unfortunately befell him. Thus it becomes necessary to consider the terms of s. 1 and s. 4 of the Law Reform (Contributory Negligence) Act, 1945. Under s. 4 the word "fault" in the Act means

"negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence."

The material part of s. 1 (1) is:

"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

It would be right in this case to hold that the share of responsibility of the deceased for this accident was one-fifth, or twenty per cent., of the total. I recognise that in so saying I am differing to some extent from ASHWORTH, J., who gave this case most careful consideration. I would allow the appeal to the extent of reducing the damages by twenty per cent.

JENKINS, L.J.: I agree. The plaintiff's case was based primarily on breach of the statutory duty imposed by the Building (Safety, Health and Welfare) Regulations, 1948. In the course of the hearing before ASHWORTH, J., the defendants admitted that regs. 7 and 12 had not been complied with. Amongst other defences, they raised the allegation that the defendants' statutory duty in this matter had been delegated to the deceased and accordingly that the plaintiff could not maintain a claim against the defendants for breach of the duty so delegated. I entirely agree with my Lord that, whatever the precise extent of the doctrine of delegation in this connection may be, no case of delegation is here made out on the facts. So far, then, the matter stands thus: The defendants admitted that they had not complied with regs. 7 and 12, and the statutory duty to comply with the regulations is an absolute duty. It

A follows that, apart from the effect of the latter part of reg. 4, the plaintiff would be entitled to succeed irrespective of any negligence on the part of the defendants, subject, of course, to such reduction, if any, in the damages recoverable as it might be proper to make on account of any contributory negligence on the part of the deceased. The latter part of reg. 4 provides as follows:

B "It shall be the duty of every person employed to comply with the requirements of such regulations as relate to the performance of an act by him and to co-operate in carrying out Parts 2 and 7 of these regulations and if he discovers any defect in the scaffolding, plant or appliances to report such defect without unreasonable delay to his employer or foreman, or to a person appointed by the employer under reg. 98."

C Regulations 7 and 12, non-compliance with which was admitted by the defendants, both occur in Part 2 of the regulations. It should be noted that the passage from reg. 4 which I have just read had no exact counterpart in the Building Regulations, 1926 to 1931, which were replaced by the Building (Safety, Health and Welfare) Regulations, 1948. The corresponding provisions of the earlier regulations contained references to co-operation, but no provision comparable to the provision in reg. 4 that every person employed is

"to comply with the requirements of such regulations as relate to the performance of an act by him . . ."

Those words are new and they substantially increase the ambit of this part of reg. 4 as compared with earlier provisions concerning the duty of employees.

E Counsel for the plaintiff invited us to hold that the words

"to comply with the requirements of such regulations as relate to the performance of an act by him "

should be construed as limited to the provisions in the regulations under which particular employees are required to do particular acts, and he instanced reg. 34 (1) (c). That regulation relates to lifting appliances, and para. (1) provides:

F "Every lifting appliance and every part thereof . . . shall . . . (c) as far as the construction permits be inspected at least once in every week by the driver, if competent for the purpose, or other competent person ";

and, said counsel, reg. 4 is in this respect satisfied by provisions of that sort. I see no reason for placing that limited construction on the wide terms of this provision of reg. 4.

G In my judgment, the deceased was performing an act within the meaning of this provision when he proceeded to erect the particular piece of scaffolding out of which this claim has arisen and incorporated therein the defective coupler, P.3. In my view, he was then performing an act and regs. 7 and 12 related to the performance of that act by him. Regulation 7 (1) provides:

H "Every scaffold and every part thereof shall be of good construction, of suitable and sound material and of adequate strength for the purpose for which it is used."

In my view, in relation to any person employed who is erecting a scaffolding, reg. 7 (1) must, within the meaning of reg. 4, relate to the performance of an

I act by him, namely, the erection of a scaffolding. Similarly with reg. 12 (1):

"Every scaffold shall be securely supported or suspended and shall where necessary be sufficiently and properly strutted . . ."

It follows that the deceased was, in my opinion, in breach of the concluding provision of reg. 4, in that he failed to comply with the requirements of regs. 7 and 12. So far one has reached this position as regards statutory duty: The deceased and the defendants are both in breach of their statutory duty under the regulations, and the defendants' breach was brought about by the deceased's breach;

that is to say, the deceased, by his own act of incorporating the faulty coupler into the scaffolding, at once committed a breach of his own statutory duty and put the defendants in breach of theirs. In these circumstances, I cannot for my part see how the plaintiff can succeed merely on proof of the defendants' breach of statutory duty. She cannot, in my view, be heard to say: "I claim damages because my husband was killed through his own breach of statutory duty, and I claim those damages on the ground that his breach of statutory duty automatically brought about a breach of statutory duty by the defendants". I cannot think that that would be a right conclusion. In my view, it must be necessary for the plaintiff, in order to succeed, to go on and prove that the breach of statutory duty—that is to say, in substance, the incorporation of P.3 in the scaffolding—was in some degree due to the defendants' negligence over and above their statutory responsibility for a mere innocent breach of the regulations. The inquiry on which one must embark thus does not greatly differ from the inquiry necessary in a case where the issue is one of negligence or no negligence at common law.

This, very briefly, is the history of this matter. The deceased was assigned to this work early in 1952; then he was away for a time and later he returned. There is no doubt on the evidence that in the first instance the defendants, in accordance with their usual practice, took the necessary gear for the scaffolding to be erected at the Exchange Station from their store in Manchester, and it was all gear which had been properly examined and put into thoroughly good order. It is clear, however, that, by the time the deceased returned, a number of P.3 couplers, which were not a kind of coupler used by the defendants and none of which was, as the learned judge found, provided by the defendants for use on this job, had become mixed with the defendants' gear. Moreover, as the learned judge found, some of these couplers, including the defective one which caused the accident, had actually been incorporated in the scaffolding. The learned judge concluded on the evidence that the part of the scaffolding from which the defective coupler P.3 was taken had been erected before the deceased returned to this job. Counsel for the defendants criticised the evidence about that; but I think the learned judge was warranted in arriving at that conclusion by the evidence of Mr. Davis (one of the deceased's two workmates on the job and working under him), who said that at the time of the accident the scaffolding could have been up two or three months and that of Mr. Naylor who gave a similar answer. Mr. Davis was asked whether the whole lot—that is to say, the scaffolding gear—was kept on a "mat". He answered "Everything was erected when I arrived on the job", which I take to mean that all the parts which had been taken down to the station for the job were already erected, that is to say, they had all been built into the system of scaffolding, when Mr. Davis arrived, as he did before the deceased's return to this job. The day before the accident, the deceased and the two men Mr. Davis and Mr. Lawrence working with or under him, set about dismantling a bay of this scaffolding to erect it further along the station. What they did was to take down the scaffolding that was no longer required where it was, pass it along at the height of about thirty feet from the ground, put it on a "mat" or platform at that level, and use it straightaway for erecting, in the manner which my Lord has described, the further bay of scaffolding at the point where it was next required. So P.3 came to the hands of the deceased as a piece of scaffolding which had, during his absence from the job, been taken into use by the defendants and actually incorporated in the defendants' own scaffolding. The deceased took this P.3 coupler and he incorporated it in the new scaffolding, with the tragic consequence that he fell to his death.

Who was to blame for the use of the P.3 coupler? It was put into place on the scaffolding, and as the deceased no doubt thought properly secured, by the deceased's own hands. So, in that sense, he was the author of his own mis-

- A fortune.. The matter does not rest there, however. If the deceased at all material times had himself been in charge of these operations, if he had been responsible for picking up and taking into the defendants' stock or gear the P.3 coupler, it seems to me that it would be difficult to arrive at any other conclusion than that the deceased was wholly to blame for the breach of statutory duty and for the accident which ensued; but that is not what happened. At the time the
- B deceased returned, according to the learned judge's finding, which I accept, P.3 was already in use by the defendants. It seems to me that that makes a very material difference. The deceased might well assume that if it had been used before, it could be used again and that there was no reason to suppose that its condition had deteriorated from the time it was put up; so that he was to that extent warranted in using P.3. It was not a stray piece picked up off the
- C platform. It was a piece which came out of the defendants' own scaffolding; and it appears clear that the usual practice, when moving the scaffolding, was to take a bay down where it was no longer wanted and use the same pieces to re-erect in another place. Someone else was responsible for the presence of P.3 amongst the defendants' gear, and in particular amongst the defendants' gear actually in use in their scaffolding. It seems to me that its introduction
- D in the first instance was really the main cause of this accident. On the facts as found by the learned judge, the conclusion seems to me to be irresistible that before the deceased's return to the job, while other chargehands were supervising operations, P.3 was picked up by somebody and taken into the defendants' stock, and it seems to me that P.3 must have been incorporated in the defendants' scaffolding under the supervision of the chargehands then
- E supervising operations. It would have been possible that P.3 should have become mixed with the defendants' other gear through the officious or mischievous act of some third party, but it seems to me that the chargehands then supervising operations must have known (or, if they did not know, they ought to have known) of the presence of this alien piece, for it could not have been built into the scaffolding without their knowledge if they had been supervising
- F operations properly.

- Accordingly, there was, it seems to me, negligence on the part of the deceased's immediate predecessors in charge of this operation and this was the main cause of the accident. On the other hand, the deceased himself was a charge-hand and he had in fact been in charge of the defendants' operations at this station from Christmas, 1952. I think he and every other chargehand at any
- G time concerned in this matter must have known that the defendants' system on which they relied for the purpose of ensuring that their gear was safe and sufficient gear was that their own gear provided out of their own store in Manchester and none other should be used. The deceased was thus, as I think, to some degree at fault in making any use at all of P.3. On the other hand, I think his fault is to a great extent mitigated by the circumstance that he did
- H not himself pick up P.3 and mix it with the defendants' gear; it came to him as apparently part of the defendants' gear and being used as such. Thus, although it is clear that he would appreciate that this was a very different type of coupler from the "Little Giant", he may have thought: "There cannot be anything wrong with it. It must be all right. Otherwise, it would not have been used in the old scaffolding". It is said that the deceased ought
- I to have observed the defect in P.3; but I cannot agree that he can be fairly charged with any appreciable degree of negligence for failing to detect that fault. P.3 was a perfectly good coupler in every respect, so far as its design and apparent condition were concerned: the threads were on the screws, the screws were revolving freely in their sockets; the bolts were not bent. There seemed to be nothing wrong with it, and in fact it was agreed on all hands that there was nothing wrong with it except that one of the bolts was too long. It was 5/16ths of an inch longer than the other and in fact too long to fit this appliance

properly, so that, in the circumstances which my Lord has explained, it would or might fail to give a tight joint when, to all appearance, the bolt had been screwed right home. Thus I cannot regard the deceased as to any serious extent to blame merely because he failed to observe that difference. It seems to me his fault is the more general one, that if he had pursued a counsel of perfection he ought not to have used P.3, which he knew or should have known was not one of the defendants' appliances. A

That, in substance, leaves the two other matters relied on by the defendants as constituting contributory negligence. One is failure to observe the usual "drill" of tightening the vertical coupler first. It is agreed that this peculiar fault in P.3 was such that if the vertical coupler had been tightened first, a firm joint would have been obtained, notwithstanding that one of the screws was too long. Speaking for myself, I am not disposed to regard that as amounting to contributory negligence. B
It was described as a drill which was laid on as a matter of general practice for safety reasons, but I do not think the evidence goes so high as to show that in all circumstances it can definitely be said to be wrong practice not to tighten the uprights first and, as was pointed out by one of the witnesses, it would be necessary in this particular construction to adjust the transom for height, so as to get it level at both ends before finally tightening the bolt. D
As the learned judge pointed out, this matter was not clearly or specifically pleaded, and that fortifies me in the view I have formed, in agreement with him, that this should not be held to amount to contributory negligence. The other matter was the use as a safety precaution of a second coupler clipped to the scaffolding member below the one effecting the junction between the vertical and the horizontal members. Here again I agree with the learned judge that in this respect the deceased should not be held guilty of contributory negligence. E
The most favourable answer on this, from the defendants' point of view, was given by the plaintiff's expert witness, and one may add that the omission of this precaution was relied on in the statement of claim as amounting to negligence on the defendants' part. The defendants' principal witness, Mr. Naylor, gave evidence which was far from clear on this point. In particular, there seems to be a doubt as to the stage at which a careful scaffolding erector, erecting scaffolding of this sort, would add his safety coupler. He might do it before the new structure was launched out over the space of eleven feet to which my Lord has referred, or he might do it at a later stage. For all one knows, this highly experienced and skilful scaffolder may have had in mind to put on these safety couplers as the very next thing he did, but was prevented from doing so by his unfortunate accident. F

Those are in substance all the matters alleged against the deceased by way of contributory negligence. Having considered all the circumstances as well as I can, while I acquit the deceased of negligence in the two respects I have last mentioned, and also acquit him of negligence on the specific matter of his failure to detect the difference in length of the bolt, I cannot wholly absolve him from blame, for this accident would never have happened if he had rejected (as, in my view, he should have done) the P.3 coupler as a coupler not supplied by the defendants and therefore not one which had been subjected to the defendants' usual precautions in the way of examination and overhaul. He may not have noticed, and he may be excused from not having noticed, the particular defect, but he must have noticed that this, so far as the defendants were concerned, was an unauthorised coupler which might be defective in one way or another and which ought not to be used. In all the circumstances of the case, it seems to me that justice will be done if, as my Lord has proposed, the amount of the damages is reduced by twenty per cent., on the ground of contributory negligence by the deceased; and, to that extent, I would allow the appeal. G

HODSON, L.J.: If the matter had rested with me, I would have dismissed this appeal and allowed the judgment of ASHWORTH, J., to stand. [His I

- A LORDSHIP summarised the facts, read reg. 7 and continued:] One of the matters which was raised in the defence I can deal with shortly. The defendants said that if there was any breach of statutory duty (which is now admitted), the defendants had delegated to the deceased the duty of selecting safe and suitable materials for the construction of the scaffolding. I agree with my Lords that there is no evidence here which could justify any finding of delegation. In support of that proposition, I would refer to the decision of this court in *Manwaring v. Billington* (1) ([1952] 2 All E.R. 747), where, although the case was decided on another ground in favour of the defendants, the majority of the court said that, in their view, in order that there might be a delegation of a statutory duty, it must be made clear that it is such a duty that is being delegated and that it is not a mere instruction that is being given. The headnote, I think, correctly summarises what they said when it uses these words ([1952] 2 All E.R. 747):

“a mere instruction to a workman as to the method of carrying out his duties did not constitute the delegation of a statutory duty relating to that matter . . .”

- D There being no delegation here, the defendants cannot succeed on that ground. They have, however, relied on breach of reg. 4 of the Building (Safety, Health and Welfare) Regulations, 1948, to which I shall have to refer, and have alleged against the deceased contributory negligence. The present regulations succeeded the Building Regulations, 1926 to 1931. Regulation 4 of the Building (Safety, Health and Welfare) Regulations, 1948, has included some words which did not appear in the earlier regulations. The duty of the employee to co-operate was in the earlier regulations, but there are now additional words. I must read the whole of the concluding paragraph of reg. 4:

- E “It shall be the duty of every person employed to comply with the requirements of such regulations as relate to the performance of an act by him and to co-operate in carrying out Parts 2 and 7 of these regulations and if he discovers any defect in the scaffolding, plant or appliances to report such defect without unreasonable delay to his employer or foreman, or to a person appointed by the employer under reg. 98.”

- F The question whether the employee co-operated in carrying out Parts 2 and 7 was investigated by the learned judge, for the defendants said that the deceased had not co-operated. Parts 2 and 7 deal with obligations which fall, *prima facie*, on employers. Part 2 deals with scaffolds and means of access, and Part 7 deals with miscellaneous provisions of all sorts—fencing of machinery, the care and the maintenance of mechanically propelled vehicles, the handling of explosives, protection from falling material, lighting, safety nets, and other matters. I should have thought that the phrase

- H “It shall be the duty of every person employed to comply with the requirements of such regulations as relate to the performance of an act by him”

- I was directed to those cases where in the regulations actions by specific employees were to be taken, as in the example to which counsel for the plaintiff drew attention, namely, reg. 34 (1) (c), which has to do with lifting appliances, and provides that, as far as the construction permits, the gear is to be inspected at least once every week by the driver, if competent for the purpose. If I had taken another view of the construction of this section, I think it must necessarily have led me to the view which JENKINS, L.J., has expressed, namely, that the deceased man must necessarily have been in breach of this regulation which imposes an absolute duty on him to use suitable material, if those words are apt to cover this case. However, I take the view that what he has to do under this part of reg. 4 is to co-operate in carrying out Parts 2 and 7. Part 2 includes the scaffolding reg. 7 as to construction and material.

The question whether or not the deceased did co-operate in carrying out reg. 7 is very nearly allied to the question whether or not he was guilty of contributory negligence. That is the real question to be determined in this case. The employers are under an absolute liability for breach of the regulation, and the deceased's own conduct has to be considered. If he had acted in flat defiance of the regulation, and of instructions which had been given by his employers, the plaintiff could not have recovered, as is shown by *Manwaring v. Billington* (1). I agree, however, with the learned judge when he said that in his view it had not been shown in this case that the deceased had in any way consciously or deliberately disregarded regulations or failed in his duty to co-operate in carrying out Part 2, which includes reg. 7. I therefore need now only deal with the question of contributory negligence.

The learned judge very conveniently summarised the allegations which remained against the deceased in his judgment:

"The criticisms of the deceased's conduct were directed to four points: (a) that the deceased should have recognised the coupler P.3 as a 'stranger' not supplied by the defendants and should not have used it at all; (b) that the deceased by careful inspection should have discovered that one bolt was too long; (c) that the deceased should have first tightened the clip attached to the vertical standard D2, in which case the excessive length of the bolt would have been no detriment; (d) that the deceased after fixing the coupler P.3 should have attached an additional coupler below P.3 as a safety precaution."

The first point raised against the deceased is the formidable point which has to be considered. The learned judge has found, as to this "stranger" coupling, P.3, which was of a different kind from the "Little Giants" which were supplied from the defendants' store and normally used by them, that it was in an existing bay when the deceased made use of it. He said:

"Although there was no evidence to show when precisely the dismantled bay was constructed, I am prepared to draw the inference (and I so find) that it—[the defective coupling]—was in position before Christmas, 1952, and therefore that the bay was probably constructed when one of the other two or three chargehands was in charge. Further, I accept the evidence of Mr. Davis that for the purpose of constructing the new bay, the only equipment used was equipment which had formed part of the dismantled bay: 'there was nothing over and nothing short'."

So the position was that the deceased, when he was constructing the new bay out of the materials which were in the old, found there on the site this coupler which turned out to be defective; and it is said against him that, as it was a "stranger" coupler, he ought to have rejected it.

I think that this is one of those cases where it is very important to remember that the man against whom an allegation is made is not alive. As was pointed out by LORD GREENE, M.R., in *Hutchinson v. London & North Eastern Ry. Co.* (2) ([1942] 1 All E.R. at p. 334):

"... I do not think it is right ... where there is a defence of contributory negligence in an action based on breach of a statutory rule designed, as I have said, to protect men as much from their own carelessness as from anything else, to draw inferences unfavourable to a deceased man and imputing to him all those elements the absence of which would negative any negligence on his part."

Suppose this man had been able to give evidence. One knows now that this coupler is, on the face of it, a perfectly good coupler, although it was unfamiliar to the chief witness for the defendants. The deceased might well have been able to say that it was a coupler which he recognised, having used one previously. There is no doubt that it was one used for scaffolding work by another firm employed

- A on the site, and it seemed to the learned judge almost certain that that coupler had become mixed up with the couplers which the defendants provided from the collection of one of the other firms. The deceased would thus have been in this position, that he had taken a coupler which, on the face of it, was a perfectly good one from the bay which he was dismantling. The bay contained this coupler, amongst others of the same kind, for there were other of these "foreign"
- B couplers in that bay, and he might well have given evidence to the effect that he had looked at it and had found that there was no stripping of the thread, nor was the bolt bent. If he had been believed on that, I find it difficult to see how he could possibly have been found to have been negligent. The use of the "foreign" coupler, to my mind, is the high-water mark of the case against the deceased of contributory negligence, because he was a chargehand, an experienced
- C scaffolder who had been for some time in the employment of the defendants, and he must have known well that the ordinary stock of couplers the defendants supplied consisted of "Little Giants" which are quite different from the defective coupler P.3. Recognising a stranger in his hand, was he negligent in using it at all? I am bound to say that I agree with the learned judge's finding that he was not. Once one gets to that position, I agree entirely with what my Lords
- D have said—indeed, with what the learned judge said—that, having the "foreign" coupler in his hand, he could hardly be held to be negligent in not detecting that the bolt was too long. Here was a man working thirty feet from the ground, not spending his time in giving a minute examination to what he had in his hand. He would not be able very easily to see that the bolt was too long once he had put the coupling round the vertical standard; and, if he could not see, it would
- E be a good deal to ask of him to say that he should have been able to feel that it was this little bit too long.

- There remained two other matters with which the learned judge dealt. There is the question whether he should have fixed the vertical before he fixed the horizontal transom. It has been said with some force—and the learned judge considered this—that when one is dealing with any routine operation, especially
- F one which is fraught with danger, it is very sound to follow the "drill" exactly, because if one's mind wanders and one does everything always in the same order, one is less likely to go wrong. The routine drill in erecting scaffolding is to fix the coupler on the vertical first, for obvious reasons, that when the scaffolding is being erected on the ground, the weight will be placed on the transverse transom, and if the coupler on the vertical is not tight, the transverse transom will not
- G take the weight. That particular argument does not apply to this case, because in the position in which the man was working, there was no question of the transverse transom taking the weight until both couplings had been secured. The point remains that there is a routine and, if the routine had been followed, the accident would not have happened, since the long bolt would not have met the resistance of the coupled transom. I agree, however, with the learned judge
- H in not finding negligence on that, particularly as one does not know what the explanation of the deceased man would have been if he could have been called to give evidence. The position in which he was may well have made it more convenient to him to fix the coupler on the transom before he fixed the coupler on the standard. There certainly is a suggestion in the evidence that in order to get the level of the new platform the same height as the platform from which
- I the deceased was working, it would be more convenient to adjust the coupler on the transom before adjusting it on the vertical standard.

There is the further point that the defendants have not alleged in their defence, namely, this failure to follow the "drill" as a specific act of negligence, and I do not think, therefore, that they ought to be able to rely on it in any event. The same applies to the question of the additional coupling. There again it is obvious to a layman that to have an additional coupler under another is a safety device, but whether it is in practice one which ought to be followed seems to me

another question; and the evidence is by no means clear on that matter. I do not propose to re-read it. It does not look as if on this class of work the practice of double couplers is regularly followed or was followed on the site of the Liverpool Exchange Station where this work was being done. The evidence of the defendants' principal witness, the contract manager, Mr. Naylor, does not strongly support the view that the deceased man was negligent in not employing a second coupler, at any rate at the stage at which he was when the accident happened. For those reasons, I would have dismissed the appeal entirely.

Appeal allowed to the extent of reducing the damages awarded to the plaintiff by one-fifth, from £6,298 10s. to £5,038 16s.

Solicitors: *Botterell & Roche*, agents for *Weightman, Pedder & Co.*, Liverpool (for the defendants); *Bentleys, Stokes & Lowless*, agents for *H. C. James Crompton & Co.*, Bury (for the plaintiff).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

GOVERNMENTS STOCK AND OTHER SECURITIES INVESTMENT CO., LTD. AND OTHERS v. CHRISTOPHER AND OTHERS.

[CHANCERY DIVISION (Wynn-Parry, J.), November 30, December 1, 2, 6, 7, 9, 1955.]

Company—"Prospectus"—Offer by a new company to acquire all shares in two existing companies—New company to issue shares in exchange—Offer contained in circular—Whether circular a prospectus—"Subscription"—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 38 (3), s. 455 (1).

By an offer in writing dated Nov. 12, 1955, the British and Commonwealth Shipping Co., Ltd., hereinafter called the "New Company", offered to acquire the whole of each class of preference and ordinary shares and stock in the issued capitals of the Union-Castle Mail Steamship Co., Ltd. (hereinafter called "Union-Castle") and the Clan Line Steamers, Ltd. (hereinafter called "Clan") in exchange for preference and ordinary shares in the New Company. The offer was made conditional on acceptance by a specified date by not less than ninety per cent. of all classes of shareholders and stockholders in Clan and Union-Castle, and permission being obtained to deal on the Stock Exchange, London. The circular containing the offer was accompanied by a form of acceptance and transfer. On a motion by the plaintiffs on behalf of themselves and all other shareholders and stockholders of Union-Castle except the defendants, the directors of the company, for an injunction to prevent the defendants from taking any further steps in connection with the offer, the plaintiffs contended that the circular was a prospectus to which s. 38 of the Companies Act, 1948, applied. It was admitted by the defendants that if the circular was such a prospectus it did in fact fail to comply with the requirements of the Act.

Held: (i) the reference in s. 38 (3) of the Companies Act, 1948, to a form of application meant only a form of application in connection with a prospectus offering shares for subscription or purchase and the word "prospectus" in s. 38 bore no wider meaning than in the definition of "prospectus" contained in s. 455 (1) of the Act.

(ii) the circular was not a prospectus within the meaning of that term in s. 455 (1) of the Companies Act, 1948, because it neither involved an offer for the purchase of shares, as the shares to be acquired were unissued shares, nor invited subscription for shares, since subscription meant taking shares for cash, and further, although it offered shares, it did not offer them to the public, and

- A (iii) the document described as "form of acceptance and transfer" was not an application for shares within s. 38 of the Companies Act, 1948, but was the communication of an offer to exchange shares.

[For the Companies Act, 1948, s. 38 (3) and s. 455, see 3 HALSBURY'S STATUTES (2nd Edn.) 488, 788.]

B Cases referred to:

- (1) *Re V.G.M. Holdings, Ltd.*, [1942] 1 All E.R. 224; [1942] Ch. 235; 111 L.J.Ch. 145; 2nd Digest Supp.
- (2) *Arnison v. Smith*, (1889), 41 Ch.D. 348; 61 L.T. 63; 9 Digest 114, 544.
- (3) *Chicago Railway Terminal Elevator Co. v. Inland Revenue Comrs.*, (1896), 75 L.T. 157, 572; 10 Digest 784, 4908.
- (4) *Brown v. Inland Revenue Comrs.*, *Gordon v. Inland Revenue Comrs.*, (1900), 84 L.T. 71; 10 Digest 1203, 8522.
- (5) *Coats v. Inland Revenue Comrs.*, [1897] 2 Q.B. 423; 66 L.J.Q.B. 732; 77 L.T. 270; 61 J.P. 693; 9 Digest 404, 2589.
- (6) *Chesterfield Brewery Co. v. Inland Revenue Comrs.*, [1899] 2 Q.B. 7; 68 L.J.Q.B. 204; 79 L.T. 559; 10 Digest 1032, 7155.

D Motion.

The plaintiffs, who were shareholders in the Union-Castle Mail Steamship Co., Ltd., on behalf of themselves and all other shareholders and stockholders of the company other than the defendants, the directors of the company, moved for injunctions to prevent the defendants from taking any further steps in connection with an offer in writing dated Nov. 12, 1955, made by the British and Commonwealth Shipping Co., Ltd., to acquire the whole of each class of preference and ordinary shares and stock in the issued capitals of the Union-Castle Mail Steamship Co., Ltd., and the Clan Line Steamers, Ltd., in exchange for preference and ordinary shares in the British and Commonwealth Shipping Co., Ltd.

The facts appear in the judgment.

- F *J. B. Lindon, Q.C.*, and *K. B. Suenson-Taylor* for the plaintiffs.
Sir Andrew Clark, Q.C., and *M. M. Wheeler* for the defendants.
Peter Foster for the defendant company.

Cur. adv. vult.

- G Dec. 9. WYNN-PARRY, J., read the following judgment: This is a motion for interlocutory relief by way of injunction in an action brought by the plaintiffs on behalf of themselves and all other shareholders and stockholders of Union-Castle Mail Steamship Co., Ltd., to which I will refer as "Union-Castle" other than the seven individual defendants who are the present directors of Union-Castle and other than Union-Castle itself. In substance what the plaintiffs seek is a series of injunctions to prevent the defendants from taking any further step of any kind in connection with an offer in writing dated Nov. 12, 1955, made by the British and Commonwealth Shipping Co., Ltd. to which I will refer as the "New Company", to acquire the whole of each class of preference and ordinary shares and stock in the issued capitals of Union-Castle and the Clan Line Steamers, Ltd., to which I will refer as "Clan" in exchange for preference and ordinary shares in the New Company as set out in the circular. The offer is expressed to be conditional in these terms:

- I "This offer is conditional upon (i) acceptance on or before Friday, Dec. 30, 1955, or such later date if any (not being after Feb. 29, 1956) as the New Company may allow, by the holders of not less than ninety per cent. of every class of issued capital of Clan and of Union-Castle, or such less percentage in the case of any such class or classes as the New Company may elect to accept, and (ii) permission to deal and quotation being granted by the council of the Stock Exchange, London, prior to the despatch of letters of allotment."

I am not concerned on this motion with the merits or demerits of the terms of

the offer from the point of view of the holders of shares and stock in Union-Castle. That is primarily a matter for each shareholder to consider for himself, but I am asked to intervene in this action on a variety of grounds, which I shall proceed to examine. [HIS LORDSHIP then considered the plaintiffs' contention that art. 4 of the articles of association of Union-Castle, which provided for the continuance of British control of the company, would be defeated by the proposed transaction since the offer did not refer to that principle and such provisions as were included in the articles of association of the new company would prove illusory. HIS LORDSHIP concluded that he ought not to intervene on the ground that those provisions would prove illusory. HIS LORDSHIP continued:] The plaintiffs then attacked the circular, alleging that it contained representations which were misleading, and omissions which had the effect of making what was stated misleading. I should say at once that counsel on behalf of the plaintiffs expressly disclaimed any suggestion that the individual defendants were acting otherwise than perfectly bona fide throughout the matter. In order to understand and consider the attacks which the plaintiffs make on the circular, I should first consider its nature. It is alleged by the plaintiffs that it is a prospectus to which s. 38 of the Companies Act, 1948, applies, and that as such it does not comply with the requirements of that Act. It is not disputed that if it is such a prospectus, it does in fact fail to comply with the requirements of the Act.

The word "prospectus" is defined in s. 455 of the Companies Act, 1948. Section 455 (1) opens with the words:

"In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them (that is to say) . . . 'prospectus' means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company."

It is argued that "prospectus" in s. 38 of the Companies Act, 1948, has a wider meaning than in s. 455 (1), the reason put forward being that in s. 38 (3) reference is made to the issue of "A form of application", and that there being nothing in the sub-section to limit the issue of the form of application to an allotment and issue for cash, it must apply where the consideration is a consideration other than cash. This, it is said, constitutes a context requiring the word "prospectus" to cover documents not included in the definition in s. 455. I do not accept this view. Section 38 follows s. 37, which appears under the heading "Prospectus". There is no ground whatsoever for giving the word "prospectus" in s. 37 any more extended meaning than it has in s. 455, and it would be strange if in the very next section "prospectus" were to be found to have a wider meaning. I can see no need to attribute any other meaning to "prospectus" in s. 38 than that given in s. 455. The reference in s. 38 (3) to a form of application means only a form of application in connection with a prospectus offering shares for subscription or purchase. It is clear that the circular does not involve an offer for the purchase of any shares. The shares in question are unissued shares of the New Company, so they cannot be the subject of an offer for purchase (see *Re V.G.M. Holdings, Ltd.* (1), [1942] 1 All E.R. 224).

It becomes necessary, therefore, to consider the word "subscription" in the definition of "prospectus". In my view the word means: taking or agreeing to take shares for cash. It imports that the person agreeing to take the shares puts himself under a liability to pay the nominal amount thereof in cash. I think that this necessarily follows from the reasoning of KEKEWICH, J., and the Court of Appeal in *Arnison v. Smith* (2) (1889) (41 Ch.D. 348), and the judgments in *Chicago Railway Terminal Elevator Co. v. Inland Revenue Comrs.* (3) (1896) (75 L.T. 157), and *Brown v. Inland Revenue Comrs.* (4) (1900) (84 L.T. 71). In MURRAY'S OXFORD DICTIONARY, one of the meanings attributed to "subscription" is:

A "A promise over one's signature to pay a sum of money for shares in an undertaking."

I can find no secondary meaning attributed to "subscription" in the Companies Act, 1948. On the contrary, paras. 4, 5, 6 and 7 of Part 1 of Sch. 4 to the Act clearly require that "subscription" and "subscribe" involve the notion of payment in cash. The circular in this case does not invite subscription for shares for cash. For these reasons I am of opinion that the circular is not a prospectus within the meaning of that word as used in the Companies Act, 1948. I would add that it would be somewhat strange if the circular were in fact a prospectus in view of the circumstance that the permission of the Board of Trade was obtained under s. 13 of the Prevention of Fraud (Investments) Act, 1939, on the basis that it was not a prospectus. I am further of opinion that the circular was not distributed to the public. I accept the proposition put forward by counsel for the defendants, namely, that the test is not who receives the circular, but who can accept the offer put forward. In this case it can only be persons legally or equitably interested as shareholders in the shares of Union-Castle or Clan. In the case of those who accept non-renounceable letters of allotment will be issued. In these circumstances the case appears to me to fall within s. 55 (2) of the Companies Act, 1948.

With the circular was sent out a document headed "Form of Acceptance and Transfer". Counsel for the plaintiffs argued that when examined, the document was in reality a form of application for shares in the New Company, and in support of his proposition cited two cases decided under the Stamp Act, 1891, *Coats v. Inland Revenue Comrs.* (5) ([1897] 2 Q.B. 423), and *Chesterfield Brewery Co. v. Inland Revenue Comrs.* (6) ([1899] 2 Q.B. 7). Both those cases turned on the construction and scope of the phrase "conveyance on sale" as used in the Stamp Act, 1891, and I do not find them of assistance in this case. I can find no reason whatever for not giving to this form the meaning so clearly intended by its author. It opens with the words:

F "If you wish to accept the accompanying offer you should sign this form and forward it, together with your share certificate(s) to the Union-Castle Mail Steamship Company Limited . . . in the pre-paid envelope provided, so as to be received not later than the close of business on Friday, Dec. 30, 1955."

Then follows the heading: "Form of Acceptance and Transfer". It is addressed to Union-Castle as agents for the New Company, and it then says:

H "I/We, [a blank being left for the name of the shareholder or stockholder to be inserted,] hereby irrevocably accept the offer made to me/us by the British and Commonwealth Shipping Company Limited (hereinafter called 'the New Company') and contained in the New Company's circular letter (hereinafter called 'the offer') dated Nov. 12, 1955, to acquire my/our holding of (blank) ordinary stock in the Union Castle Mail Steamship Company Limited (hereinafter called 'the stock') upon the terms and subject to the conditions set out therein."

Paragraph (2) states that the stockholder encloses his stock certificate which is to be held by Union-Castle on the terms of the offer. Paragraph (3) provides that subject to the offer becoming unconditional, the signature of the stockholder to the form of acceptance and transfer shall constitute for Union-Castle an execution by the stockholder of an instrument of transfer of the stock to the New Company, and the stockholder further undertakes to execute any further assurances that may be necessary in connection with such transfer. The stockholder then authorises and requests Union-Castle to forward to him a fully paid non-renounceable letter of allotment, and in due course a dividend certificate in respect of the shares of the New Company to be allotted to the stockholder pursuant to the offer. There is then a dividend request, and a provision that in

the event of the offer not becoming unconditional, Union-Castle is to return the certificate. Then follows provision for the signatures and the witnessing of the signatures of the stockholder or stockholders. To my mind nothing could be clearer. It is to operate as an acceptance of the offer made by the New Company and of the shares in the New Company, and as a transfer of the acceptor's holding in Union-Castle or Clan as the case may be. Why then should the court be astute to turn this form upside down or inside out in an attempt to give it some other meaning, particularly in view of the circumstance that I have held that the circular is not a prospectus, but what it purports to be, namely, the communication of an offer to exchange shares in the New Company for shares in Union-Castle or Clan as the case may be.

It is against the background provided by the construction which I place on the circular, and the form accompanying it, that I turn to consider the allegations that the circular contains such material misrepresentations and omissions that I should intervene at this stage in a representative shareholders' action. In this regard it is, I think, necessary to bear in mind the proposition that a mere omission to state facts in the circular does not amount to a misrepresentation which would give rise to any cause of action, unless the effect of the omission is to render untrue or at least misleading some positive statement therein.

[His LORDSHIP then considered the plaintiffs' criticisms of the circular and held that it was neither false nor misleading and that the plaintiffs were not entitled to the injunctions which they sought.]

Motion dismissed.

Solicitors: *Barnett, Tuson & Co.* (for the plaintiffs); *Slaughter & May* (for the defendants and the defendant company).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

MILNER v. STAFFORDSHIRE CONGREGATIONAL UNION (INCORPORATED).

[CHANCERY DIVISION (Danckwerts, J.), February 8, 1956.]

Charity—Sale of charity estate—Consent of Charity Commissioners—Absence of consent at date of contract—When sale is made—Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29.

Sale of Land—Sale by a charity—Consent of Charity Commissioners—Absence of consent at date of contract—When sale is made—Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), s. 29.

On Sept. 11, 1954, the plaintiff purported to enter into a written contract with the trustees of a charity for the purchase from them of freehold land. The consent of the Charity Commissioners to the sale had not at that date been obtained by the trustees, and on Sept. 24, 1954, the plaintiff was informed that the sale was subject to such consent. On Oct. 16, 1954, the plaintiff purported to withdraw from the contract, and on Nov. 12, 1954, the consent of the Charity Commissioners to the sale was obtained. The plaintiff claimed the return of his deposit.

Held: the plaintiff was entitled to recover his deposit because a sale within the Charitable Trusts Amendment Act, 1855, s. 29*, was made when the contract was entered into and, accordingly, under that section, the contract was not lawful without the approval of the Charity Commissioners and, being unlawful, was not binding on the plaintiff.

Ellis v. Rogers (1885) (29 Ch.D. 661) and *Day v. Singleton* ([1899] 2 Ch. 320) distinguished.

[**Editorial Note.** The decision in the present case may not govern the rights of the parties if the contract for the sale of charity land is expressed to be

* The terms of s. 29 of the Charitable Trusts Amendment Act, 1855, are printed at p. 496, letter I, post.

A subject to the consent of the Charity Commissioners being obtained (see p. 498, letter C, post).

For the Charitable Trusts Amendment Act, 1855, s. 29, see 2 HALSBURY'S STATUTES (2nd Edn.) 876.]

Cases referred to:

- B (1) *Re Mason's Orphanage & London & North Western Ry. Co.*, [1896] 1 Ch. 54; *affd.* C.A., [1896] 1 Ch. 596; 65 L.J.Ch. 439; 74 L.T. 161; 8 Digest (Repl.) 475, 1790.
- (2) *R. v. Edwards, Ex p. Joseph*, [1947] 1 All E.R. 314; [1947] K.B. 392; [1947] L.J.R. 538; 111 J.P. 163; 2nd Digest Supp.
- (3) *A.-G. v. Wyndham*, (1862), 1 H. & C. 563; 32 L.J.Ex. 1; 7 L.T. 386; 158 E.R. 1008; 42 Digest 734, 1574.
- C (4) *Ellis v. Rogers*, (1885), 29 Ch.D. 661; 53 L.T. 377; 40 Digest 255, 2216.
- (5) *Day v. Singleton*, [1899] 2 Ch. 320; 68 L.J.Ch. 593; 81 L.T. 306; 40 Digest 240, 2087.

Action.

D This was an action for the return of a deposit of £250, paid by the plaintiff as purchaser under a contract of sale of a freehold dwelling-house vested in the defendants on charitable trusts. The plaintiff claimed that at the date of the contract the defendants had not obtained the consent of the Charity Commissioners as required by the Charitable Trusts Amendment Act, 1855, s. 29, and in consequence the contract was not lawful. The plaintiff repudiated the contract and claimed the return of the deposit. The defendants counterclaimed for specific performance of the contract.

E *G. A. Grove* for the plaintiff, the purchaser.
G. B. H. Dillon for the defendants, the vendors.

DANCKWERTS, J.: The point which is raised in this action does not appear to be covered in the authorities, though it arises under an Act of 1855.

F On Sept. 11, 1954, the plaintiff purported to enter into a contract for the purchase of a house known as No. 4, Lonsdale Road, Wolverhampton, with the secretary of the defendants, who are an incorporated charity known as the Staffordshire Congregational Union (Incorporated). The purported contract was drawn up on a form used by an estate agent who obviously did not appreciate that there might be a question under the Charitable Trusts Amendment Act, 1855, as emerged subsequently. The purchaser was expressed to be:

G ". . . the purchaser of all that freehold messuage and premises together with the appurtenances thereto belonging and known as 4, Lonsdale Road, Wolverhampton, in the county of Stafford, at a price of £2,200."

H Then it is stated that the purchaser agreed to pay the vendors' legal costs not exceeding £50. The contract was subject to the obtaining of a mortgage of £1,675, and recited that the plaintiff had paid a deposit of £250

I ". . . on the terms of the common form conditions of the Law Society so far as the same are applicable to a sale by private treaty and the vendor and the purchaser agree to complete the sale and purchase accordingly. The property is sold subject to any reservations as to mines, minerals, right of way, light, easements, and restrictive covenants (if any). The vendor shall deduce a good marketable title and the purchase shall be completed on or before Oct. 30, 1954, on which date vacant possession shall be given to the purchaser."

The price expressed, £2,200, appears to have been altered from some other figure, and there is a note in the corner: "Mr. Milner" (i.e., the plaintiff) "authorised this on 'phone 15/9/54."

On Sept. 24, 1954, the plaintiff's solicitors were informed by letter from the defendants' solicitors that

"the sale of this property must be subject to the consent of the Charity Commissioners, to whom we have already sent the usual application." A

Whereupon the Charity Commissioners inserted an advertisement in a newspaper referring to the proposal by the charity to sell the property in question for £2,200 "the purchaser paying all the trustees' expenses of the sale", which was not in fact, as it seems to me, an accurate description of the terms of the contract. B The obligation of the purchaser was to pay legal costs up to £50, and the trustees' legal costs might or might not exceed that figure. Then the advertisement continues:

"Any higher offer, objection or suggestion which relates to the proposed sale should be in writing, addressed to the secretary, Charity Commission . . . and if delivered at the office of the commissioners on or before Nov. 1, 1954, will be taken into consideration." C

On Oct. 16, 1954, two letters were written, one to the defendants' solicitors and the other to the estate agent, declaring that the plaintiff, in view of the advertisement which he apparently had seen, considered that he was not bound by the contract, and did not wish to proceed with the purchase. Accordingly, it is claimed on behalf of the plaintiff that he has repudiated the sale, and that the matter is at an end. D

On the other hand, as eventually a consent was obtained from the Charity Commissioners on Nov. 12, 1954, in regard to the property, it is claimed on behalf of the defendants that there is a binding contract by the plaintiff to purchase the property for £2,200, subject to the question about the costs which were to be paid by the purchaser. The order of the Charity Commissioners is expressed in the following terms, so far as it is material: E

"The body corporate called the Staffordshire Congregational Union (Incorporated) being the trustees of the charity may sell the said property for £2,200 subject to the conditions that: (a) the sale shall be completed within one year from the date of this order; (b) the purchaser shall pay all the proper expenses of the trustees in connection with the sale." F

As I remarked in referring to the advertisement, the terms of the order do not seem to me to coincide exactly with the terms of the alleged contract, but there has been an admission for the purposes of the action that, for the purposes of the conditions to which I have referred made by the Charity Commissioners, the proper expenses of the defendants in connection with the sale of the property would have been only the defendants' solicitors' scale costs, £40 10s., since Mr. T. L. Grosvenor, the estate agent, made no charge in respect of either his commission or his out-of-pocket expenses. It is contended, therefore, that the limit of £50 which was imposed by the terms of the alleged contract has not been exceeded. I should add that there has been a later order dated Dec. 9, 1955, repeating the same consent by the Charity Commissioners on account of the time which has passed since the original alleged contract was entered into and the original consent of the Charity Commissioners was given. G H

The matter depends on the meaning and effect of the Charitable Trusts Amendment Act, 1855, s. 29, which provides:

"It shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the express authority of Parliament, under any Act already passed or which may hereafter be passed, or of a court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the Board [viz., the Charity Commissioners] any sale, mortgage, or charge of the charity estate, or any lease thereof in reversion after more than three years of any existing term, or for any term of life, or in consideration wholly or in part of any fine, or for any term of years exceeding twenty-one years." I

A The material words for the purpose of the present case are: "It shall not be lawful for the trustees or persons acting in the administration of any charity to make . . . otherwise than with the . . . approval of the Board . . . any sale."

The question is: what is a sale, and when is it made? The power of the Charity Commissioners to give their consent to a sale is contained in the Charitable Trusts Act, 1853, s. 24, but I do not think anything turns on that section. I have been referred to some cases on behalf of the defendants in which it is claimed there are expressions used by the judges to the effect that a sale is not complete, and, therefore, it is argued, there is no sale until there has been a conveyance or transfer of the property. In *Re Mason's Orphanage & London & North Western Ry. Co.* (1) ([1896] 1 Ch. 54), there is an expression (*ibid.*, at p. 61) by STIRLING, J., suggesting that alienation is the matter to which s. 29 is directed. The point which I have to decide was not, however, under consideration in that case by either STIRLING, J., or the Court of Appeal (*ibid.*, at p. 596) to which the case was taken. The only question was whether a power to sell contained in a deed or document creating a charity was a scheme legally established within the meaning of s. 29. Therefore it is not really of any help to me to find that this particular phrase was used by the learned judges in that case.

In the same way, *R. v. Edwards, Ex p. Joseph* (2) ([1947] 1 All E.R. 314), and *A.-G. v. Wyndham* (3) (1862) (32 L.J.Ex. 1) in which there are expressions suggesting that the sale is not complete until the money is paid, or that the sale requires a conveyance, do not seem to me to carry the matter much further. They do not really shed any light on the meaning which is to be applied to the particular section of the Act with which I have to deal. Again, I have been referred to cases relating to the assignment of leaseholds and contracts to assign leaseholds which are subject to a covenant against alienation: *Ellis v. Rogers* (4) (1885) (29 Ch.D. 661) and *Day v. Singleton* (5) ([1899] 2 Ch. 320). In those cases no doubt it was suggested that in the sale of leaseholds where the consent of the landlord is required to the assignment, the matter of obtaining the consent is one of title which may be obtained at any time up to the date fixed by the contract for completion, and that a purchaser is not at liberty to withdraw before that date, because at the time in question such consent of the landlord has not been obtained. The position between the landlord and his tenant is purely a matter of contract. There is an agreement binding between the landlord and his tenant that the tenant will not assign without the consent of the landlord, and if the tenant does assign without the consent of the landlord, he commits a breach of contract, and he may be liable in damages. What is more important is, so it seems to me, that it is only a question of damages unless the agreement in question is supported by the sanction of a condition of re-entry. The contract between the landlord and the tenant might not be effective against an assignee but for the condition of re-entry. It is the fact that the assignee is liable to be evicted by the landlord under the condition of re-entry in those cases, which makes the title one which is not wholly satisfactory unless and until the landlord's consent to assignment is obtained. Subject to that there is nothing unlawful, as far as I can see, in a tenant agreeing to assign the term to a purchaser; and therefore it does not seem to me to be at all the same matter as that which arises in the present situation, owing to the provisions of the Charitable Trusts Amendment Act, 1855, s. 29.

I have to decide what that Act means when it says: "make . . . any sale". It does not say "make any conveyance" or "complete any sale" or anything of that sort; it simply says "make . . . any sale", and I think for the purposes of the section, though I am bound to say that the matter is not free from doubt, that a sale is made when a contract is entered into by the owners of the property in question for the sale of the property to some purchaser. It is therefore a breach of the terms of the section if the trustees of a charity enter into a contract

to sell the trust property without the authority of the Charity Commissioners. I would observe that there is some support for this view to be found in the documents in the present case. In the alleged contract the phrase is: "The property is sold subject to any reservations . . ." and in the solicitors' letter of Sept. 24, 1954, the expression is: "the sale of this property must be subject to the consent of the Charity Commissioners". It is perhaps then not unreasonable to think that the word "sale" in the section must be used in a similar manner. I am not saying, of course, that a conveyance in pursuance of the purported contract would be any more lawful than the original contract would be, but it seems to me that "sale" must include the making of a contract of sale at least as well as a conveyance on sale.

Accordingly, a contract to sell the charitable property without the consent of the Charity Commissioners is not lawful. As it is not lawful, it is not enforceable. I will not express any opinion as regards the position where the contract entered into between the parties is expressed to be conditional on the obtaining by the vendors of the consent of the Charity Commissioners. It may be that different considerations may arise, and in a case of that kind the purchaser may not be at liberty to withdraw from the transaction if the charity trustees are duly obtaining the consent of the Charity Commissioners, though it may not have been obtained at some given moment before the time of completion.

In the present case the contract was not lawful, and therefore could have no lawful effect so as to bind the plaintiff, and the contract is not binding on him. He is entitled to recover the deposit which he has paid.

Judgment for the plaintiff.

Solicitors: *Savory, Pryor & Blagden*, agents for *Hayward, Iliff & Co.*, Wolverhampton (for the plaintiff); *Miller & Smiths*, agents for *Shelton, Bates & Wolverson*, Wolverhampton (for the defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

BULLOCK v. G. JOHN POWER (AGENCIES), LTD.

[COURT OF APPEAL (Denning, Morris and Parker, L.JJ.), January 20, 1956.]

Factory—Dangerous machinery—Wire drawn through hole by revolving drum—Whether material or part of machinery—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 14 (1).

In order to reduce the diameter of a long piece of wire, it was pulled through a hole of the required diameter by means of a drum on to which the wire was wound when the drum was revolved by an electric motor. To prevent the loose end of the wire flapping out as the winding finished, there was a guard round most of the drum. During this operation, the wire struck and killed a workman, having, so it was found, ridden up over the guard. In an action for damages for negligence and for breach of statutory duty brought by the workman's widow and administratrix against the occupiers of the factory, it was found that the occupiers had not been guilty of negligence at common law, but that they were in breach of their statutory duty under s. 14 (1) of the Factories Act, 1937, securely to fence a "dangerous part of machinery", viz., the revolving drum and the wire. On appeal,

Held: notwithstanding its function in drawing the remaining wire through the hole, the wire which had passed through the hole was material in the machine and not a "part of machinery" within the section, and the occupiers were therefore not in breach of their statutory duty and were not liable.

Nicholls v. Austin (Leyton), Ltd. ([1946] 2 All E.R. 92) applied.

Appeal allowed.

[As to fencing dangerous parts of machinery in a factory, see 14 HALSBURY'S LAWS (2nd Edn.) 594, para. 1130; and for cases on the subject, see 24 DIGEST 908-911, 62-81.]

A For the Factories Act, 1937, s. 14 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 1009.]

Case referred to:

(1) *Nicholls v. Austin (Leyton), Ltd.*, [1946] 2 All E.R. 92; [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5; 2nd Digest Supp.

B Appeal.

The defendants were the occupiers of a factory at West Bromwich, at which wire was drawn through a hole of half an inch diameter in order to reduce its thickness by 1/32nd of an inch. The wire was drawn by a revolving drum on to which it was wound. After it had been fully drawn through the hole, the end of the wire rode over a guard round the drum designed to prevent such occurrence and struck and killed a workman employed by the defendants. The workman's widow and administratrix brought an action against the defendants under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, claiming damages for negligence at common law and for breach of statutory duty in failing to fence a dangerous part of machinery, the wire, under s. 14 (1) of the Factories Act, 1937. On Oct. 18, 1955, STABLE, J., found the defendants not guilty of negligence at common law but held that they were in breach of their statutory duty securely to fence a dangerous part of machinery, the drum and the wire. He gave judgment for the plaintiff. The defendants appealed.

John Thompson, Q.C., and *E. G. H. Beresford* for the defendants.

R. F. Levy, Q.C., and *C. G. Heron* for the plaintiff.

E DENNING, L.J.: On July 23, 1952, in the middle of the night, there was an accident in a factory at West Bromwich, and Mr. Bullock was killed. His widow, the plaintiff, now brings an action against the employers, the defendants, alleging that they were at fault at common law or, alternatively, were guilty of a breach of s. 14 (1) of the Factories Act, 1937. The work was drawing out wire.

F A long piece of wire just over half an inch thick—1/32nd of an inch thicker than half an inch—had to be reduced to half an inch. For this purpose it was pulled through a hole of half an inch diameter under great force, so as to reduce it by pressure down from 17/32nds of an inch to half an inch. The pulling end was on a drum which was revolved by an electric motor. That drum pulled the wire round and round itself in a coil. As the winding finished, the end of the wire became loose and swung outwards from the drum. There was a guard or fence for most of the way round the drum so that the wire would not flap out at the side. On this occasion all that we know about the accident (for unfortunately the man was killed) is that a workman some few yards away heard the banging of the wire against the guard and a little later looked round and there was Mr. Bullock on the ground. The police found a piece of human hair on the end of the wire. The inference which the judge drew (which must be accepted) was that one end of the wire, the loose end, had in some way ridden up over the guard and had struck Mr. Bullock on the head and killed him.

G The claim for negligence at common law against the defendants failed, because the judge was satisfied that no one could have anticipated any accident from this machine and the wire as it then was. No such accident had been heard of before.

H The machine has been operated in just the same way ever since and no other accident has been known; and, indeed, the witnesses could not explain how this happened. The judge acquitted the defendants of negligence and there is no appeal from that finding. The question now depends on the Factories Act, 1937. It is said that this was a "dangerous part of machinery" and ought to have been securely fenced within s. 14 (1) of the Act.

I The House of Lords in *Nicholls v. Austin (Leyton), Ltd.* (1) ([1946] 2 All E.R. 92) pointed out that the section itself drew a distinction between parts of machinery, on the one hand, and materials or articles which are in motion in it on the other

hand. In that case, where a splinter of wood came out of a woodworking machine which was securely fenced, it was held that the wood which was being worked was not a dangerous part. In this case the judge has held that this revolving drum, plus the wire, was a dangerous part of machinery. On reading through the speeches in *Nicholls v. Austin (Leyton), Ltd.* (1), I find myself unable to agree with the judge. LORD UTHWATT pointed out (*ibid.*, at p. 99) that it was not right to view the machine as a single operating unit. The machinery by itself and the materials by themselves must be looked at. That is borne out by s. 14 (3) which provides that any part of a stock-bar which projects beyond the head-stock must be securely fenced and authorises the Secretary of State to make regulations requiring the fencing of materials or articles which are dangerous while in motion in a machine. Thus it is forcibly indicated that material which is in motion in the machine does not come within the section unless either it is brought expressly within it, as it is in sub-s. (3) in the case of a stock-bar, or regulations have been made by the Secretary of State to deal with it. The Secretary of State has made no regulations.

Counsel for the defendants argued that the wire was material in motion in the machine, and therefore did not come within the obligations of the Act. In order to overcome that argument, counsel for the plaintiff sought to divide the wire into two parts: viz., the pulling part which was pulling the wire through the hole and which, he said, was temporarily part of the machinery, and the part on the other side which was being pulled into the hole and which, he said, was the material which was being worked on. I am afraid that that is much too fine a distinction for the court to adopt. The truth is that the whole piece of wire was being worked on in this machine. It had to be reduced by 1/32nd of an inch. It was material in the machine and not part of the machinery. The Act does not require material to be fenced. It is left to the common law.

If that be right, no further question arises. I would only say, though, that, if this wire could be considered as part of the machine, I myself should have regarded it as a dangerous part. But we are bound by the House of Lords' decision to hold that it is not part of the machine. The only obligation is at common law, and, the plaintiff not having proved negligence at common law, the action must fail and she must be left to her remedies under the Industrial Insurance provisions. I think that the appeal should be allowed.

MORRIS, L.J.: I have reached the same conclusion. The principal point involved is one of the construction of s. 14 (1) of the Act and of the application of that section to the facts found by the learned judge. I think that counsel for the defendants is right when he says that it is helpful to look at s. 14 as a whole, including the last paragraph, whether that paragraph be thought to be a part of sub-s. (3) or not. It seems to me that the decision in *Nicholls v. Austin (Leyton), Ltd.* (1) really binds us in this case. The facts there were somewhat different, the injury occurring when a piece of wood flew out of a circular saw in use. LORD SIMONDS said ([1946] 2 All E.R. at p. 98):

"The first question is, I think, correctly stated in the appellant's case in these words: Whether the words 'every dangerous part' referred to in the Factories Act, 1937, s. 14, refer only to parts which are directly dangerous by reason that the part itself is liable to cause injury so that such parts only are required to be fenced by the said section, or whether the said words 'every dangerous part' includes parts which are indirectly dangerous in that they are liable to throw out material with such force that the material is liable to cause injury to the worker so that such parts also are required to be fenced by the said section."

He answered that question in these words (*ibid.*):

"My Lords, I have no doubt that this question should be answered by saying that the words 'every dangerous part' in their context refer only

A to parts which are directly dangerous by reason that the part itself is liable to cause injury."

He said further on (ibid.):

B "Finally, the concluding words of s. 14, which might well be in a separate section, confirm this view. For the Secretary of State is thereby authorised 'as respects any machine or any process in which a machine is used' to make regulations requiring the fencing of materials or articles which are dangerous while in motion in the machine. Here a clear distinction is drawn between dangerous parts of the machine and materials or articles. The authority would be superfluous if the danger apprehended by sub-s. (1) included danger not only from contact with a dangerous part but also from the materials which it might discharge."

C Counsel for the plaintiff has sought to distinguish that case from the present by submitting that here there was no discharge of a part of something passing through a machine and that the wire itself became part of the machinery. He submitted that force was necessary to draw the wire through that part of the die where the reducing process took place: that some traction of the wire was D therefore necessary, and that the wire which had passed through the die and was on the drum formed a part of the machine because that wire had to draw the wire that still remained to pass through the die. It is difficult to know where that submission would stop, because wire near to the die which had not passed through it could be said to be performing the function of drawing the wire which was still further away from the die.

E It seems to me that the suggested distinction is unreal and artificial, that the reasoning in *Nicholls v. Austin (Leyton), Ltd.* (1) based on the construction of the words found in s. 14 (1) cannot be distinguished. I think that the appeal succeeds. I agree with what my Lord has said as to the other part of the case.

F PARKER, L.J.: I agree. I think the reasoning of their Lordships in *Nicholls v. Austin (Leyton), Ltd.* (1) negatives any liability on the part of the defendants in this case, unless the true view be that the wire which caused the injury and death was itself part of the machine. Counsel for the plaintiff, in his very able argument, put the matter in two ways. He said, first, that this wire was firmly attached to the machine and, secondly, that, not only was it attached, but that, when attached, it performed part of the function of the machine itself. G It seems to me that the mere fact that material is firmly attached to a machine cannot make it part of the machine. Indeed, if that were so, the provision in s. 14 (3) in regard to the stock-bar would be quite unnecessary.

H Counsel puts the second proposition in this way, that, so soon as any part of the length of wire has come through the die, it performs the function of haulage, a function of the machine itself. I feel quite unable to divide up the wire in that way as partly raw material and partly performing the function of the machine. It seems to me that the true view is that this machine is dealing with a length of wire, fifty feet, or whatever it may be; and that the drum itself (which undoubtedly is part of the machine) is pulling that fifty-foot length of wire through the die, and at the same time winding it into a coil, in which form it will be removed from the machine and stored. Reluctantly I feel that this I appeal must be allowed.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *E. P. Rugg & Co.*, agents for *Buller, Jeffries & Kenshole*, Birmingham (for the defendants); *Rivington & Son*, agents for *Rabnett, Conway & Co.*, Birmingham (for the plaintiff).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

JOHNSON AND OTHERS *v.* COMMISSIONER OF
STAMP DUTIES.

COMMISSIONER OF STAMP DUTIES *v.* JOHNSON
AND OTHERS.

PERPETUAL TRUSTEE CO. (LTD.) *v.* COMMISSIONER OF
STAMP DUTIES.

FORSTER AND ANOTHER *v.* COMMISSIONER OF
STAMP DUTIES.

[PRIVY COUNCIL (Viscount Simonds, Lord Oaksey, Lord Reid, Lord Keith of Avonholm and Lord Somervell of Harrow), November 22, 23, 24, 28, 1955, January 31, 1956.]

Privy Council—Australia—New South Wales—Death duty—Interest limited to cease on death—Interest in property within and outside New South Wales—Validity of relevant statutory provisions—New South Wales Stamp Duties Act, 1920-1952, s. 102 (2) (g), (2A)—New South Wales Constitution Act, 1902 (No. 32), s. 5.

Section 102 (2) (g) of the New South Wales Stamp Duties Act, 1920-1952, extends only to property within New South Wales. It has sufficient relevant territorial connection, therefore, with New South Wales and is not beyond the legislative powers conferred by the New South Wales Constitution Act, 1902, s. 5, on the legislature of that state (see p. 508, letter C, post).

Comr. of Stamp Duties (New South Wales) v. Millar (1932) (48 C.L.R. 618) and *Broken Hill South, Ltd. v. Comr. of Taxation (New South Wales)* (1937) (56 C.L.R. 337) approved.

Dictum of LORD LOREBURN, L.C., in *Winans v. A.-G.*, [1910] A.C. at p. 30 applied.

Section 102 (2A) of the New South Wales Stamp Duties Act, 1920-1952, purported to impose duty on property outside New South Wales where the deceased died domiciled in that state and where the property would be liable if it were inside New South Wales; as there was no way of splitting the enactment so as partly to be good and partly to be bad, and as it was not legitimate to read into the enactment words limiting liability for the duty to persons inside New South Wales, the enactment was wholly bad. Moreover, the enactment was not saved by s. 144 of the Act which provided against so construing the Act that its provisions should exceed the legislative powers of the state (see p. 512, letters A to C, post).

Carter v. Potato Marketing Board (1951) (84 C.L.R. 460) and *Newcastle & Hunter River Steamship Co., Ltd. v. A.-G. for the Commonwealth* (1921) (29 C.L.R. 357) distinguished.

A testator, who was domiciled in New South Wales, died on Aug. 20, 1936. By his will he directed that his real and personal estate should be sold and, after the usual administrative provisions, provided that his residuary estate should be held on trust to pay one-third of the income thereof to his wife during her life and subject thereto on various trusts for the benefit of his children and their issue. On Dec. 8, 1952, the testator's widow died, being then domiciled in New South Wales.* At the date of the widow's death the testator's residuary estate comprised real property in New South Wales, and personal property some of which was in New South Wales and some of which was outside New South Wales in Victoria. At that date two of the three trustees were domiciled in New South Wales and the third, a limited company, was incorporated and carried on business in that state.

* The domicile of the life tenant at her death, however, made no difference to the principle on which the case was decided; see *Perpetual Trustee Co. (Ltd.) v. Comr. of Stamp Duties*, p. 512, letter E, post.

A The testator's children were domiciled and resident in New South Wales. The Commissioner of Stamp Duties included in the dutiable estate of the widow the whole of the assets of the estate of the testator to the extent to which a benefit accrued or arose by cesser of the interest therein of the widow limited to cease on her death. He acted by virtue of the New South Wales Stamp Duties Act, 1920-1952, s. 102 (2) (g), as extended by s. 102 (2A)* of that Act, and he valued the benefit at one-third of the principal value of the assets and treated the one-third as an estate by itself.

B **Held:** such of the assets as were situate at the date of the widow's death in New South Wales were liable to duty by virtue of the New South Wales Stamp Duties Act, 1920-1952, s. 102 (2) (g); but the personal property situate in Victoria was not liable to duty, because s. 102 (2A) was invalid to charge such property with duty.

C Appeals and cross-appeal dismissed.

[As to the validity of extra-territorial legislation of the States of the Commonwealth of Australia, see 5 HALSBURY'S LAWS (3rd Edn.) 475, para. 1052.]

Cases referred to:

- D (1) *A.-G. v. Australian Agricultural Co.*, (1934), 34 S.R. (N.S.W.) 571.
 (2) *Comr. of Stamp Duties (New South Wales) v. Millar*, (1932), 48 C.L.R. 618.
 (3) *Comr. of Stamp Duties (New South Wales) v. Perpetual Trustee Co., Ltd.* (*Watt's Case*), (1926), 38 C.L.R. 12.
 (4) *Vicars v. Comr. of Stamp Duties (New South Wales)*, (1945), 71 C.L.R. 309.
 (5) *Broken Hill South, Ltd. v. Comr. of Taxation (New South Wales)*, (1937), 56 C.L.R. 337.
 E (6) *Winans v. A.-G.*, [1910] A.C. 27; 79 L.J.K.B. 156; 101 L.T. 754; 21 Digest 5, 1.
 (7) *R. v. Poole, Ex p. Henry (No. 2)*, (1939), 61 C.L.R. 634.
 (8) *Carter v. Potato Marketing Board*, (1951), 84 C.L.R. 460.
 (9) *Newcastle & Hunter River Steamship Co., Ltd. v. A.-G. for the Commonwealth*, (1921), 29 C.L.R. 357.

F Appeals.

Appeals by trustees of wills from orders of the Supreme Court of New South Wales, dated Apr. 20, 1955, on three Cases Stated by the Commissioner of Stamp Duties for New South Wales. In the first case (*Johnson and Others v. Comr. of Stamp Duties*), there was also a cross-appeal by the commissioner against the order of the Supreme Court. The facts of the first case (*Johnson and Others v. Comr. of Stamp Duties*) appear in the judgment of the Board. The facts of the other two cases, the appeal by Brady's Trustee (*Perpetual Trustee Co. (Ltd.) v. Comr. of Stamp Duties*) and the appeal by Forster's Trustees (*Forster and Another v. Comr. of Stamp Duties*) were similar to those in the first case, the differences being noted in the judgment of the Board at p. 512, letters D and F, post, respectively.

H *Sir Garfield Barwick, Q.C.*, and *K. S. Jacobs* (both of the Australian Bar) for the appellants in each case and the respondents on the cross-appeal.

G *The Solicitor-General for New South Wales (H. W. Snelling, Q.C.)*, *R. Else Mitchell, Q.C.*, and *K. J. Holland* (all of the Australian Bar) for the respondent in each case and the appellant on the cross-appeal.

I **LORD KEITH OF AVONHOLM:** These appeals raise certain questions as to the validity of assessments to death duty made by the Commissioner of Stamp Duties under the Stamp Duties Act, 1920-1952, of the State of New South Wales. The Supreme Court of New South Wales, on Cases Stated by the commissioner, in the first case in part upheld and in part rejected the assessment, and in the other two cases upheld the assessments in whole. The judgment of the court in the first case determined the result in the other two cases.

* The text of these is printed at pp. 505, 506, post.

Appeal by Johnson's Trustees

The material facts can be briefly stated. Frank Johnson (hereinafter called the testator) died on Aug. 20, 1936, being then domiciled in the State of New South Wales and leaving property within that state. Probate of his will and three codicils thereto was granted on Dec. 29, 1936, to the appellants, the executors named in the will and codicils and the present trustees thereof. By his will, the testator, after the bequest of certain pecuniary legacies, gave, devised and bequeathed all his real and personal estate on trust to sell, with power to postpone; to pay his debts, funeral and testamentary expenses, State Probate, Federal Estate and all other duties and the said legacies; to invest and to stand possessed of the investments and to hold the net income from the residuary estate on trust to pay one-third of the income to his wife, Sarah Johnson, during her life, and to divide the residue of the income (including, after the death of his wife, the income to which she was entitled) into four equal parts, and to hold such income on trust to pay one of such parts to each of his four children for life, with gifts over of the income of a child dying before the distribution of the residuary estate, and on trust as to the corpus of the residuary estate for such of the issue of the four children of the testator as should be living at the death of such children respectively and should attain the age of twenty-one years, in equal shares per stirpes as tenants in common.

The said Sarah Johnson (hereinafter called the deceased) died on Dec. 8, 1952, being then domiciled in the State of New South Wales and leaving property within the said state. At the date of the death of the deceased, the executorial duties in respect of the estate of the testator had been carried out, and the residuary estate vested in the appellants (excluding real estate in Queensland which is not affected by this appeal) comprised real estate in New South Wales, valued at the date of death of the deceased at £15,000, and personal estate consisting of shares in public companies and Commonwealth Inscribed Stock and debts due by a proprietary company to the appellants. The total value of the said property and assets at the date of death of the deceased was £97,639 14s. 9d. It is unnecessary to particularise further the personal estate beyond saying that part of it was located in New South Wales and part in the State of Victoria. At the date of the death of the deceased, two of the appellants, namely, George Johnson and George Edgerley Johnson, were domiciled and resident in the State of New South Wales. The third appellant, Perpetual Trustee Co. (Ltd.), was incorporated and carried on business in the said state. The children of the testator were all living at the date of the death of the deceased and, in consequence of her death, are each entitled for their respective lives to one-fourth of the income of the estate of the testator, having previously been each entitled to one-fourth of two-thirds of the said income. The children are all domiciled and resident in the State of New South Wales.

On the basis of these facts, the commissioner included in the dutiable estate of the deceased the whole of the property and assets of the estate of the testator to the extent to which a benefit accrued or arose by cesser of the interest therein of the deceased limited to cease on her death, and valued such benefit at one-third of the principal value of the said property and assets, namely, after a certain immaterial adjustment, £32,297. For the purpose of assessing death duty on the estate of the deceased, the commissioner treated the said property and assets, to the extent to which a benefit accrued or arose by cesser of the interest therein of the deceased, as an estate by itself, and separately assessed duty thereon in the sum of £3,633 8s. 3d.

The Commissioner of Stamp Duties stated the following questions for the determination of the Supreme Court:—(i) Whether any part of the property included in the estate of the testator in which Sarah Johnson had an interest limited to cease on her death was liable to duty under and by virtue of the provisions of the Stamp Duties Act, 1920-1952? (ii) If the answer to question (i)

A be in the affirmative—(a) what part of such property was liable to duty as aforesaid? (b) what was the value attributable to such part thereof for the purpose of assessing death duty thereon in accordance with the provisions of the said Act?

B The Supreme Court answered the questions as follows: (i) Yes; (ii) (a) Such of the said property as was situate at the date of the death of Sarah Johnson in the State of New South Wales; and found it unnecessary to answer (ii) (b). Against this judgment, the trustees of the will of Frank Johnson have appealed, and the Commissioner of Stamp Duties has cross-appealed, to their Lordships' Board.

C The deceased died on Dec. 8, 1952, and the New South Wales Stamp Duties Act, 1920-1952, is the relevant statute. It will be convenient to set forth some of the most relevant provisions of the Act. These run as follows:

D " 101D. (1) In the case of every person who dies after the commencement of the Stamp Duties (Amendment) Act, 1939, whether in New South Wales or elsewhere, and who was at the date of his death domiciled in New South Wales, duty (hereinafter called death duty) at the rates mentioned in Sch. 7 to this Act, shall subject to this section be assessed and paid upon the final balance of the estate of the deceased as determined in accordance with this Act . . .

E " 101E. In the case of every person who dies after the commencement of the Stamp Duties (Amendment) Act, 1939, whether in New South Wales or elsewhere, and who was at the date of his death domiciled outside New South Wales, duty (hereinafter called death duty) at the rate or rates mentioned in Sch. 8 to this Act shall be assessed and paid upon the final balance of the estate of the deceased as determined in accordance with this Act . . .

F " 102. For the purposes of the assessment and payment of death duty but subject as hereinafter provided, the estate of a deceased person shall be deemed to include and consist of the following classes of property:—

G " (1) (a) All property of the deceased which is situate in New South Wales at his death. And in addition where the deceased was domiciled in New South Wales all personal property of the deceased situate outside New South Wales at his death . . . to which any person becomes entitled under the will or upon the intestacy of the deceased, except property held by the deceased as trustee for another person under a disposition not made by the deceased.

H " (2) . . . (g) (i) Any property in which the deceased or any other person had, at any time either before or after the commencement of the Stamp Duties (Amendment) Act, 1952, an estate or interest limited to cease on the death of the deceased or at a time determined by reference to the death of the deceased (in this Act referred to as the 'limited interest') to the extent to which a benefit accrues or arises by cesser of the limited interest, whether or not the limited interest has been surrendered, assured, divested or otherwise disposed of, whether for value or not, to or for the benefit of a person entitled to an estate or interest in the property in remainder or reversion expectant upon the determination of the limited interest: Provided that where the limited interest was so surrendered, assured, divested or disposed of not less than three years before the death of the deceased, and bona fide possession and enjoyment of the property was assumed immediately after the limited interest was so surrendered, assured, divested or disposed of, and thereafter retained to the entire exclusion of the person theretofore entitled to the benefit of the limited interest, and of any benefit to such person, whether enforceable or not, the property shall not be deemed part of the estate.

I "The value of the benefit accruing or arising from the cesser of the limited interest shall—(a) if the limited interest extended to the whole of the income

or benefits of the property, be the principal value of that property; and (b) if the limited interest extended to less than the whole of the income or benefits of the property, be the principal value of an addition to the property equal to the income or benefits to which the limited interest extended.

"In the application of this sub-paragraph to and in respect of a limited interest which is an annuity the property out of which or out of the income or proceeds of which the annuity is payable shall be deemed to be held for an estate or interest in remainder or reversion expectant upon the determination of the annuity . . .

"(2A) All personal property situate outside New South Wales at the death of the deceased, when—(a) the deceased dies after the commencement of the Stamp Duties (Amendment) Act, 1939; and (b) the deceased was, at the date of his death, domiciled in New South Wales; and (c) such personal property would, if it had been situate in New South Wales, be deemed to be included in the estate of the deceased by virtue of the operation of para. (2) of this section.

"105A. (1) Any property which is deemed to be included in the estate of any deceased person solely by virtue of the operation of s. 102 (2) (g) of this Act or of that sub-paragraph as extended in its application by para. (2A) of that section (in this Act referred to as 'non-aggregated property') shall not be aggregated with the balance of the estate of the deceased but shall be separately assessed and shall for that purpose be an estate by itself: Provided that the aggregate of all non-aggregated property included in the dutiable estate consequent upon the cesser of limited interests which were created by the same person shall be separately assessed and shall for that purpose be an estate by itself . . .

"114A. (1) Death duty separately assessed in respect of non-aggregated property shall constitute a debt payable to Her Majesty out of the non-aggregated property and such duty shall be paid accordingly out of the non-aggregated property by the person in whom the non-aggregated property is vested.

"(2) For the purpose of paying the duty the person in whom the non-aggregated property is vested, if a trustee, may raise the amount of the duty by mortgage or sale of the non-aggregated property.

"(3) The person in whom the non-aggregated property is vested shall not be liable for any duty in excess of the assets constituting the non-aggregated property.

"115A. (1) Death duty separately assessed in respect of non-aggregated property shall become due and payable on the assessment thereof by the commissioner, or if not duly so assessed within six months from the death of the deceased then on the expiration of that period of six months.

"(2) Such duty shall constitute, as from the death of the deceased, a charge upon so much of the non-aggregated property as is situated in New South Wales, but no such charge shall affect the title of a bona fide purchaser for value (whether before or after the death of the deceased) without notice.

"(3) In case the duty is not paid within the prescribed time the commissioner may apply to the Supreme Court, which may order that a sufficient part of the non-aggregated property so situated be sold and the proceeds of such sale applied in payment of the duty and of the costs consequent thereon.

"(4) Where any property has been sold under any such order the Supreme Court may make an order vesting the property in the purchaser . . .

"120. (1) Where any property which is or the value of which is included in the dutiable estate of a deceased person is vested in any person other than the administrator, the duty payable in respect thereof (other than death duty separately assessed in respect of non-aggregated property) shall be

A paid by the persons entitled thereto according to the value of their respective interests therein, to the administrator.

B “(2) Every person who as beneficiary, trustee, or otherwise acquires possession or assumes the management of any such property (including non-aggregated property), shall upon retaining the same for his own use, or distributing or disposing thereof, and in any case within three months after the death of the deceased, deliver to the commissioner a full and true account verified by oath of such property, together with a valuation thereof by a competent valuer: Provided that the time for delivering the account or valuation may be extended by the commissioner.

C “(3) Any person directed by this section to deliver an account of any property shall upon the assessment of the duty payable in respect thereof be liable to pay such duty (including death duty separately assessed in respect of non-aggregated property) and interest thereon at the rate of £8 per centum per annum from the date of the expiration of the period of six months after the death of the deceased or if administration has been first granted out of New South Wales, from the date of the expiration of the period of twelve months after the death of the deceased, and if a trustee may raise the same by mortgage or the sale of the property.

D “(5) In case the account and valuation is not lodged within the time abovementioned, or if the duty is not paid within one month after assessment, the commissioner or any person interested may apply to the Supreme Court, which may order that a sufficient part of such property be sold, and the proceeds of such sale applied in payment of the duty and of the costs consequent thereon.

E “(6) Where any property has been sold under any such order the Supreme Court may make an order vesting the property in the purchaser . . .”

F Their Lordships would observe that, while s. 102 (1) deals with property of the deceased to which any person becomes entitled by will or on intestacy of the deceased and so is property of which he died possessed, s. 102 (2) includes a large number of categories of dutiable estate (not set out above), consisting mainly of property of which the deceased had disposed, or rights which he had created in third parties, during his lifetime, or within three years of his death, without full consideration. Most, if not all, of these cases are familiar in corresponding British legislation and have been compendiously referred to in various cases in the Australian courts as notional property of the deceased. They are G cases which differ in origin and nature from the property described in s. 102 (2) (g), which need have been at no time the property of the deceased, and the limited interest in which will normally not have been created by the deceased.

The question at issue on the appeal may now be stated. To quote the words of the Supreme Court:

H “The legislature of New South Wales is a subordinate legislature. Its powers are to be found in the Constitution Act, 1902, s. 5* of which, so far as material, provides that:—‘The legislature shall subject to the provisions of the Commonwealth of Australia Constitution Act have power to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever.’ Legislation on any subject-matter which has no relevant territorial connection whatever with New South Wales falls outside I the power of the legislature of New South Wales (see *A.-G. v. Australian Agricultural Co.* (1) (1934) (34 S.R. (N.S.W.) 571), and *Comr. of Stamp Duties (New South Wales) v. Millar* (2) (1932) 48 C.L.R. 618).

“One must examine the Stamp Duties Act, therefore, to see whether there is a relevant nexus between the property dealt with in para. (g) and the State of New South Wales, bearing in mind that under para. (g) property

* I.e., of New South Wales.

is brought into the estate of the deceased whom, for convenience, we will call the life tenant, although, of course, para. (g) has a wider application than merely to cases where the deceased was a life tenant. It is brought in only for the purpose of it thereupon being segregated and treated as a separate estate; it is brought in wherever the life tenant died and wherever he was domiciled (ss. 101, 101E). It is so brought in wherever the remaindermen, or in the case of equitable estates, the trustee, resides or is domiciled, and without regard to the system of law by reference to which the instrument creating the limited interest or regulating the rights of the remaindermen was executed, or to which it owes its force, or by reference to which it would be administered. On these grounds it is said that no relevant connection with the State of New South Wales appears from the legislation."

On the question thus posed, the Supreme Court reached the conclusion that s. 102 (2) (g) extended only to property within New South Wales and that, so construed, it had sufficient relevant territorial connection with New South Wales to withstand the challenge of invalidity. In their Lordships' view, the Supreme Court were right. While the statute in its present form is the result of a period of growth through legislative amendments made on the original Act over a long period of years, the broad statutory scheme of the Act, as it now stands, seems fairly plain. The Act has regard first of all to persons dying domiciled in New South Wales and to persons dying domiciled outside New South Wales (s. 101D and s. 101E). By s. 102 (1), the estate of a deceased person is deemed to include and consist of (a) his property situate in New South Wales at his death and, in addition, (b) his personal property situate outside New South Wales at his death where he died domiciled in New South Wales. The person who is domiciled in New South Wales and the person who is not so domiciled are alike caught under (a), but the person who is not so domiciled escapes under (b). It would be a remarkable thing if the statute, when it comes to deal with the various very special categories of property brought in for purposes of death duty by s. 102 (2), cast the net wider than was done under sub-s. (1), by including under sub-s. (2) property inside and outside New South Wales, irrespective of whether the deceased died domiciled there or not. In their Lordships' view, this would be an unreasonable construction to place on the statute. That it was not so intended would, indeed, seem to follow from the addition of sub-s. (2A), which would be otiose if property under sub-s. (2) already included property inside and outside New South Wales. But, as regards para. (g), the matter is, in their Lordships' judgment, concluded by references in s. 102A, s. 105A and s. 112E to para. (g) "as extended in its application by para. (2A)". The only extension made by sub-s. (2A) was to bring in property situate outside New South Wales where the deceased died domiciled in New South Wales. The natural reading is that para. (g), of itself, is confined to property inside New South Wales. This view is in harmony with decisions of the High Court in Australia, when, dealing with other paragraphs of s. 102 (2), in *Comr. of Stamp Duties (New South Wales) v. Perpetual Trustee Co., Ltd. (Watt's Case)* (3) (1926) (38 C.L.R. 12), and *Vicars v. Comr. of Stamp Duties (New South Wales)* (4) (1945) (71 C.L.R. 309). In reaching their conclusion that the statute should be so read, their Lordships have found no occasion to invoke s. 17 of the Interpretation Act, 1897.

It is contended, however, that, even if para. (g) be limited to property within New South Wales, that is not sufficient to create a territorial nexus with New South Wales when regard is had to the subject-matter of para. (g). Everything, it is said, which is contemplated by para. (g) may take place outside New South Wales. The limited interest may be created outside New South Wales; the person with the limited interest may be a foreigner living outside New South Wales; he may hold the interest *pur autre vie*, that is of the deceased, who is

- A also living outside New South Wales; the trust administration and the remainderman may be outside New South Wales; the limited interest may be surrendered or disposed of outside New South Wales; and the only connection may be that the property has subsequently been brought into New South Wales before the death of the deceased. Their Lordships assume, however, that the property in which the limited interest was had can be clearly identified as being in New
- B South Wales at the death of the deceased. If so, there is, in their judgment, a sufficient territorial connection with New South Wales. It is the benefit derived through the property by the cesser of the life interest that is taxed and, if the property is inside the jurisdiction at the date of death, it is immaterial what are the circumstances attendant on the creation and enjoyment of the limited interest. The presence of property within a state's jurisdiction has always been
- C regarded as a cogent reason for recognising the right and power to tax that property. The property enjoys the protection of the state's laws and, in their Lordships' judgment, fiscal legislation taxing that property can be regarded as a law for the peace, welfare and good government of that state.

- Their Lordships were referred to several cases decided by the High Court of Australia dealing with this question. They find it sufficient to mention only
- D two. In *Comr. of Stamp Duties (New South Wales) v. Millar* (2), a provision of the Stamp Duties Act of New South Wales (now repealed) imposed death duty on shares of any company, registered or incorporated within or without New South Wales and carrying on mining, or agricultural, or timber, business in New South Wales, belonging to a deceased person. In the case in question, the deceased had died resident and domiciled outside New South Wales, and the company was incorporated out of, and had no share register within, that state. The court held by a majority of three to two that the enactment was not confined to companies whose sole business was in New South Wales, and that the enactment was beyond the legislative power of the state. The shares held by the deceased could not be regarded as situate in New South Wales, and what was taxed was not the advantage to the deceased from the operations of the company
- E in New South Wales but the whole value of the shares which might be due in part and, perhaps, entirely to operations conducted outside New South Wales. As expressed in the judgment of the majority, the legislature, in taxing the share out of the jurisdiction, had adopted (48 C.L.R. at p. 632)

- "a connection which is too remote to entitle its enactment to the description a law 'for the peace, welfare, and good government of New South
- G Wales'. . . Or, to state the matter in another way, although some connection between the shareholder and New South Wales may be discovered in the existence there of part of the company's undertaking, the enactment goes beyond legislating in respect of that connection."

- In contrast with this decision is the decision in *Broken Hill South, Ltd. v. Comr. of Taxation (New South Wales)* (5) (1937) (56 C.L.R. 337), where, in the matter
- H of certain income tax legislation of New South Wales, it was held that income tax on a foreign company in respect of interest on money secured by mortgage of property in New South Wales was within the constitutional power of the state legislature. LATHAM, C.J., said (*ibid.*, at p. 358):

- "The circumstance in respect of which the law operates must be something which really appertains to New South Wales",
- I and DIXON, J., said (*ibid.*, at p. 375):

"But it is within the competence of the state legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein of a liability to taxation or of any other liability".

In their Lordships' opinion, these judgments proceeded on the right principle and are in accordance with the conclusion which their Lordships have reached in

the present case. In this connection, their Lordships would also refer to a sentence in the speech of LORD LOREBURN, L.C., in *Winans v. A.-G.* (6) ([1910] A.C. 27), which was concerned with the imposition of estate duty under British legislation on bearer bonds situate in the United Kingdom belonging to a foreigner domiciled abroad. Referring to property in the United Kingdom, whether of a domiciled Englishman or of a foreigner, he said (*ibid.*, at p. 30):

"In both cases the property received the full protection of British laws—which is a constant basis of taxation—and can only be transferred from the deceased to other persons by the authority of a British court."

This passage is as applicable to a subordinate legislature like that of New South Wales as to a supreme legislature like the British Parliament.

Lastly, it was suggested that legislation that taxed property in the circumstances covered by para. (g) was contrary to the comity of nations. Their Lordships are aware of no comity that applies to such a case, even if such were a relevant consideration. But, here also, authority is against the appellants. In *Winans v. A.-G.* (6), LORD ATKINSON said (*ibid.*, at p. 31):

"There does not appear, a priori, to be anything contrary to the principles of international law, or hurtful to the polity of nations, in a state's taxing property physically situated within its borders, wherever its owner may have been domiciled at the time of his death. That principle is not, however, acted upon in the case of legacy and succession duties, wide as is the language of the statutes imposing them. In these cases the principle of *mobilia sequuntur personam* is applied."

LORD SHAW OF DUNFERMLINE expressed himself to a similar effect (*ibid.*, at p. 48):

"... I know no reason either under the law of nations, by the custom of nations, or in the nature of things why property within the jurisdiction of this country, possessed and held under the protection of its laws, should not, upon transfer from the dead to the living, pay the same toll which would have been paid by property enjoying the same protection but owned by a deceased British subject."

Cross-Appeal by the Commissioner of Stamp Duties

As already indicated, some of the personal property of the testator was outside New South Wales at the death of the deceased, and the Supreme Court have held that this is not dutiable estate. The commissioner relies on the terms of s. 102 (2A) as bringing this property into charge in respect that the deceased was, at the date of her death, domiciled in New South Wales. In their judgment, the Supreme Court say:

"In our opinion the suggested nexus is completely irrelevant, and, consequently, in so far as s. 102 (2A) purports to extend the operation of para. (g) it is, we think, invalid."

In their Lordships' opinion, the Supreme Court arrived at a right conclusion.

The case is not that of a deceased dying possessed of personal estate, or a case of a deceased who has given away property shortly before his death without valuable consideration. The deceased's only interest was a limited interest ceasing on her death, and it is not her estate that is brought into charge. If the presence of the property in the state at the death of the deceased is lacking, every other incident, or circumstance, associated with the limited interest may also find its place, as has already been exemplified, outside New South Wales. The domicile of a deceased within New South Wales at the date of his death is, in their Lordships' judgment, a quite insufficient ground by itself to make good the lack

A of any other connection with the state. In the succinct language of the Supreme Court:

“The case may be exemplified as being one in which a duty is levied on or in respect of the property ‘A’ because of the domicile in the jurisdiction of ‘B’.”

B The Solicitor-General referred to other sections of the Act, and particularly to s. 5, s. 114A, s. 115A and s. 120, to show that the legislature contemplated exacting the duty only against the property, or from the person in whom the property is vested, if within the jurisdiction, and that, accordingly, the provisions of sub-s. (2A) were not, in their practical effect, so drastic as to be beyond state competence. But no enactment can be enforced without effective jurisdiction to do so, and to make a virtue of necessity cannot save a bad enactment. C The enactment must be valid before it can be enforced.

Reliance was next placed on s. 144 of the Act, to save sub-s. (2A) in its application to para. (g), in those cases where some other element than domicile was present which would give a sufficient nexus with the state, such as the presence of the remainderman, or person in whom the property was vested, within the state. D Section 144 runs as follows:

“This Act shall be read and construed so as not to exceed the legislative power of the state to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.”

E Similar clauses have been considered in numerous cases in the Commonwealth and state courts of Australia, and in the United States of America. It has been said that they reverse the presumption that the legislature intended its will on any particular matter as expressed in the statute to operate in its entirety, and had no intention that something less should be law. So legislation found F partially invalid must be treated as distributable or divisible unless it appears affirmatively that it was not part of the legislative intention that so much as might have been validly enacted should become operative without what was bad (*R. v. Poole, Ex p. Henry (No. 2)* (7) (1939), 61 C.L.R. 634, per DIXON, J., at p. 651). Reliance was placed on two cases where this distributive, or divisible, principle was applied. In *Carter v. Potato Marketing Board* (8) (1951) (84 C.L.R. G 460), a Queensland statute imposed a penalty on any one who, inter alia, received potatoes from any person other than the Potato Marketing Board. The transaction in that case was carried on wholly in Queensland, and it came under the words of the enactment. The validity of the enactment was challenged as being an attempted impairment of the freedom of trade, commerce and intercourse among the states in respect that the general language of the enactment, given a literal application, would include transactions of inter-state commerce. The H statute, however, included a provision corresponding to s. 144, and it was held that the enactment was capable of receiving distributive effect so as to be valid in respect of intra-state trade, though it would be bad in so far as it interfered with inter-state trade. A similar decision was reached in *Newcastle & Hunter River Steamship Co., Ltd. v. A.-G. for the Commonwealth* (9) (1921) (29 C.L.R. 357), I in upholding the validity of a Commonwealth Navigation Act, in so far as it affected ships engaged in inter-state and foreign trade, though, in so far as it prescribed for ships engaged in domestic trade within the confines of one of the constituent states, it was in excess of the power of the Commonwealth Parliament.

In their Lordships' opinion, these cases are distinguishable. The elements of divisibility or distributiveness lay within the framework of the enactments. The enactments applied to all transactions of a particular kind and to all persons who engaged in such transactions, or prescribed requirements for all ships of defined categories. In certain cases coming within the enactments, no objection

could be taken to the validity of the legislation, if these had been the only type of case to which the enactment applied, though in other types of cases the enactment would be bad. In the present case, there is no scope for the application of any such distributive principle. The enactment* prescribes for only one thing, the imposition of duty on property outside New South Wales where the deceased dies domiciled in that state and the property would be liable if it were inside New South Wales. There is no way of splitting that up into good and bad in its application to para. (g). It is wholly bad. It applies solely to property outside New South Wales which, ex hypothesi, the domicile of the deceased in New South Wales is insufficient of itself to subject to charge. To invoke the presence in New South Wales of the person liable to the duty, in order to save the enactment in part, is to bring in something from outside the enactment, to write the enactment up rather than to read it down. This is a provision to confer taxing jurisdiction, and it is not legitimate to introduce into the subsection, to eke out its deficiencies, factors which are not already there. That, in their Lordships' judgment, is not a permissible way of applying s. 144. In their Lordships' judgment, the cross-appeal accordingly fails.

Appeal by Brady's Trustee

This also is a para. (g) case. It differs from the case of *Johnson's Trustees*, in that the whole property of the testator was, at the death of the holder of the limited interest, situated in New South Wales. It also differs in that the person in enjoyment of the limited interest (as to the whole of the testator's estate) died domiciled in England, though leaving property in New South Wales, and that some of the remaindermen are domiciled outside New South Wales. These latter differences do not affect the principles on which the case falls to be decided. The Supreme Court held that all the property of the testator was liable to duty, being all situated in New South Wales, and, for the reasons already given, their Lordships are of opinion that the Supreme Court were right.

Appeal by Forster's Trustees

The relevant facts here are similar to those in *Johnson's case*, except that all the property of the testator was, at the death of the holder of the life interest, situated in New South Wales. It follows that the whole of the property of the testator is liable to duty, as the Supreme Court has held.

The Board will humbly advise Her Majesty in the case of *Johnson's Trustees* that the appeal and cross-appeal should both be dismissed; and that, in the cases of *Brady's Trustee* and *Forster's Trustees*, the respective appeals should be dismissed. The appellants in the appeal and cross-appeal in the first of these cases must bear the costs of their respective appeals. The appellants in the other two cases must also pay the costs of their appeals, but their Lordships direct that, on taxation, these appellants' costs shall not be increased by the fact that, at the hearing, the appeal and the cross-appeal in the first case were heard at the same time.

Appeals and cross-appeal dismissed.

Solicitors: *Bell, Brodrick & Gray* (for the appellants in each case and the respondents on the cross-appeal); *Light & Fullon* (for the respondent in each case and the appellant on the cross-appeal).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

* I.e., s. 102 (2A) of the New South Wales Stamp Duties Act, 1920-1952, printed at p. 506, letter C, ante.

O'CONNOR v. ISAACS AND OTHERS.

[QUEEN'S BENCH DIVISION (Diplock, J.), January 19, 20, 23, 24, 1956.]

Justices—Jurisdiction—Acting without jurisdiction—Maintenance order—Wife's allegation of cruelty not proved but consent order for maintenance made—Husband committed to prison for failure to comply with order—Order discharged by Divisional Court—Action against justices for damages for false imprisonment and for sums paid to wife under order—Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 2, s. 3, s. 13.

Public Authority—Limitation of action—Action against justices for false imprisonment—Plaintiff committed to prison for failure to comply with maintenance order—Order made without jurisdiction—Last period of imprisonment ending in 1945—Order discharged in October, 1954—Action commenced in December, 1954—Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 2—Limitation Act, 1939 (2 & 3 Geo. 6 c. 21), s. 21 (1).

In August, 1941, the plaintiff's wife issued a summons against him under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, alleging that he had been guilty of persistent cruelty to her. The summons was heard by three justices of the Petty Sessional Division of Kingston-on-Thames who made an order, dated Aug. 18, 1941, whereby, after stating that persistent cruelty had not been proved but that the plaintiff had consented to an order, they ordered that the plaintiff should pay £1 5s. a week to the collecting officer for the use of the wife. The justices, having found that persistent cruelty was not proved, had no jurisdiction to make the order even by consent (and in fact the plaintiff had merely assented to the amount to be paid not to the payment being enforceable under a court order); and the order was bad on the face of it. The order was subsequently varied on several occasions between 1942 and January, 1954, by orders of the same and other justices of the same court. The plaintiff fell into arrears in respect of the payments to be made under the order and under some variations of the order, and was committed to prison for non-payment on three different occasions in the years 1942 to 1945 by justices of the Kingston bench. In all, he was in prison for 193 days (on one occasion he borrowed £5 and paid it under the order so as to secure an early release), being released on the last occasion on Oct. 19, 1945. On Oct. 6, 1954, the Divisional Court of the Probate, Divorce and Admiralty Division discharged the original order and the orders of variation, on the ground that they were made without jurisdiction. The plaintiff had paid a total of £971 3s. under the orders before they were discharged. On Dec. 21, 1954, the plaintiff issued a writ against all the justices of the Petty Sessional Division of Kingston-on-Thames who had sat on the bench when the original order, the orders of variation or the committal orders were made, claiming damages for false imprisonment and for acts done by the defendants without jurisdiction while sitting as justices. The damages were of two categories, viz., (a) general damages and loss of wages during the time of his imprisonment and money paid to secure release from imprisonment, and (b) damages for payments made by him pursuant to the orders made without jurisdiction. The justices relied, among other defences, on the Justices Protection Act, 1848*, and s. 21 (1)† of the Limitation Act, 1939.

Held: (i) the plaintiff had established a right of action at common law for false imprisonment against, in view of s. 3 of the Justices Protection Act, 1848, only those of the defendants who had made either the original

* The terms of relevant provisions of the Justices Protection Act, 1848, are printed at pp. 527, 528, post.

† The terms of s. 21 are set out at p. 531, letter H, post. The section has been repealed by the Law Reform (Limitation of Actions, etc.) Act, 1954, ss. 1, 8 (3), and Schedule, which came into force on June 4, 1954.

order of Aug. 18, 1941, or subsequent variations thereof under which the plaintiff had been imprisoned; and the plaintiff would have been entitled to damages for loss of wages or money paid to procure his release from imprisonment (see p. 530, letter E, post), but

(ii) the plaintiff's right of action was barred by s. 21 (1) of the Limitation Act, 1939, since the proviso to s. 2 of the Justices Protection Act, 1848, did not postpone the accruing of the plaintiff's causes of action until after the original order and variation orders had been quashed (as none of these orders was a "conviction" within that enactment) and since, apart from the question of the construction of s. 2, time would have begun to run for the purposes of s. 21 of the Act of 1939 from the dates of the acts of trespass constituting the false imprisonment (*Coburn v. Colledge* [1897] 1 Q.B. 702, applied; see p. 533, letter A, and p. 535, letter C, post).

(iii) section 2 and s. 13 of the Justices Protection Act, 1848, do not create any cause of action which does not exist at common law (see p. 527, letter I and p. 530, letter C, post), but s. 3 of that Act may do so (see p. 528, letter I, post).

(iv) in the absence of malice no cause of action lay for recovering from the justices damages in respect of moneys paid by the plaintiff pursuant to the original order and the variation orders (see p. 524, letter H, to p. 525, letter A, post).

Per CURIAM: at common law there were two possible causes of action against a justice of the peace for acts done as a justice. Against a justice acting within his jurisdiction the action was in the nature of an action for malicious prosecution (i.e., an action on the case), and malice was an essential ingredient of the cause of action. Against a justice acting outside his jurisdiction, the like cause of action involving malice would lie in an appropriate case, but the normal cause of action lay in trespass, viz., for false imprisonment or trespass to goods (see p. 524, letters C and F, post). *Morgan v. Hughes* (1788), 2 Term Rep. at pp. 231, 232, per BULLER, J., and *Taylor v. Nesfield* (1854), 3 E. & B. at p. 724 per ERLE, C.J., adopted.

Quaere whether, if malice had existed, an action would have lain for the recovery of the moneys paid under the original order and variation orders (see p. 525, letter C, cf. p. 526, letter C, post).

Gelen v. Hall (1857) (2 H. & N. 379) considered.

[**Editorial Note.** In the judgment in this case reference is frequently made to actions in trespass and actions on the case; the distinction between the two old forms of action is briefly discussed in 1 HALSBURY'S LAWS (3rd Edn.) 27, 28. In the course of his judgment DIPLOCK, J., incidentally refers to the question whether imprisonment for non-payment of maintenance wipes out the arrears in respect of which the commitment was made, and explains that the power of enforcing payment by imprisonment only exists in respect of sums which have fallen due since the last commitment. Thus, after one commitment, there is no remedy by imprisonment for the arrears due before it (see p. 518, letter I, post).

The repeal of s. 21 of the Limitation Act, 1939, which has been noted, did not affect its operation for the purposes of the present case; see Interpretation Act, 1889, s. 38 (2), 24 HALSBURY'S STATUTES (2nd Edn.) 229.

As to the protection afforded to justices acting without jurisdiction, see 26 HALSBURY'S LAWS (2nd Edn.) 282, para. 599; and for cases on the subject, see 38 Digest 88, 89, 647-655.

As to the liability of a justice for false imprisonment, see 33 HALSBURY'S LAWS (2nd Edn.) 41, para. 72.

For the Justices Protection Act, 1848, see 14 HALSBURY'S STATUTES (2nd Edn.) 801; for the Limitation Act, 1939, s. 21, see 13 HALSBURY'S STATUTES (2nd Edn.) 1180.]

A Cases referred to:

- (1) *Onepps v. Durden*, (1777), 2 Cowp. 640; 98 E.R. 1283; 38 Digest 90, 660.
- (2) *Pease v. Chaytor*, (1861), 1 B. & S. 658; 31 L.J.M.C. 1; 5 L.T. 280; *subsequent proceedings*, (1863), 3 B. & S. 620; 32 L.J.M.C. 121; 8 L.T. 613; 27 J.P. 309; 122 E.R. 233; 38 Digest 93, 694.

B

- (3) *Houlden v. Smith*, (1850), 14 Q.B. 841; 19 L.J.Q.B. 170; 15 L.T.O.S. 64; 14 J.P. 687; 117 E.R. 323; 38 Digest 84, 616.
- (4) *Morgan v. Hughes*, (1788), 2 Term Rep. 225; 100 E.R. 123; 38 Digest 91, 672.

C

- (5) *Taylor v. Nesfield*, (1854), 3 E. & B. 724; 23 L.J.M.C. 169; 23 L.T.O.S. 206; 18 J.P. 663; 118 E.R. 1312; 38 Digest 87, 642.
- (6) *Sommerville v. Mirehouse*, (1860), 1 B. & S. 652; 121 E.R. 857; sub nom. *Somerville v. Mirehouse*, 3 L.T. 294; 25 J.P. 21; 38 Digest 94, 696.
- (7) *Polley v. Fordham*, [1904] 2 K.B. 345; 73 L.J.K.B. 687; 90 L.T. 755; 68 J.P. 321; 38 Digest 127, 930.

D

- (8) *Everett v. Griffiths*, [1921] 1 A.C. 631; 90 L.J.K.B. 737; 125 L.T. 230; 85 J.P. 149; 38 Digest 78, 551.
- (9) *Kirby v. Simpson*, (1854), 10 Exch. 358; 23 L.J.M.C. 165; 18 J.P. 696; 156 E.R. 482; 38 Digest 87, 643.
- (10) *Gelen v. Hall*, (1857), 2 H. & N. 379; 29 L.T.O.S. 183; 21 J.P. 710; 157 E.R. 157; sub nom. *Gelan v. Hall*, 27 L.J.M.C. 78; 38 Digest 88, 645.
- (11) *Norton v. Monckton*, (1895), 43 W.R. 350; 38 Digest 91, 670.

E

- (12) *R. v. Swindon JJ.*, (1878), 42 J.P. 407; 33 Digest 428, 1411.
- (13) *R. v. Lancashire JJ.*, *Ex p. Tyrer*, [1925] 1 K.B. 200; 94 L.J.K.B. 331; 132 L.T. 382; 89 J.P. 17; 33 Digest 428, 1414.
- (14) *Brittain v. Kinnaird*, (1819), 1 Brod. & Bing. 432; 4 Moore, C.P. 50; 129 E.R. 789; 38 Digest 81, 582.
- (15) *Gray v. Cookson*, (1812), 16 East, 13; 104 E.R. 994; 38 Digest 81, 581.
- (16) *Polley v. Fordham* (No. 2), (1904), 91 L.T. 525; 38 Digest 127, 930.

F

- (17) *Board of Trade v. Cayzer, Irvine & Co.*, [1927] A.C. 610; 96 L.J.K.B. 872; 137 L.T. 419; Digest Supp.
- (18) *Coburn v. Colledge*, [1897] 1 Q.B. 702; 66 L.J.Q.B. 462; 76 L.T. 608; 32 Digest 339, 229.
- (19) *Musurus Bey v. Gadban*, [1894] 2 Q.B. 352; 63 L.J.Q.B. 621; 71 L.T. 51; 32 Digest 347, 306.

G

- (20) *Read v. Brown*, (1888), 22 Q.B.D. 128; 58 L.J.Q.B. 120; 60 L.T. 250; 1 Digest 13, 107.
- (21) *Monckton v. Payne*, [1899] 2 Q.B. 603; 68 L.J.Q.B. 951; 81 L.T. 204; 32 Digest 332, 177.

Action.

H In this action the plaintiff, John O'Connor, claimed damages against several defendants, all of whom were or had been justices of the Petty Sessional Division of Kingston-on-Thames in the county of Surrey. The action was originally brought against fourteen defendants, but, since the issue of the writ, one of the defendants had died and the action was discontinued against two others. The facts and the nature of the claim appear in the judgment.

I

N. R. Fox-Andrews, Q.C., and *R. L. Bayne-Powell* for the plaintiff.
G. G. Baker, Q.C., and *D. M. Wachter* for the defendants.

Cur. adv. vult.

Jan. 24. **DIPLOCK, J.:** This is an action brought by the plaintiff against a number of justices who are members of the Petty Sessional Division of Kingston-on-Thames in the county of Surrey, in respect of acts done by them over a period of some thirteen years, allegedly without jurisdiction, and arising out of summary matrimonial proceedings instituted by the plaintiff's wife, Annie O'Connor, by a summons dated Aug. 5, 1941. It is an important case; important not

only to the plaintiff who, as a result of these proceedings, spent 193 days in prison, to which, it is common ground, he was not liable, but important also from the public point of view, because the plaintiff seeks to make personally liable a number of justices as a result of a perfectly bona fide mistake of law made by them, or by three of them, or, more accurately, by their clerk, when the original proceedings were brought as long ago as August, 1941. The question of law which I have to consider in this case is whether any of those justices is personally liable to the plaintiff in respect of his imprisonment and in respect of sums of money which he paid to his wife over a period of thirteen years in consequence of the original order and orders varying it made by them.

The facts of the case are not in dispute, except in a minor respect. On Aug. 5, 1941, Annie O'Connor, the wife of the plaintiff, took out a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, alleging that he had been guilty of persistent cruelty to her and asking for a separation and maintenance order. The hearing of that summons took place on Aug. 18, 1941, and it is common ground that the justices who then sat, who are the first three defendants, found that the allegation of persistent cruelty was not proved. This, indeed, appears on the face of the order which was drawn up by them and signed by the first defendant on Aug. 18, 1941, and which reads as follows:

"Annie O'Connor, wife of John O'Connor (hereinafter called the defendant) having made a complaint that the defendant had been guilty of persistent cruelty to her, his said wife And the defendant having appeared, and persistent cruelty not having been proved but the said defendant having consented to an order It is this day ordered and adjudged that the said Annie O'Connor be no longer bound to cohabit with the defendant; and that the defendant do pay to J. Sackville Bell, collecting officer, for the use of his said wife the weekly sum of £1 5s., the first of such payments to be made on Monday, Aug. 25, 1941, and subsequent payments to be made on every Monday for each succeeding week until this order be altered, varied or discharged in due course of law; and that the defendant do pay for the costs of the court, the sum of 10s. 6d."

It is conceded that on that finding that persistent cruelty had not been proved the justices had no jurisdiction to make an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, it being a condition precedent to their right to make an order that the husband should have been guilty of one of the matrimonial offences which are set out in s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, one of which is persistent cruelty, and that being the one that was relied on.

The order in itself shows that there was no jurisdiction. It is an order that is bad on its face, and where an order is bad on the face of it, it ceases to have the advantage which orders, although made without jurisdiction but good on their face, have, namely, that they are valid and are to be treated as valid until they have been set aside. Authority for that proposition is to be found in a number of old cases, of which I would refer to *Crepps v. Durden* (1) (1777) (2 Cowp. 640), which was a case under the Sunday Observance Act, 1677 (29 Car. 2 c. 7), where a baker was convicted and was awarded three penalties of 5s. each for carrying on the trade of a baker on a Sunday, those offences being alleged to have been committed on the same Sunday. The court held that under the Act there could be only one offence of carrying on one's trade on the same Sunday. The conviction on its face showing three offences, the court held that it was bad on the face of it. To quote from a passage in the judgment of LORD MANSFIELD (2 Cowp. at p. 647):

"... it is illegal on the face of it; and therefore, as was very rightly admitted by the counsel for the defendant in the argument, if put upon the record by way of plea, would have been bad, and on demurrer must have been so adjudged."

A The next case to similar effect is *Pease v. Chaytor* (2) (1861) (1 B. & S. 658), which was a church rate case. That was a case where a distress warrant had been issued against the plaintiffs for non-payment of church rate. Under the procedure available the plaintiff had disputed the rate, and the justices had in those circumstances no jurisdiction to issue a warrant of distress for the rate while the matter was under dispute. There again it was held, there being a bona fide dispute as to the church rate, and it so appearing on the record, that the justices were not protected.

B The third case to which I desire to refer is *Houlden v. Smith* (3) (1850) (14 Q.B. 841). This was a case, not against justices, but against a county court judge, and it is of some importance in relation to some matters which I shall have to discuss later to note that the principle as respects justices is no different from the principle as respects a county court judge. The defendant was judge of the County Court of Lincolnshire held at Spilsby, and the reason why he had no jurisdiction was that the plaintiff did not live within the jurisdiction of the county court. The headnote sets out the decision simply:

C “A judge of a court of record is answerable in an action for an act done by his command, when he has no jurisdiction and is not misinformed as to the facts on which jurisdiction depends.”

D The headnote then sets out the facts about the plaintiff living at Cambridge and not at Spilsby, and goes on:

E “Afterwards, while the plaintiff still dwelt and carried on business at Cambridge, a judgment summons was issued by order of the judge of the Spilsby Court, under s. 98 [of the County Courts Act, 1846,] calling upon the plaintiff to be examined as to his estate and effects; and, the plaintiff not appearing, the judge, knowing the facts, but believing, nevertheless, that he had authority, made an order that the plaintiff should be committed for his contempt. Held, that the commitment was without jurisdiction; and that, as the judge had ordered it under a mistake of the law and not of the facts, he was liable in trespass.”

F The law, therefore, appears to me to be clear that, where, as a result of a mistake of law, appearing on the face of the record itself, a justice or any judge of an inferior court assumes jurisdiction where he has no jurisdiction, he is liable in trespass for acts done as a result of that erroneous assumption of jurisdiction. Here it appears on the face of the record that the justices made the order without jurisdiction.

G The order purports to be made by consent: the words, “the said defendant having consented to an order”, are inserted. Whether or not the order was assented to by the defendant (that is, the plaintiff in the present case) is an issue of fact, and there is some slight dispute as to it. I do not think that that matter is relevant to the question of liability, although it might be a matter to be considered on the question of damages. It is, however, desirable that I should make my findings of fact on that matter.

H The consent, if it were given, was given now something like 14½ years ago. The justices do not pretend to remember what happened on that occasion, and indeed I should have been surprised if any of them had been able to come in the box and say that he or she did remember. The plaintiff gave a detailed account of what he said happened, which involved a suggestion that the justices had retired (I think that it was three times) before eventually saying to him that they had decided to make an order and could he afford to pay 25s. a week. I do not accept that story in full. I am satisfied that the justices thought there had been a consent to the order as recorded in the justices’ book, which was produced, and in the order itself. I think that what happened was that the justices, having heard the case and taking the view, sitting in a domestic court, that they should do their best for the parties to get a common-sense solution which would avoid

wrecking the marriage, expressed the view that the plaintiff ought to pay something to his wife. I think that he did tell them that he would pay 25s. a week, but it does not follow from that by any means that he consented to such payment being the subject of an order such as the justices in fact made. I think that it is necessary to draw attention to what the nature and effect of such an order is.

The order was made under the Summary Jurisdiction (Married Women) Act, 1895, as subsequently amended, and s. 9 of that Act provides:

"The payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation."

Section 4 of the Bastardy Laws Amendment Act, 1872, provides for the making of an order for the support of a bastard child, and entitles the justices in petty session

"... to make an order on the putative father for the payment to the mother of the bastard child, or to any person who may be appointed to have the custody of such child ... of a sum of money weekly ... for the maintenance and education of the child ..."

Then the section continued*:

"and if at any time after the expiration of one calendar month from the making of such order as aforesaid it be made to appear to any one justice, upon oath or affirmation, that any sum to be paid in pursuance of such order has not been paid, such justice may, by warrant under his hand and seal, cause such putative father to be brought before any two justices, and in case such putative father neglect or refuse to make payment of the sums due from him under such order, or since any commitment for disobedience to such order as hereinafter provided, together with the costs attending such warrant, apprehension, and bringing up of such putative father, such two justices may, by warrant under their hands and seals, direct the sum so appearing to be due, together with such costs, to be recovered by distress and sale of the goods and chattels of such putative father, and may order such putative father to be detained and kept in safe custody until return can be conveniently made to such warrant of distress, unless he give sufficient security, by ways of recognizance or otherwise, to the satisfaction of such justices, for his appearance before two justices on the day which may be appointed for the return of such warrant of distress, such day not being more than seven days from the time of taking any such security; but if upon the return of such warrant, or if by the admission of such putative father, it appear that no sufficient distress can be had, then any such two justices may, if they see fit, by warrant under their hands and seals, cause such putative father to be committed to the common gaol or house of correction of the county, city, borough, or place where they have jurisdiction, there to remain, without bail or mainprize, for any term, not exceeding three calendar months ..."

So the method of enforcement laid down by the Act is by sending the defendant who does not pay to gaol. Incidentally, that section did, I think, solve the problem on which Mr. Bell gave evidence of the practice of the court, that the imprisonment wiped out the liability for the arrears in respect of which the imprisonment was imposed, because the power of the justices was a power to send the defendant to prison where "any sum to be paid in pursuance of such order has not been paid", and then they might direct that he should be imprisoned in respect of "the sums due from him under such order, or since any commitment for disobedience to such order". So that the power of enforcing

* These words have been repealed by the Magistrates' Courts Act, 1952, s. 132 and Sch. 6, the replacing provisions material to the liability to imprisonment being ss. 74, 64.

A payment by imprisonment only existed in respect of sums which had fallen due since the last commitment under the order.

By s. 54* of the Summary Jurisdiction Act, 1879, the method of recovering sums due under a bastardy order was assimilated to the method of recovering fines imposed by the justices. Section 5* of that Act provided a scale of imprisonment for non-payment of fines. A distinction was drawn in the Summary Jurisdiction Act, 1879, between the method of recovering fines and the method of recovering a sum ordered to be paid by the justices in the exercise of their civil jurisdiction, which sum became a civil debt. A payment of a sum due under a bastardy order was not, however, a civil debt, but fell into the category of fines. It was, therefore, only recoverable by the special method laid down, and consequently when the sanction for recovering it had disappeared, **C** because recovery can be made only in respect of sums which had fallen due since the last committal order, the liability also disappeared.

What is important about that is the nature of the sanction. The order made by the justices was an order which imported those sanctions, viz., a liability to distress and imprisonment if the sums made payable under the order were not in fact paid. I am quite satisfied that the plaintiff never agreed to pay **D** the sum in a manner which would import sanctions of that kind. I therefore find as a fact that although he may have expressed his willingness to pay his wife 25s. a week, he did not consent to an order which would involve sanctions of that kind being imposed on him in the event of non-payment. In my view, as a matter of law, the question whether the plaintiff consented is irrelevant on the question of liability. He could not, by his consent, confer on the justices **E** jurisdiction to make an order of this kind. Furthermore, as to damages, it does not seem to me to be relevant to consider whether he expressed his willingness to pay 25s. a week to his wife at that time. In so far as it was an agreement with the justices to pay that sum, it must, I think, have been a nudum pactum, for there was no consideration. It is not alleged to have been an agreement with his wife to pay that sum, but, if it were alleged to have been such an agreement, it would appear equally, having regard to the circumstances at that time, **F** to have been a nudum pactum, because until then he had not failed to maintain her.

That mistake made by the justices who sat on Aug. 18. 1941, is the original error on which this action is based. I will run briefly through the subsequent history. On Apr. 14, 1942, the wife having by this time given birth to a child, **G** a summons for variation was issued, which came on for hearing on Apr. 27, 1942, and an order was made by the first and fourth defendants (the fourth defendant had not sat on the previous occasion) varying the order by increasing the amount to be paid from £1 5s. to £1 15s. a week, and then in brackets it is said: "being 10s. extra for the child". No order was made as to the custody of the child. **H** Quite apart from the initial lack of jurisdiction because no matrimonial offence had been committed, it seems to me that there was a further lack of jurisdiction in making an order for a payment in respect of the child, although the order itself is in a slightly ambiguous form. On the same day an order for committal was made for the sum of £8 of arrears due under the original order of Aug. 18, 1941. The order, I am told, although this does not appear on its face, was **I** suspended while instalments of arrears were paid by the plaintiff. In fact, he failed to pay those instalments or to keep up with them, and he was imprisoned from June 18, 1942, until June 29, 1942. That was not the full length of the imprisonment ordered under the warrant of commitment, because, as he told me, he bought himself out by borrowing from a friend a sum of £5. As a result of

* Now superseded by s. 64 of, and Sch. 3 to, the Magistrates' Courts Act, 1952; as regards the similar provisions for recovery of sums ordered to be paid under an affiliation order or other order enforceable as such, see 3 HALSBURY'S LAWS (3rd Edn.) 131 et seq.

the provisions of s. 3 (1)* of the Criminal Justice Administration Act, 1914, and of s. 12† of the Police, Factories, etc. (Miscellaneous Provisions) Act, 1916, there was statutory provision whereby the length of imprisonment was reduced proportionately to the amount paid of the total amount for the non-payment of which imprisonment was given. A

On Mar. 7, 1944, while the order as varied by the order of Apr. 27, 1942, was still in force, a fresh order for commitment was made in respect of £100 5s., being the arrears into which the plaintiff had fallen since his commitment to prison in 1942. The order was, as the previous one was, suspended while instalments were paid, but on July 28, 1944, the plaintiff having failed to keep up the instalments, he was imprisoned for three months, and he served the whole of that sentence, i.e., until Oct. 27, 1944. On May 23, 1945, a fresh order for commitment was made for £53 10s., which must have been additional arrears incurred since his release from prison in October, 1944, and on July 20, 1945, the plaintiff was again imprisoned for three months, and he served the whole of that time, i.e., until Oct. 19, 1945, which was the last date on which the plaintiff was imprisoned under this order and orders varying it. B C

The order was subsequently varied on three occasions. On June 26, 1951, the wife took out a summons for a variation of the order, and on July 9, 1951, on that summons, the amount for the wife under the order was not increased, but reduced to £1 from 25s. a week. On Aug. 2, 1951, the wife took out a further summons for variation, and on Aug. 13, 1951, the amount for the child was increased from 10s. to 15s., so that the aggregate amount was brought back to what it was before the order of July 9, 1951. On Nov. 30, 1953, the wife took out a further summons for variation, and on Jan. 4, 1954, the amount for the child was increased to £1. D E

These orders varying the original order of Aug. 18, 1941, were made by which-ever justices on the rota happened to be sitting when the application for variation was made; the variation orders were not made by all the justices who had made the original order.

Shortly after the order of Jan. 4, 1954, the husband took legal advice. He tells me that on a number of previous occasions he had consulted poor man's lawyers and welfare officers when in the Royal Air Force, and they all told him there was nothing that could be done about it. I am not surprised, as he told me that he had not in fact shown them the order. I should not have been very surprised if they had missed the point even if they had seen the order. However, by March, 1954, he had taken the advice of qualified lawyers who had seen the point, and on Mar. 17, 1954, he took out a summons to set aside the order as having been made without jurisdiction. On Apr. 5, 1954, the court held that it had no jurisdiction itself to set aside the order because of the limited powers under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, of varying and discharging orders, which by s. 7 are expressed to be exercisable on cause being shown on fresh evidence. Whether they were right or wrong in taking the view that their powers were so limited does not matter for the purposes of this case, because on Oct. 6, 1954, the plaintiff, who had taken the matter to the Divisional Court of the Probate, Divorce and Admiralty Division, obtained an order discharging the original order of Aug. 18, 1941, and each of the orders for variation which I have already recited, the Divisional Court having extended the time for the plaintiff to appeal against the orders. F G H I

There is one other matter to which I must refer in respect of the proceedings before the Divisional Court. It appears, as recorded in the order of the Divisional Court, which I have before me, that the husband undertook not to reopen the matter as to any payments made under the orders. I am told by the plaintiff, and I accept it, that that undertaking which was made in proceedings between

* Now replaced by s. 67 (2) of the Magistrates' Courts Act, 1952.

† Since repealed by the Criminal Justice Act, 1948, s. 83 (3) and Sch. 10, Part 1.

A the husband and wife was an undertaking not to reopen matters with the wife, and indeed I should, having regard to the surrounding circumstances, so construe the recital of the undertaking in the order itself.

The orders having been discharged in that way on Oct. 6, 1954, the plaintiff on Dec. 21, 1954, issued the writ in this action claiming damages for false imprisonment and for acts done by the defendants without jurisdiction while sitting as justices of the peace. A number of difficult issues of law are raised. The first is: What, if any, cause or causes of action are there against the defendants, or any of them? The second is: Against which defendant or defendants does each such cause of action lie? The third issue of law is: Which, if any, of such causes of action is barred by s. 21 of the Limitation Act, 1939? The fourth issue of law is: What damages, if any, is the plaintiff entitled to?

C I will deal first with the issue as to cause or causes of action. The damages claimed by the plaintiff are under two heads. The first is damages for false imprisonment, which is an action of trespass to the person. Under this head the plaintiff claims general damages and loss of wages during the time of his imprisonment, a figure which was agreed at £200, thus avoiding any necessity for considering the new problems arising in regard to tax. The second head **D** under which damages are claimed is for money paid in obedience to the order or orders of the court made without jurisdiction. He claims to recover from the justices the sums which he paid to his wife through the collecting officer of the court in obedience to the order or orders*.

Starting with the Constables Protection Act, 1750 (24 Geo. 2 c. 44), protection in gradually increasing degrees has been given to justices acting or purporting to act in the exercise of their functions. The original protection was extended by the Justices Protection Act, 1803 (43 Geo. 3 c. 141), and finally by the Justices Protection Act, 1848, which, in so far as it is unrepealed, governs the statutory position today. I shall have to look at these Acts, and particularly the Justices Protection Act, 1848, in some detail later, but I say now, in anticipation of that examination of the Acts, that it is, in my view, necessary to consider first what **F** the position was at common law, quite apart from any statutory protection. It was in that connection that I mentioned earlier *Houlden v. Smith* (3) which was the county court case where statutory protection does not apply.

At common law a sharp distinction was drawn between a justice who acted within and one who acted outside his jurisdiction. A justice who acted outside his jurisdiction had no protection. He was in the same position as any other **G** person. If he, or persons acting under his orders, committed a tort he could be sued. In considering the common law position it is always a good rule to fly first to BULLEN & LEAKE'S PRECEDENTS OF PLEADINGS (3rd Edn.) (1868), and there one will find, at p. 345, a count against justices for imprisonment, and the action is there set out in trespass. It is perhaps of some interest to note the way in which it is framed:

H "That the defendants were justices of the peace in and for the county of —, and the defendants purporting and assuming to act as such justices, but without any jurisdiction or authority in that behalf, caused the plaintiff to be assaulted and imprisoned, and to be kept and detained in custody until payment by him of a sum of £—, which the defendants had adjudged **I** the plaintiff to pay under and by virtue of a certain conviction before them, made by them without any jurisdiction or authority in that behalf, and which said conviction was afterwards quashed in due form of law upon the appeal of the plaintiff against the same; whereby the plaintiff was compelled to pay the said sum of £— in order to liberate himself from the said imprisonment and custody, and was also put to great costs and charges in and about

* In the particulars in the statement of claim the plaintiff alleged that he had paid sums amounting, in all, to £971 3s. under the orders.

appealing against the said conviction, and procuring the same to be quashed." A

It will be noticed that this is a claim founded in trespass.

In BULLEN & LEAKE'S PRECEDENTS OF PLEADINGS (3rd Edn.) the learned authors then refer to further counts (*ibid.*, at p. 346):

"Count against a justice of the peace for a malicious conviction . . .
Against a justice of the peace for maliciously procuring the plaintiff to be arrested on a charge of assault and committing him for trial . . . Count against justices for seizing plaintiff's goods under a distress warrant for church rates after notice to dispute the validity of the rate . . ." B

I pause to note that the learned authors of BULLEN & LEAKE'S PRECEDENTS OF PLEADINGS (3rd Edn.) deal in that passage with two kinds of action: a count for trespass of the person (the one which I have just cited), and a count for seizing the plaintiff's goods which is trespass to goods (*Pease v. Chaytor* (2)), and then two counts, one for malicious conviction and the other for malicious arrest. C

BULLEN & LEAKE'S PRECEDENTS OF PLEADINGS (3rd Edn.) are supported by a number of early reports, the first of which, in order of date, is *Morgan v. Hughes* (4) (1788) (2 Term Rep. 225). That was an action brought against a justice for committing the plaintiff to gaol without jurisdiction in what today, I think, would be called proceedings preliminary to indictment. The actual details of the case do not matter, but the judgment of BULLER, J., is an important one for the purposes of the present case. The count which was put was for D

" . . . falsely, unlawfully, wilfully, wrongfully, injuriously, maliciously, and without any charge or accusation having been made . . ." E

committing the plaintiff to gaol. It was argued on the case that this should have been a count in trespass, the justice having acted without jurisdiction, and it was so held by the court. BULLER, J., said (*ibid.*, at p. 231):

"The distinction between the actions of trespass and case has long been settled in the manner mentioned by my brother ASHHURST. The gravamen in the present case is, that the defendant personally took and arrested the plaintiff illegally, and imprisoned him; this is false imprisonment, and is an immediate injury to the person of the plaintiff. It is stated on the record, that the warrant was illegally granted, and it never was doubted but that in such a case trespass was the proper remedy. But even if an action on the case could be maintained here, this declaration cannot be supported. The grounds of a malicious prosecution are, first, that it was done maliciously; and, secondly, without probable cause. The want of probable cause is the gist of the action: but that is not stated here; for it should have been shewn on the face of the record, that the prosecution was at an end. Saying that the plaintiff was 'discharged' is not sufficient; it is not equal to the word 'acquitted', which has a definite meaning. Where the word 'acquitted' is used, it must be understood in the legal sense, namely, by a jury on the trial. But there are various ways by which a man may be discharged from his imprisonment, without putting an end to the suit." F

BULLER, J., then said (*ibid.*, at p. 232), and these words are important: G

"Neither is there any distinction between a malicious commitment and a malicious prosecution. The present is more like the case of an action for maliciously holding to bail than any other; in which case it must be shewn that there is an end to the suit. The process in a civil suit is merely to bring the party into court; and so here the warrant is to take up the party, that he may take his trial at the assizes." H

What BULLER, J., is there saying is that, where there is lack of jurisdiction, the action for trespass lies, assuming that the facts amount to trespass; that there I

A may be an action on the case, but if there is an action on the case, then, as in the case of malicious prosecution, malice is a necessary ingredient.

Again, in *Taylor v. Nesfield* (5) (1854) (3 E. & B. 724), ERLE, J., puts the matter very pithily. In that case the question in issue was whether the notice which had to be given under s. 9 of the Justices Protection Act, 1848, sufficiently showed the nature of the cause of action. The facts are stated as follows (*ibid.*):

B "The first count of the declaration was for assault and battery", that is to say, for trespass to the person.

"The second count charged that defendant, on Nov. 3, 1853, maliciously, and without reasonable or probable cause, issued a warrant under his hand and seal, for the apprehending of the plaintiff, and for bringing him before one or more of Her Majesty's justices of the peace for the county of Derby, to answer to a charge of assault, falsely alleged to have been made by the plaintiff upon one James Dove."

C The notice, which is set out in detail (*ibid.*, at pp. 725, 726), in effect alleged trespass to the person and did not contain the word "maliciously". ERLE, J., put the matter very succinctly (*ibid.*, at p. 730):

D "I also think that this notice is bad for not shewing what the defendant is charged with, and that the act charged was malicious. If the act of a magistrate is done without jurisdiction, it is a trespass; if within the jurisdiction, the action rests upon the corruptness of motive; and, to establish this, the act must be shown to be malicious."

E Thus it appears from those two cases, and from those referred to in BULLEN & LEAKE'S PRECEDENTS OF PLEADINGS (3rd Edn.) that there were two possible causes of action. Against a justice acting outside his jurisdiction the action was one of trespass. There was, however, another possible form of action available against a justice acting within his jurisdiction, and I apprehend also, from *Morgan v. Hughes* (4), available in appropriate cases against a justice acting outside his jurisdiction: that was an action in the nature of an action for malicious prosecution or malicious arrest, of which a necessary ingredient was malice.

F That the normal action against a justice acting without jurisdiction was trespass is supported also by certain cases cited by counsel for the defendants. I need only refer to *Sommerville v. Mirehouse* (6) (1860) (1 B. & S. 652) in which HILL, J., in the course of the argument, said (*ibid.*, at p. 657):

G "If anything had been done under the order it might be different: as soon as an invalid order is acted upon a trespass is committed."

A little earlier HILL, J., had referred to the other possible form of action in which malice is involved, and said (*ibid.*), quoting the rule*:

H "The broad line of distinction is this; that unless the duty of the magistrate is simply and purely ministerial, he cannot be made liable to an action for a mistake in doing or omitting to do any thing in the execution of that duty, unless he can be fixed with malice'."

So also in a more recent decision, *Polley v. Fordham* (7) ([1904] 2 K.B. 345), WILLS, J., said (*ibid.*, at p. 348):

I "It seems to me the act complained of is the distress and nothing else. No such thing was ever heard of as an action for making an order against a person without jurisdiction. If the order is not followed by consequences against the individual, it comes to nothing. Actions for illegal distress of one sort or another were at one time very common, but such actions were always actions of trespass. The form of the complaint used to be that the defendant had wrongfully entered the house or premises of the plaintiff

* See *Linford v. Fitzroy* (1849) (13 Q.B. 240, at p. 247), per LORD DENMAN, C.J.

and had done so and so. Then any question which arose about the warrant, the conviction, or order on which the erroneous proceedings by way of distress and entry were founded was raised on a defence setting up that it was justified because of the warrant and the conviction or order on which the warrant was founded. But the action itself was not for erroneous exercise of jurisdiction, but was for making a distress and breaking and entering a man's premises where there was no right to do so. No such action as that suggested by the respondent will be found in *BULLEN AND LEAKE*; in *CHITTY ON PLEADING*; or in any of the books of precedents."

I therefore reach the conclusion that the position at common law was that a justice acting without jurisdiction was liable in trespass for all wrongful acts done pursuant to his order. When a justice was acting erroneously although within his jurisdiction, no action against him lay, unless malice was alleged and proved. The action being akin to malicious prosecution was not an action of trespass. Although it started originally, I think, by a writ of malicious prosecution, it was in the nature of an action on the case. It is perhaps right that I should say that doubts have been expressed by no less a person than *VISCOUNT FINLAY* in a dictum in *Everett v. Griffiths* (8) ([1921] 1 A.C. 631), where he expressed the view (*ibid.*, at p. 666) that justices of the peace were not liable to be sued in respect of purely judicial acts within their jurisdiction, even if alleged to be malicious. It is, however, plain that in *Kirby v. Simpson* (9) (1854) (10 Exch. 358) the court assumed that such an action lay. The headnote will, I think, suffice for the present purposes:

"In an action against a magistrate for having, in the execution of his office, acted maliciously and without reasonable and probable cause, he is entitled to notice of action as required by [the Justices Protection Act, 1848], s. 9."

It is quite plain from the judgment of the court that they took the view that such an action would lie where a justice had acted maliciously. The same also appears from *Morgan v. Hughes* (4) and *Taylor v. Nesfield* (5), to which I have already referred.

I hold, therefore, that at common law an action for trespass would lie against justices acting without jurisdiction. Therefore, it would lie in respect of false imprisonment and in respect of distress for goods. Counsel for the plaintiff asks me to hold that it would also lie for money paid by the plaintiff pursuant to an order of the court although no steps had been taken to enforce that order by distress or by commitment. That is to say, counsel submits that a cause of action lies in respect of moneys which the plaintiff paid to his wife under the order of Aug. 18, 1941, and the subsequent variations.

At common law one cannot find in the reported cases any trace of an action of this kind lying in the absence of malice. I think one must ask oneself: What is the nature of the cause of action? Plainly it cannot be *indebitatus assumpsit* as money had and received, because the money was not received by the justices, it was paid to their collecting officer for the use of the wife, and it was money which was paid under a pure mistake of law, namely, that the order was a valid order, a mistake of law which was shared by the justices and by the plaintiff. The action, therefore, must be (to use the old phraseology, and I am looking at the old common law position) an action on the case in tort. Counsel for the plaintiff says quite frankly that he cannot find any precedent for this, but he asks me to hold that there is a general principle under which the plaintiff is entitled to recover. He put the principle in a way which I shall venture to paraphrase thus: if A. is clothed with an authority (which, I interpolate, is *ex hypothesi* limited) and in purported exercise of that authority he does something in relation to B. outside the limit of his authority, and the natural consequence of his act will be that B. will act to his detriment, A. is liable for any damage to B. resulting from his so acting. Although I have used rather different

A words from those which counsel used, I do not think that I have put unfairly the proposition of law which he asks me to say is good law.

I cannot accept so broad a proposition. None of us has been able to find any precedent for it, and I see great difficulty in finding a basis for it in principle or in analogy. If A., acting in perfectly good faith, orders B. to do something, **B** and B. does it, I know of no principle which makes A. liable for any damage suffered by B. as a result of doing it. It seems to me that it is *damnum absque injuria*. If a policeman, who has a limited authority, orders me to cross the road in circumstances where he has no right to do so, and I do so, and as a result of that I suffer damage, we both of us erroneously thinking he is entitled to give such an order to me, I cannot see any principle on which I should be entitled to **C** recover from the policeman the damage which I have suffered as a result of our mutual mistake of law. Now, if A. does it maliciously, then it may well be that an action will lie, whether or not he has the authority to give the order, although in *Gelen v. Hall* (10) (1857) (2 H. & N. 379) the court left open the question whether an action would lie.

D *Gelen v. Hall* (10) is interesting in this connection for two reasons. In that case the plaintiff was prosecuted, first, for failing to have a ticket, and, subsequently, for failing to produce it when demanded. The circumstances, briefly, were these. He had been asked to produce his ticket. Owing to the ticket machine being defective, the date on his ticket was wrong. Under the local Act he was taken before a justice and committed to the lock-up pending trial. The inspector in the meantime discovered that the machine was defective and **E** that, therefore, the ticket was all right, and the plaintiff was released from custody without having come to trial on that issue. He was, however, subsequently tried for failing to produce the ticket, there having been some discussion whether or not he would produce it at once. He brought an action, first, for false imprisonment in respect of his original commitment to the lock-up pending trial. The second count, which I take from the report (2 H. & N. 380), stated:

F "That the defendant . . . being one of the justices of the peace . . . did unlawfully and maliciously, and without reasonable and probable cause, take the information of one [P.W.] against . . . the plaintiff, for having . . . been guilty of a breach of a certain bye-law . . . of [the railway company] . . . And that the defendant . . . wilfully, maliciously **G** and without reasonable and probable cause, did issue a summons . . . directed to the plaintiff . . . and [on his appearing before the justices] wilfully, maliciously, and without any reasonable or probable cause, as the defendant well knew, did convict . . . the plaintiff . . . of the said offence . . ."

H and caused him to pay a sum of money to prevent him from being imprisoned. On appeal to quarter sessions the conviction was afterwards quashed. The plaintiff claimed as special damages (which shows some analogy to the claim of the plaintiff in the present case) the penalty which he had been compelled to pay in order to avoid the distress or commitment which would have followed had he not paid the penalty.

I I do not think it is necessary for me to deal with the first count, which was in trespass. As regards the second count, POLLOCK, C.B., who delivered the judgment of the court, said (*ibid.*, at p. 398):

"The second count was in respect of the conviction of the plaintiff on [Sept. 27] for not delivering up his ticket, and it alleges that the defendant convicted the plaintiff wrongfully, wilfully and maliciously, and without reasonable or probable cause, and that the plaintiff was thereby compelled to pay a sum of money, and that the conviction was afterwards quashed upon appeal to the quarter sessions. As to it a verdict was found for the

plaintiff for considerable damages. A rule was obtained on behalf of the defendant to set aside the verdict as being against evidence, and also to arrest the judgment on the ground that the second count discloses no legal cause of action. Upon the latter point we have bestowed much consideration, and we are not at present prepared to hold the count bad."

POLLOCK, C.B., then said that, in view of the fact that they were ordering a new trial, the less they said about it the better.

That is another case where malice was alleged. *Morgan v. Hughes* (4) also suggests that malice is a necessary ingredient; and the references in BULLEN & LEAKE'S PRECEDENTS OF PLEADINGS (3rd Edn.) at p. 346, also suggest that at common law no cause of action of the kind with which I am dealing, namely, to recover money paid under an order, existed unless malice could be proved. I therefore take the view that at common law the right of action in trespass for false imprisonment existed, but no right of action existed for the money paid.

That being the position at common law, it is now necessary to look at the statutes for two purposes: the first to see to what extent they create fresh causes of action which did not exist at common law; and the second to see to what extent they limit the common law causes of action. I can deal quickly with the earlier statutes, of which the first is the Constables Protection Act, 1750*. Section 1 of that Act required notice to be given before an action was brought against a justice for an act done within his jurisdiction. Section 2 provided for tender of amends. Section 4 made provision for payment into court. All these matters of minor protection related to acts done within the jurisdiction. Section 6 of the Act is not for the protection of the justices, but for the protection of constables who carried out warrants of arrest or commitment made by justices without jurisdiction, and, in effect, it provides that the justices be joined in the action and that, in the event of a warrant of a justice being proved to have been issued without jurisdiction, that should be a defence to the constable and judgment should be obtained against the justice. Section 7 related to malice, and provided:

" . . . that where the plaintiff in any such action against any justice of the peace shall obtain a verdict, in case the judge before whom the cause shall be tried, shall in open court certify on the back of the record, that the injury for which such action was brought, was wilfully and maliciously committed, the plaintiff shall be intitled to have and receive double costs of suit."

Then, finally, s. 8 created a limitation period of six calendar months after the act committed.

The Justices Protection Act, 1803 (43 Geo. 3 c. 141)†, related only to convictions made within the jurisdiction of the justices and to proceedings consequent on such convictions. Section 1 provided:

" . . . that in all actions whatsoever which shall, at any time after the passing of this Act, be brought against any justice or justices of the peace in the United Kingdom of Great Britain and Ireland, for or on account of any conviction by him or them had or made, under or by virtue of any Act or Acts of Parliament in force in the said United Kingdom, or for or by reason of any act, matter, or thing whatsoever, done or commanded to be done by such justice or justices, for the levying of any penalty, apprehending any party, or for or about the carrying of any such conviction into effect, in case such conviction shall have been quashed, the plaintiff or plaintiffs in such action or actions, besides the value and amount of the penalty or penalties which may have been levied upon the said plaintiff or plaintiffs, in case any levy thereof shall have been made, shall not be entitled to

* Sections 1-5, 7 of this Act were repealed and superseded by the Justices Protection Act, 1848, but s. 6 is still in force; s. 8 was repealed by the Statute Law Revision Act, 1948.

† This Act was repealed by the Justices Protection Act, 1848, s. 17.

A recover any more or greater damages than the sum of two-pence, nor any costs of suit whatsoever, unless it shall be expressly alleged in the declaration in the action wherein the recovery shall be had, and which shall be in an action upon the case only, that such acts were done maliciously and without any reasonable and probable cause."

B That section, which related only to convictions and the consequences thereof, and to convictions within the jurisdiction of the justices, did expressly provide that the action should in that event be an action on the case only, and that malice had to be declared and proved. Whether before that date a justice could be made liable in trespass for an act done within the jurisdiction without malice may be doubtful; it appears to be doubtful on the cases which I have cited.

C At any rate, from 1803 onwards in relation to convictions that position was clearly laid down by statute, whether or not it was declaratory of the common law. Then in s. 2 of the same Act there was a limitation as to the damages recoverable, which is reproduced in the Justices Protection Act, 1848, s. 13*, and on which, therefore, I need not pause at the moment.

D That brings me to the Justices Protection Act, 1848, parts of which have been repealed, but for the purpose of construing it I must look at it as on the day on which it was passed. The Act of 1848 was a consolidating and amending Act. Section 1 relates to acts done by justices within their jurisdiction. In effect, it replaces part of s. 1 of the Act of 1803, and extends it, not merely to convictions and acts consequent thereon, but to all acts done by justices within their jurisdiction. Section 1 of the Act of 1848 provides:

E "Every action hereafter to be brought against any justice of the peace for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done maliciously, and without reasonable and probable cause; and if at the trial of any such action, upon

F the general issue being pleaded, the plaintiff shall fail to prove such allegation, he shall be non-suit, or a verdict shall be given for the defendant."

It is, therefore, plain that, whether or not this was declaratory of the common law in respect of judicial acts (as I think it probably was), after 1848, an action against a justice for an act done within his jurisdiction, although it would in other circumstances have amounted to trespass, could not be brought in trespass, but could be brought in case only, and malice was a necessary ingredient of the action.

G Then in s. 2 of the Justices Protection Act, 1848, there is a provision, and a very important provision, for the protection of justices acting outside their jurisdiction. Section 2 reads:

H "For any act done by a justice of the peace in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction or order made or warrant issued by such justice in any such matter, may maintain an action against such justice in the same form and in the same case as he might have done before the passing of this Act, without making

I any allegation in his declaration that the act complained of was done maliciously, and without reasonable and probable cause . . ."

The words "in the same form and in the same case as he might have done before the passing of this Act" are important. Pausing there, I think that it is plain that this part of s. 2 was not intended to alter the common law rights or the nature of the common law cause of action. I draw attention to the fact that, in contradistinction to s. 1, which says that in future, where an action is brought

* See page 529, letter G, post.

against a justice acting within his jurisdiction the action shall be on the case, whatever it may have been in the past, s. 2 says that, where the justice is acting outside his jurisdiction, the person injured thereby may maintain an action "in the same form and in the same case as he might have done before the passing of this Act".

Then there is this proviso to s. 2 of the Justices Protection Act, 1848:

"Provided nevertheless, that no such action shall be brought for any thing done under such conviction or order until after such conviction shall have been quashed, either upon appeal, or upon application to Her Majesty's Court of Queen's Bench; nor shall any such action be brought for any thing done under any such warrant which shall have been issued by such justice to procure the appearance of such party, and which shall have been followed by a conviction or order in the same matter, until after such conviction or order shall have been so quashed as aforesaid; or if such last-mentioned warrant shall not have been followed by any such conviction or order, or if it be a warrant upon an information for an alleged indictable offence, nevertheless if a summons were issued previously to such warrant, and such summons were served upon such person, either personally, or by leaving the same for him with some person at his last or most usual place of abode, and he did not appear according to the exigency of such summons, in such case no such action shall be maintained against such justice for any thing done under such warrant."

That proviso, at which I shall have to look again when I come to the question of the period of limitation, makes it a fresh requirement which did not exist prior to the passing of the Act, that the action must not be brought until the conviction shall have been quashed. That, in effect, assimilates the law as to a conviction, when made without jurisdiction, to the law which existed previously as to a conviction good on its face. A conviction good on its face was a good answer to trespass until the conviction had been set aside. The proviso to s. 2 of the Act of 1848, apart from a question of the period of limitation, which I shall have to consider later, says that, even where the conviction is without jurisdiction, the action cannot be brought until the conviction is set aside. Therefore, in this case it was a necessary requirement that the plaintiff should be in a position to prove, as he has been, that the order was set aside. Note the transposition from the word "conviction" to "order" in this case, on which something may turn later*.

Section 3 of the Justices Protection Act, 1848, provides:

"Where a conviction or order shall be made by one or more justice or justices of the peace, and a warrant of distress or of commitment shall be granted thereon by some other justice of the peace bona fide and without collusion, no action shall be brought against the justice who so granted such warrant by reason of any defect in such conviction or order, or for any want of jurisdiction in the justice or justices who made the same, but the action (if any) shall be brought against the justice or justices who made such conviction or order."

That is a section which applies both where the justices are acting within and where they are acting without their jurisdiction. It alters the law in that it takes away a cause of action which would otherwise have existed against justices who granted a warrant of commitment on an invalid order, and it grants (and it may be that in some circumstances this is creating a fresh cause of action) a right of action against the justices who made the order. I think there may well have been circumstances in which such a right of action would not have existed before this section was enacted.

* See p. 533, letter A, post.

A I do not think I need read s. 4 and s. 5 of the Justices Protection Act, 1848. Counsel for the plaintiff relied on s. 6, which provides:

B “In all cases where a warrant of distress or warrant of commitment shall be granted by a justice of the peace upon any conviction or order which, either before or after the granting of such warrant, shall have been or shall be confirmed upon appeal, no action shall be brought against such justice who so granted such warrant for any thing which may have been done under the same by reason of any defect in such conviction or order.”

That was, I think, a fresh protection, and in effect it meant that if justices had, rightly or wrongly, been upheld on appeal they were protected against any action.

C Then s. 7 merely provides that actions which are prohibited by this Act may be set aside. Section 8 was the original limitation section, and was in, broadly, the same terms as the Public Authorities Protection Act, 1893*, s. 1 (a). It established a limitation period of six months after the act complained of had been committed.

D Then s. 9, which corresponded to s. 1 of the Constables Protection Act, 1750, in so far as there is a requirement of notice, provided:

E “No such action shall be commenced against any such justice of the peace until one calendar month at least after a notice in writing of such intended action shall have been delivered to him, or left for him at his usual place of abode, by the party intending to commence such action, or by his attorney or agent, in which said notice the cause of action, and the court in which the same is intended to be brought, shall be clearly and explicitly stated . . .”

Both s. 8 and s. 9 have been repealed†, but in construing the Act one has to look at it as it was passed. I note in passing that there is here a condition precedent to the bringing of the action, which is the giving of a notice. The draftsman of the Act appears to regard the cause of action as existing before that condition precedent to the bringing of the action has been satisfied.

F I need not refer to s. 10 to s. 12. Section 13 is another section on which counsel for the plaintiff relies. It is the child of s. 2 of the Justices Protection Act, 1803, which it replaces, and it provides as follows:

G “In all cases where the plaintiff in any such action shall be entitled to recover, and he shall prove the levying or payment of any penalty or sum of money under any conviction or order as parcel of the damages he seeks to recover, or if he proves that he was imprisoned under such conviction or order, and shall seek to recover damages for any such imprisonment, he shall not be entitled to recover the amount of such penalty or sum so levied or paid, or any sum beyond the sum of two-pence as damages for such imprisonment, or any costs of suit whatsoever, if it shall be proved that he was actually guilty of the offence of which he was so convicted, or that he was liable by law to pay the sum he was so ordered to pay, and (with respect to such imprisonment) that he had undergone no greater punishment than that assigned by law for the offence of which he was so convicted, or for non-payment of the sum he was so ordered to pay.”

I That on the face of it, by reason of the opening words “in all cases where the plaintiff . . . shall be entitled to recover”, does not appear to be a section which is creating fresh causes of action; it is a section limiting the amount of damages recoverable in certain circumstances. The section covers actions in respect of acts of justices both within and outside their jurisdiction, and I think that in

* Repealed by the Law Reform (Limitation of Actions, etc.) Act, 1954, s. 1, s. 8 (3) and Schedule.

† Section 8 and s. 9 were repealed by the Statute Law Revision Act, 1894.

construing it one has got to see whether there were circumstances before the Act was passed in which a penalty levied or a sum of money ordered to be paid was recoverable in an action against a justice. It seems to me that there were cases in which a penalty levied, or a sum of money ordered to be paid, was recoverable. See, for example, the count which I have read from BULLEN & LEAKE'S PRECEDENTS OF PLEADINGS (3rd Edn.) at p. 345*, for a case where a sum of money was paid in order to obtain release from imprisonment. That would apply in the present case to the sum of £5 which was paid by the plaintiff in order to be released from imprisonment in the first instance. It would also cover such a case as *Norton v. Monckton* (11) (1895) (43 W.R. 350), in which a sum was paid in order to get release from prison. It would cover, too, a case where a payment had been made in order to obtain release of a distress issued for money due, and it might also cover such a case as *Gelen v. Hall* (10), where a penalty had been paid under a malicious conviction.

It seems to me that all the words of s. 13 of the Act of 1848 are fully satisfied by the possibilities existing under the common law of claiming "payment of any penalty or sum of money under any conviction or order as parcel of the damages", and I cannot read that section as creating any new cause of action, in respect of a penalty or sum of money ordered to be paid, that did not exist at common law.

I think, therefore, that, in order to determine what the rights of the plaintiff are, one must see what his common law rights were. I hold that at common law he had a right of action for false imprisonment and for any special damages which would flow from that, such as loss of wages, or money paid to be released from prison, but that he had no right of action in respect of any of the sums paid to his wife. It will follow from this that the action lies, in my view, only against those defendants who made the order and the variation orders for non-obedience to which imprisonment took place. The last period of imprisonment finished in 1945, and the imprisonment was only for disobedience to the order as varied up to April, 1942. It would follow that he had cause of action only against the first four defendants, of whom the first three made the original order, and the first and fourth defendants made the first variation order. As, however, the fourth defendant is dead and the plaintiff is no longer proceeding against him, it would follow for the purposes of this case that the only cause of action disclosed, in my view, is against the first, second and third defendants.

Since I have held that no action lies against the defendants other than the first three defendants, I do not know that it is necessary for me to deal with two other grounds on which counsel for the defendants contended, i.e., that, even if the first three defendants were liable, those who made the variation orders were not. However, in deference to his argument, it is probably convenient that I should express my view, and I can express it very briefly. The first ground on which counsel so contended was that the original order made on Aug. 18, 1941, was valid until set aside, and that, on the subsequent occasions, the justices were entitled to act on it and treat it as valid. In support of that proposition he cited *R. v. Swindon JJ.* (12) (1878) (42 J.P. 407), and *R. v. Lancashire JJ., Ex p. Tyrer* (13) ([1925] 1 K.B. 200). It seems to me that those cases do not assist me, because they were cases of convictions which were valid on their face. This order, as I have already held, is invalid on its face, and it seems to me that, where a justice is confronted with an order which is invalid on its face, he cannot rely on the protection. The cases to which I originally referred seem to me to support this view, and also the passage from the judgment of PARK, J., in *Brittain v. Kinnaird* (14) (1819) (1 Brod. & Bing. 432 at p. 440), where the learned judge cited the final sentence from the judgment of LORD ELLENBOROUGH, C.J., in *Gray v. Cookson* (15) (1812) (16 East, 13 at p. 28).

In this connection I should deal also with the point that under the practice

* See p. 521, letter H, to p. 522, letter A, ante.

- A of the Petty Sessional Division of Kingston-on-Thames the justices who deal with the variation of an order do not have the original order put before them. Therefore, it is perfectly fair to say of those justices who dealt with the variation orders that they never saw the order which was invalid on its face. I do not think that that helps them, because each of the variation orders provides, after ordering the variation, that "save and subject to such variation the said order shall remain in force".
- B If justices, sensibly and rationally and in a businesslike way (because they rely, and have to rely, on their skilled clerks and officers in these matters) agree to vary an order without looking at it, I do not think they can say that they were not affected with notice that the order was invalid on its face. It seems to me to be a matter of common sense, but I think that some support is to be found in *Polley v. Fordham* (No. 2) (16) (1904) (91 L.T. 525).
- C That was again a case where there was a perfectly sensible and businesslike practice, and a stipendiary magistrate did not notice that there was a defect in the summons, and that, therefore, he was without jurisdiction. None of the Divisional Court in that case thought that that fact was any protection to him. Therefore, I do not find that that is a good defence in the case of the fourth to the fourteenth defendants.
- D The third ground on which counsel for the defendants asked me to say that they were excused is on the construction of s. 3 of the Justices Protection Act, 1848. That section provides:

"Where a conviction or order shall be made by one or more justice or justices of the peace, and a warrant of distress or of commitment shall be granted thereon by some other justice of the peace bona fide . . ."

- E then no action could be brought against the second justice of the peace. On the strength of the bicycle cases*, counsel for the defendants asks me to read the words "and a warrant of distress or of commitment shall be granted thereon by some other justice of the peace", as if they included, "and the said order shall be varied or a warrant of distress or of commitment shall be granted by some other justice of the peace".
- F I do not think I can, on the strength of any bicycle cases, strain the language of the section so far. My finding about the causes of action is based, therefore, on the view which I take of the position at common law and under the Justices Protection Act, 1848.

- I must turn now to the next point, which is concerned with s. 21† of the Limitation Act, 1939, on which counsel for the defendants relies. I have already held that there was a cause of action in respect of the false imprisonment which finished in 1945. The act of which the plaintiff complained was plainly done more than one year before the action was brought. The relevant statute, having

- G * The cases to which counsel for the defendants referred are mentioned in STONE'S JUSTICES' MANUAL (87th Edn.), p. 1084, note (m). The cases are *Taylor v. Goodwin* (1879) 4 Q.B.D. 228; *Smith v. Kynnersley*, [1903] 1 K.B. 788; and *Cannan v. Abingdon (Earl)*, [1900] 2 Q.B. 66.

- H † Section 21 of the Limitation Act, 1939, reads: "(1) No action shall be brought against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued: Provided that where the act, neglect or default is a continuing one, no cause of action in respect thereof shall be deemed to have accrued, for the purposes of this sub-section, until the act, neglect or default has ceased. (2) The foregoing provisions of this section shall not apply to any action to which the Public Authorities Protection Act, 1893, does not apply, or to any criminal proceedings."

- I Section 21 (1) of the Limitation Act, 1939, replaced, as regards civil proceedings, s. 1 (a) of the Public Authorities Protection Act, 1893. Both s. 21 of the Limitation Act, 1939, and the whole of the Public Authorities Protection Act, 1893, were repealed by the Law Reform (Limitation of Actions, etc.) Act, 1954, s. 1, s. 8 (3), and Schedule, so that the limitation period for actions in tort not involving personal injury is now that provided by s. 2 of the Limitation Act, 1939, namely, six years; see 34 HALSBURY'S STATUTES (2nd Edn.) 463, 467, 468.

regard to the dates, is the Limitation Act, 1939, s. 21. Counsel for the plaintiff says, in effect: "No doubt, the last act which the defendants did was more than a year before the writ was issued". I think he would go further, and say that, if the relevant limitation were that of the old Public Authorities Protection Act, 1893, where the time ran from the "act, neglect or default complained of"*, he would, no doubt, be out of court. He says, however, that in the Limitation Act, 1939, s. 21 (1), the date from which time runs is "the date when the cause of action accrued". He refers to s. 2 of the Justices Protection Act, 1848, and says: "By reason of the proviso which requires the conviction to be quashed, the cause of action did not accrue until Oct. 6, 1954, when the original order of the justices and the subsequent orders were set aside by the Divisional Court. Since the writ was plainly issued within a year of that date, despite the fact that all this took place over ten years ago, I am not defeated by the Limitation Act, 1939". I have, therefore, to construe the proviso to s. 2 of the Justices Protection Act, 1848, in its context. I draw attention again to the fact that, in its context, the substantive part of the section to which the proviso is appended is not purporting to alter any existing cause of action.

The section, in fact, reads:

"... may maintain an action against such justice in the same form and in the same case as he might have done before the passing of this Act . . ."

in contradistinction to s. 1, which states that thereafter every action shall be an action on the case. Then s. 2 goes on:

"... Provided nevertheless, that no such action shall be brought for any thing done under such conviction or order until after such *conviction* shall have been quashed, either upon appeal, or upon application to Her Majesty's Court of Queen's Bench . . ."

In this case there was not, and could not be, any conviction. The word is, in any event, inappropriate to matrimonial proceedings of this kind, and in this particular case the only thing which could be called by any stretch of the use of the word a "conviction" would be the conviction for having been guilty of persistent cruelty to the wife, and there was on the face of the order (and that, indeed, is the whole cause of the trouble) a finding that such guilt had not been proved. Counsel for the plaintiff asks me to read the proviso to s. 2 of the Act of 1848 as if, instead of the word "conviction", which appears there†, there were the words, "conviction or order", as, indeed, there are in the latter part of the proviso which deals with liability for a warrant which shall be followed by a conviction or order. Therefore, counsel for the plaintiff is, in effect, asking me to put in, because it would make sense of the thing, words which are not there, although in a somewhat similar context the draftsman has put in the words "or order".

I have to construe this part of s. 2 as part of a section which is taking away common law rights. The substantive part of it, which I have just read, is asserting or saving common law rights, and this is a proviso which is cutting them down. It is saying, in effect: "Although at common law you could have brought an action in particular circumstances, nevertheless your common law rights will be cut down, unless certain other circumstances exist". It is a limitation section, preventing a subject from exercising rights which he otherwise would exercise. I think in those circumstances I must approach it without broadening the construction so as to exclude rights which are not excluded by the plain terms of

* See s. 1 (a) of the Public Authorities Protection Act, 1893, which was repealed, except so far as it related to criminal proceedings, by the Limitation Act, 1939, s. 34 (4) and Schedule.

† The word conviction is printed in italic type, in the extract of the section set out above, at the point to which reference is being made. The phrase "conviction or order" appear subsequently as well as previously, see the terms of the proviso printed at p. 528, letter B, ante.

- A the section. I remember, too, the history of this Act and that special provisions in the Justices Protection Act, 1803, were included in this Act in relation to convictions and nothing else*. I do not read this Act as extending the expression "conviction" to "conviction or order", and so I do not find that the plaintiff's case is brought within the proviso at all because there was no conviction. It is, I agree, a little ironical that in construing the Justices Protection Act, 1848, as
- B I think I must, so as not to take away the rights of the subject to a greater extent than the plain terms of the Act require, the result in this particular case is that the plaintiff has not got a rejoinder which he would or might otherwise have to the claim that an action of this kind is time barred.

- There is, however, another reason why this rejoinder to the plea of the Limitation Act, 1939, is not good. I have already pointed out that s. 2 of the Act of 1848
- C does not purport to alter the nature of the cause of action; it leaves the cause of action untouched. What was the cause of action here? The cause of action, and the only cause of action, as I have held, was trespass, unlike actions under s. 1 of the Act of 1848, which are actions on the case. What does "cause of action accrued" in s. 21 (1)† of the Limitation Act, 1939, mean? Let me take the analogy of malicious prosecution, where it is clear law that the action cannot
- D be brought unless the conviction has been set aside; it cannot be brought while the conviction still subsists. Nevertheless, although the fact that the conviction has been set aside would have to be proved in order to succeed, time runs in malicious prosecution from the date at which the loss, which is followed by special damage, arose. So also there are cases of conditions precedent to bringing actions, such as that (familiar in a great many other statutes as well) which
- E was contained in s. 9 of the Justices Protection Act, 1848, where it was provided:

"No such action shall be commenced against any such justice of the peace until one calendar month at least after a notice in writing of such intended action shall have been delivered to him, or left for him at his usual place of abode . . . in which said notice the cause of action . . . shall be clearly and explicitly stated . . ."

- F It is plain that the draftsman of the Act of 1848 regarded the cause of action as having accrued, but the requirement of notice was a procedural requirement before the action could be brought.

- My attention has been drawn to cases which, as counsel for the defendants said and counsel for the plaintiff accepted, seem to run on parallel lines without
- G meeting. I think the real distinction between the one line of cases and the other is whether the particular requirement constitutes part of the cause of action or whether it is in the nature of a requirement which bars the remedy, although the cause of action already exists. The first of the cases to which I was particularly referred, on the one hand by counsel for the plaintiff, and, on the other, by counsel for the defendants, was *Board of Trade v. Cayzer, Irvine & Co.* (17) ([1927] A.C. 610), which was a case on the *Scott v. Avery* arbitration clause‡, and a case in which *Coburn v. Colledge* (18) ([1897] 1 Q.B. 702) (which is, incidentally, the strongest case in the defendants' favour), was cited to their Lordships. It does not seem to me that *Board of Trade v. Cayzer, Irvine & Co.* (17) presents any very close analogy to the type of question which I have to consider here. It was, as I read it, no more than a decision that the parties to a contract which
- H contains the *Scott v. Avery* arbitration clause are entitled to contract, and do contract, that a cause of action, either for breach of the contract or under the contract, shall not arise until certain conditions are fulfilled. It does not seem to me that that sort of consideration affords much guidance in the present case.
- I A case much nearer the mark, on which counsel for the plaintiff relied, was

* See p. 526, letter G, to p. 527, letter C, ante.

† cf. footnote† p. 531, ante, for the terms of the sub-section.

‡ See *Scott v. Avery*, (1856), 5 H.L.Cas. 811.

Musurus Bey v. Gadban (19) ([1894] 2 Q.B. 352). That was a claim in respect of money lent to the Turkish ambassador and it was held by the court that, while the ambassador was entitled to diplomatic immunity, the period of limitation did not begin to run. I will not cite the judgments in that case in any detail; I will merely say that I find considerable difficulty in understanding exactly what the ratio decidendi was. It seems to have been based, at any rate in part, on the view of the extra-territoriality of the ambassador, or, alternatively, on the non-existence of a person who could be sued. A
B

The third case on which counsel for the plaintiff relied was *Read v. Brown* (20) (1888) (22 Q.B.D. 128), which concerned the jurisdiction of the Mayor's Court and whether the cause of action arose within the jurisdiction. It was there held that an assignment to the plaintiff of the debt in respect of which the action was brought was a necessary part of the cause of action, and, as the assignment took place within the jurisdiction, therefore the Mayor's Court had jurisdiction. That case does not seem to help counsel for the plaintiff unless he is prepared to say that the period of limitation as respects that debt ran only from the date of the assignment. C

Counsel for the defendants relied strongly on *Coburn v. Colledge* (18), a decision of the Court of Appeal within three years after the decision in *Musurus Bey v. Gadban* (19), which does not appear to have been cited. *Coburn v. Colledge* (18) was an action by a solicitor for the amount of his bill of costs, and the question was whether the cause of action arose as soon as the work was completed or after the solicitor had delivered a signed bill of costs, which was a condition precedent to his recovering his fees. By the Solicitors Act, 1843, s. 37 (since repealed)*: D
E

"No attorney or solicitor . . . shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor . . ."

shall have delivered a signed bill of costs. It was held there that, despite the requirement of delivery of the bill of costs before any action could be brought, time ran from the date when the work was completed. In that case the Limitation Act, 1623 (21 Jac. 1 c. 16), s. 3, which also contained the words, "cause of action", applied. Both LOPES, L.J., and CHITTY, L.J., referred to BULLEN & LEAKE'S PRECEDENTS OF PLEADINGS, and CHITTY, L.J., also referred to CHITTY ON PLEADING, and they drew attention to the fact that it was not necessary for the plaintiff to plead that the bill had been delivered; it was for the defendant to plead that it had not been delivered. It is fair to say, in favour of counsel for the plaintiff, that, in the precedent which I read from BULLEN & LEAKE'S PRECEDENTS OF PLEADINGS (3rd Edn.) at p. 345, the allegation that the conviction was afterwards quashed in due form of law does appear†. Therefore, he is, at any rate, in a position to say that, although that appeared to be the case in *Coburn v. Colledge* (18) on which the two learned lords justices relied, no similar argument based on what appears in BULLEN & LEAKE'S PRECEDENTS OF PLEADINGS (3rd Edn.) is open to counsel for the defendants in the present case. F
G
H

The other case on which counsel for the defendants relied was *Monckton v. Payne* (21) ([1899] 2 Q.B. 603), where it was decided that where a landlord was entitled to a fine on the admittance of a tenant, the period of limitation began to run from the time of the admittance, and not on the date when the landlord, who was entitled to dictate the amount of the fine, did so. For my part, I find some difficulty in seeing how time could run for an amount which was unfixed, even although it lay within the sole power of the landlord to fix the sum, and I do not think that that case throws much light on this problem. I

* See now the Solicitors Act, 1932, s. 65 (1).

† See p. 521, letter H, to p. 522, letter A, ante.

- A After great hesitation I have come to the conclusion that this requirement falls within the *Coburn v. Colledge* (18) category rather than the category of a fact forming part of the cause of action. I think it is a requirement which prevents the remedy, but does not form part of the cause of action. I think that the cause of action here lies in trespass; that, to apply the test in *Coburn v. Colledge* (18), it is unnecessary to state in the declaration that the conviction has
- B been set aside, although such a statement appears in BULLEN & LEAKE'S PRECEDENTS OF PLEADINGS (3rd Edn.) at p. 345, and I come to that conclusion because of the contrast between s. 1 of the Justices Protection Act, 1848, which expressly requires malice to be stated in the declaration, and s. 2 of the Act, which says, in a proviso, that the conviction must have been set aside, but does not contain a requirement for that fact to be stated in the declaration. I am,
- C therefore, of the opinion that the quashing of the conviction, as in the case of malicious prosecution, or as in the case of the notice which was formerly required under s. 9 of the Justices Protection Act, 1848*, does not form an essential part of the cause of action, but is a requirement which has to be satisfied before the remedy for the already existing cause of action can be pursued. It, therefore, follows that I hold that the defence of the Limitation Act, 1939, applies.
- D This is obviously a case of great difficulty, and it is probably desirable in case it goes elsewhere that I should express my view as to the damages for false imprisonment in the event of my proving wrong as to the effect of s. 21 (1) of the Limitation Act, 1939. [HIS LORDSHIP then assessed the general damages for false imprisonment at £650 and the special damages for loss of wages at £200, to which he added the £5 which the plaintiff paid in June, 1942, to be released from prison
- E (see p. 519, letter I, ante). HIS LORDSHIP continued:]

- As regards the other part of the claim†, I do not think I should be assisting any-one if I sought to assess damages for that. Finding as I do great difficulty in seeing what the cause of action is against any of the justices, and, if there is a cause of action, what the cause of action is against each group of justices, I do not think I could assist in trying to say what is the measure of damages for a cause
- F of action which I do not understand, and how it is to be applied against different justices. In those circumstances, I do not propose to make any finding as to the measure of damages.

Judgment for all the defendants still before the court.

Solicitors: *George C. Carter & Co.* (for the plaintiff); *Wilkinson, Howlett & Moorhouse* (for the defendants).

[*Reported by A. P. PRINGLE, Esq., Barrister-at-Law.*]

* See p. 529, letter D, ante.

† I.e., on account of the plaintiff's having paid sums pursuant to the order of Aug. 18, 1941, and variations thereof; see p. 521, letter D, ante.

SIDNEY BOLSOM INVESTMENT TRUST, LTD. v. E. KARMIOS & CO. (LONDON), LTD.

[COURT OF APPEAL (Denning and Morris, L.JJ., and Harman, J.), February 6, 7, 1956.]

Landlord and Tenant—New tenancy—Tenant's request—Validity—Need to state duration of new term—Upon the terms of the current tenancy—Duration of current tenancy imported—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 24 (1), s. 26 (1) (3) (5) (6)—Landlord and Tenant (Notices) Regulations, 1954 (S.I. 1954 No. 1107), App., Form 8.

Tenants of business premises under a lease for seven years served a notice on the landlords under s. 26 (1) of the Landlord and Tenant Act, 1954, requesting a new tenancy of the premises to commence on June 25, 1955, the day after the existing lease was due to expire, and stating: "Our proposals as to the rent to be payable under the new tenancy and as to the other terms of the new tenancy are an annual rent of £200 per annum upon the terms of the current tenancy as set out in the lease . . ." The tenants intended to ask for a lease for fourteen years, as they indicated in a letter three weeks later. In their notice of opposition to an application to the court for a new tenancy under s. 26 (6) the landlords stated that they would oppose such an application on the ground, among other grounds, that "no valid request for a new tenancy has been served in the prescribed form". No application for a new tenancy was made by the tenant to the county court. In an action for possession of the premises brought by the landlords, the tenant claimed that the original tenancy was continued by virtue of s. 24 (1) of the Act and had not been terminated by the request by virtue of s. 26 (5) on the ground that the request was invalid, or alternatively that the landlords were estopped by their notice from contending that it was valid.

Held: the lease had been brought to an end on June 24, 1955, by the request and the landlords were entitled to possession because—

(i) although s. 26 (3) of the Landlord and Tenant Act, 1954, required, on the true construction of the Act, that a request under s. 26 (1) should specify the duration of the new tenancy, this request did comply with that requirement as the words therein "upon the terms of the current tenancy" imported the duration of the former tenancy, viz., seven years, and

(ii) the landlords were not estopped from contending that the request was valid since their notice of opposition merely intimated the grounds on which they would oppose an application to the court for a new tenancy if such an application were made.

Appeal allowed.

[**Editorial Note.** The practical consequence of this decision is that tenants when making requests for new tenancies pursuant to s. 26 (1) of the Landlord and Tenant Act, 1954, should, as a matter of expediency, ensure that there is included in the prescribed form of notice a statement of the duration (not exceeding fourteen years) of the term for which the new tenancy is to continue.

For s. 24 (1) and s. 26 of the Landlord and Tenant Act, 1954, see 34 HALSBURY'S STATUTES (2nd Edn.) 409, 411.]

Case referred to:

(1) *De Tchihatchef v. Salerni Coupling, Ltd.*, [1932] 1 Ch. 330; 101 L.J.Ch. 209; 146 L.T. 505; Digest Supp.

Appeal.

The landlords brought an action for possession of business premises (a shop, two rooms, a cellar and yard) at 707, Romford Road, Manor Park, London, E.12, against the tenants under a lease for seven years which had expired. They

- A claimed that the tenant was not entitled to a continuation of the tenancy under s. 24 (1) of the Landlord and Tenant Act, 1954, since that tenancy was terminated under s. 26 (5) on the day of the expiry of the lease, June 24, 1955, by a request for a new tenancy to commence on June 25, 1955, made by the tenant on Dec. 6, 1954, under s. 26 (1) and not subsequently pursued by means of an application to the county court for such a tenancy under s. 24 (1). The
- B tenant contended that the tenancy had not been so determined on the following grounds: (i) that the request was invalid since it did not specify the duration of the new tenancy asked for as required by implication by s. 26 (3) of the Act, and alternatively since it was made by a mistake in that it had been intended to ask for a lease of fourteen years and not for a lease of the duration of the original lease, as was indicated in a letter sent to the landlords on Dec. 23, 1954; and (ii) that the landlords were estopped from contending that the request was
- C valid by their statement in their notice of opposition given on Jan. 28, 1955, that they would oppose any application for a new tenancy to the county court on the ground inter alia that no valid request for a new tenancy had been served in the prescribed form. On Oct. 20, 1955, HAVERS, J., gave judgment for the tenants. The landlords appealed.

- D
- M. Waters* for the landlords.
H. T. Buckee for the tenants.

- DENNING, L.J.:** In 1948 the landlords, Sidney Bolsom Investment Trust, Ltd., let business premises at 707, Romford Road, Manor Park, to lessees under a lease for seven years from June 24, 1948, at a rent of £175 a year on various terms and conditions, including an option for a further lease for seven years at a rent to be agreed. In 1955 the lease was vested in lessees called E. Karmios & Co. (London), Ltd. At common law it would have come to an end on June 24, 1955, but before that time the Landlord and Tenant Act, 1954, came into operation. Under that Act a lease of business premises is automatically extended without any step being taken by either party, and this
- E extension continues indefinitely, unless and until it is determined in accordance with the Act. One way of determining the statutory extension (or preventing its arising) is for the landlord to give notice of determination himself. Another way is for the tenant to make a valid request for a new tenancy. Each of these requires six months' notice before it takes effect. If the tenant wishes thereafter to stay on in the premises, he must apply to the county court for a new
- F tenancy to begin as soon as the statutory extension comes to an end.

- G We are here concerned with a tenant's request for a new tenancy. On Dec. 6, 1954, when the lease had just over six and a half months to go, the tenants made a request for a new tenancy, which they asked should commence on June 25, 1955. If that request was a valid request, it operated to terminate the tenant's interest on the day

- H "immediately before the date specified in the request for the beginning of the new tenancy",

under s. 26 (5) of the Act. It would therefore bring the tenant's interest to an end on June 24, 1955, the very day on which the contractual lease expired. It would thus stop the statutory extension from arising at all.

- I Having thus themselves brought their existing tenancy to an end, the tenants should have followed up their request with an application to the court for a new tenancy. They had four months in which to do it, under s. 29 (3) of the Act, but they did not do it within the permitted time or indeed at all. The result is that their interest came to an end on June 24, 1955, and they must quit unless they can in some way avoid that result.

They seek to do this by throwing over their own request. They say that it was not a valid request, because it did not comply with s. 26 (3) of the Act, which provides:

"A tenant's request for a new tenancy shall not have effect unless it is made by notice in the prescribed form given to the landlord and sets out the tenant's proposals as to the property to be comprised in the new tenancy (being either the whole or part of the property comprised in the current tenancy), as to the rent to be payable under the new tenancy and as to the other terms of the new tenancy."

In this case the request of Dec. 6, 1954, was made by notice in the prescribed form. The tenants got a printed form which was an exact copy of the statutory prescribed form*, and they filled it in. They gave first the time when they wanted the new tenancy to commence, June 25, 1955. They said secondly:

"We propose that the property to be comprised in the new tenancy should be the whole of the property comprised in the current tenancy."

And then thirdly—the important part for this purpose:

"Our proposals as to the rent to be payable under the new tenancy and as to the other terms of the new tenancy are an annual rent of £200 per annum upon the terms of the current tenancy as set out in the lease dated Sept. 7, 1948."

Counsel for the tenants says that the request, in order to be valid, ought to state the *duration* proposed for the new tenancy. Section 26 (3) does not expressly require the tenant to set out his proposals as to the duration of the new tenancy. He has only to set out the rent and "the other terms of the new tenancy". But I think that, in this context, the "other terms" include the duration of the tenancy. That is seen by looking at s. 35, from which it appears that "terms" in this Act includes not only terms like the covenant to repair, but also the term as to the duration of the tenancy. In addition, it is obvious that the proposed duration of the new tenancy is one of the most important matters which the landlords would want to know. Whether they should accept the proposed rent will often depend very much on the proposed duration of the tenancy. The tenant should therefore state his proposal for duration, but I think it can be done sufficiently by implication.

Does the proposal in the request sufficiently set out the duration of the new tenancy? I think it does. The proposal is for

"an annual rent of £200 per annum upon the terms of the current tenancy . . . dated Sept. 7, 1948."

The word "terms" in that proposal must have the same meaning as the word "terms" in the earlier part of the same sentence, and that in turn has the same meaning as the word "terms" in s. 26 (3) of the Act. It therefore includes all the terms in the current lease, i.e., not only the covenants to repair and so forth, but also the term as to duration, namely, seven years, and the other term as to an option and so forth. The proposal therefore complied sufficiently with the Act in that it impliedly proposed a duration of seven years for the new tenancy.

Counsel for the tenants next said that the request was invalid because it was made under a mistake. If the proposal on its true construction asked for seven years, then it was made by the tenants under a mistake, because they intended to ask for fourteen years and not for seven years. The judge admitted evidence in support of this contention. He heard the evidence of Mr. Karnios himself, and also of his solicitor's managing clerk, and held that there was a mistake in that the request should have asked for fourteen years and did not, and that the request was therefore invalid.

I do not think that that evidence was admissible. To my mind, this case falls within the general principle that parol evidence cannot be admitted to

* I.e., Form 8 in the Appendix to the Landlord and Tenant (Notices) Regulations, 1954 (S.I. 1954 No. 1107).

A add to, vary or contradict the terms of a written document. Whatever his inmost state of mind, once a tenant has to all outward appearances made a valid request in the prescribed form setting out his proposals, then he cannot thereafter rely on his own mistake to say that it was a nullity or invalid, no matter how important the mistake was. The validity of the request must be judged by the true interpretation of it, without regard to what happened behind the scenes. It is a formal document with specific legal consequences and it must be treated as such. If the proposals had ripened into a contract, then the mistake might in some circumstances be a ground for setting the contract aside in equity, but it does not render the request invalid.

Counsel for the tenants next relied on the letter of Dec. 23, 1954, in which the solicitors for the tenants wrote to the landlords:

C "Upon perusing our copy, we notice that we have not stated in the notice the length of term for which a new lease is sought. The term sought is a maximum term of fourteen years."

D Counsel said that, after receiving that letter, the landlords knew that the original request was made under a mistake and they could not thereafter assert that it was valid. The judge seems to have accepted that contention, but I do not think it is correct. It is plain that, after that letter, the landlords could not accept the original proposals so as to turn them into a binding contract as they stood, but I do not think the letter affects the validity of the request as a request. The tenants could still make it the basis of an application to the county court for a new tenancy, and the court would be free to grant a new lease for a term up to fourteen years.

E The last point taken by counsel for the tenants was one of estoppel. He said that the landlords could not be heard to say that the request was valid. He based this on the notice of opposition given by the landlords on Jan. 28, 1955, in which they said:

F "We will oppose an application to the court under Part 2 of the above mentioned Act for the grant of a new tenancy on the ground that (i) No valid request for a new tenancy has been served in the prescribed form. (ii) You have obligations as respects the repairs and maintenance of the premises and that you ought not to be granted a new tenancy in view of the state of repair of the premises which has resulted from your failure to comply with these obligations."

G Counsel says that, on receipt of that notice, the tenants took the landlords at their word. They accepted the view that no valid request had been served and, on the faith of that, refrained from applying to the county court for a new tenancy. Now I quite agree that a representation about the legal position—about the legal effect of a document, for instance—can give rise to an estoppel. That is amply shown by *De Tchihatchef v. Salerni Coupling, Ltd.* (1) ([1932] H 1 Ch. 330), to which counsel referred us, and the Privy Council case therein referred to, as well as several later cases. But, in order to work as an estoppel, the representation must be clear and unequivocal, it must be intended to be acted on, and it must be in fact acted on. When I say it must be "intended to be acted on", I would add that a man must be taken to intend what a reasonable person would understand him to intend. In short, the representation must be made in such circumstances as to convey an invitation to act on it. It seems to me that the representation in this case conveyed no such invitation. The landlords by their notice of opposition did not suggest that the tenants should refrain from applying to the county court. On the contrary, their notice of opposition assumed that the tenants would apply to the county court within the permitted time, and gave them notice that at the hearing the landlords would take the point that no valid request had been served. It was simply a point taken by the landlords for what it was worth, and it was for the

tenants to make up their own minds whether it was a good point or a bad point, and to act as they thought fit. If they were certain that their own request was invalid, of course, they need make no application to the county court for a new tenancy; but if they were not certain whether it was valid or not, their only safe course was to apply to the court within the permitted time; because, if it was valid, it brought their interest to an end and they would be able to stay in the premises only if they got a new lease. In my opinion, therefore, there was a valid request; there was no application by the tenant to the county court within the prescribed time and the lease came to an end on June 24, 1955. I would, therefore, allow the appeal and give judgment for the landlords for possession. A B

MORRIS, L.J.: I have reached the same conclusion. The question is whether the request dated Dec. 6, 1954, was a request made in accordance with the provisions of the Act. Section 26 (5) provides: C

“Where the tenant makes a request for a new tenancy in accordance with the foregoing provisions of this section, the current tenancy shall, subject to the provisions of s. 36 (2) of this Act and the provisions of Part 4 of this Act as to the interim continuation of tenancies, terminate immediately before the date specified in the request for the beginning of the new tenancy.” D

The request dated Dec. 6 was one for a new tenancy commencing on June 25, 1955. As no application was made by the tenant to the county court under s. 24 of the Act, the provisions of s. 36 (2) apply, if the request was a valid request. If it was, the tenancy terminated on June 24, 1955. It is a curious feature of this case that those who served the request now submit that it was in bad form and those who took the point that it was in bad form now submit that it was in order. The point has to be determined by reference to the document itself, looked at having regard to the provisions of the Act. When a request is made, then it is the document, in the form in which it was received by the recipient, which must be looked at. E

Section 26 (3) provides that the request shall not have effect unless it is made in the prescribed form—the word is “in” and not “on”. A form has been prescribed by regulation*. The notice to be given to the landlords in the prescribed form must set out: (i) the tenant's proposals as to the property to be comprised in the new tenancy; (ii) whether it is the whole or *part* of the property comprised in the current tenancy; (iii) the rent to be payable under the new tenancy; and (iv) the “other terms” of the new tenancy. F G

I have reached the conclusion that the duration of the requested new tenancy must be set out. If s. 26 (3) had stood alone, this matter might be difficult of determination; but I think that regard must be had to the provisions of s. 32, s. 33, s. 34 and s. 35. Section 32 deals with the property to be comprised in the new tenancy. Section 33 provides: H

“Where on an application under this Part of this Act the court makes an order for the grant of a new tenancy, the new tenancy shall be such tenancy as may be agreed between the landlord and the tenant, or, in default of such an agreement, shall be such a tenancy as may be determined by the court to be reasonable in all the circumstances, being, if it is a tenancy for a term of years certain, a tenancy for a term not exceeding fourteen years, and shall begin on the coming to an end of the current tenancy.” I

Section 34 deals with rent, and s. 35 provides:

“The terms of a tenancy granted by order of the court under this Part of this Act (other than terms as to the duration thereof and as to the rent

* See Form 8 in the Appendix to the Landlord and Tenant (Notices) Regulations, 1954 (S.I. 1954 No. 1107).

A payable thereunder) shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court; and in determining those terms the court shall have regard to the terms of the current tenancy and to all relevant circumstances."

I think the words in the opening part of s. 35

B "The terms of a tenancy granted by order of the court under this Part of this Act (other than terms as to the duration thereof and as to the rent payable thereunder) "

denote that, when used in this Act, the word "terms" includes duration. Section 69 (1) provides:

C "In this Act the following expressions have the meanings hereby assigned to them respectively . . . 'terms', in relation to a tenancy, includes conditions."

I therefore think that in a request form, it is necessary to set out the duration of the new tenancy that is requested.

The third paragraph of the document sent in this case reads:

D "Our proposals as to the rent to be payable under the new tenancy and as to the other terms of the new tenancy are an annual rent of £200 per annum upon the terms of the current tenancy as set out in the lease dated Sept. 7, 1948."

E The word "terms" is used in the opening part of that paragraph, and at the end of it, "upon the terms of the current tenancy". I think that the paragraph must be read as meaning that the application was for a new tenancy of the duration of seven years. The request was, therefore, a good request for a new tenancy made in accordance with s. 26.

A later letter of Dec. 23 referred to the notice, and proceeded:

F "Upon perusing our copy we notice that we have not stated in the notice the length of term for which a new lease is sought. The term sought is a maximum term of fourteen years."

G For the reasons given, I think the request had already stated the length of the term for which a new lease was sought. This letter, however, conveyed an intimation that it was desired to have a term of fourteen years. The landlords had themselves intimated in a letter of Nov. 4 that, at a considerably increased rent or at the existing rent with a high premium, the tenant could have either fourteen or twenty-one years' duration of tenancy. This later letter of Dec. 23 did not purport to withdraw the previous request for a new tenancy. If there had been an application by the tenant and the matter had come before a learned county court judge, I cannot conceive that the point would successfully have been taken that there was not a valid request for a new tenancy made in accordance with s. 26 of the Act.

H When the landlords served a notice that they would oppose an application, they indicated that they would rely on one of the grounds of opposition set out in s. 30 (1) of the Act, i.e., that in para. (a). They also gave notice that they would oppose the validity of the application on the ground that

I "No valid request for a new tenancy has been served in the prescribed form."

As it seems to me, that was merely an indication that, if there were an application, that point would be argued when the application was heard. Both parties knew what was in any document and it was for both parties to decide whether there had been a valid request for a new tenancy. It does not seem to me that anything stated by the landlords here was tantamount to an invitation to the tenants to take any particular course: it was merely advising the tenants as to a proposition or argument or contention that it would be advanced in a

certain event. The tenants were not asked to act on it; it was for them to A
decide what course they would follow.

For these reasons it seems to me that there was a valid request, and that,
as there was no application to the court by the tenants, the consequences denoted
by s. 26 (5) follow. I think therefore that the appeal succeeds.

HARMAN, J.: I agree. I cannot regard the draftsmanship of s. 26 (3) B
of the Act with any enthusiasm. I think the draftsman wished to talk about
a term of years, but he had already used the words "terms of the tenancy"
and was, therefore, likely to land himself in obscurity. As a result he has
produced something which on first examination led me to suppose that it was
not necessary for the statutory form of request to mention the length of the C
term of years required. But, having regard to the later sections of the Act
and to the obvious importance between the parties of the statement of such
a matter, I agree with my Lords that "terms" here includes the length of
the term. I cannot help thinking, however, that it would be well if hereafter
those who make these requests should express the term of years which they want
and should not leave it to be gathered by implication, as it was left in this case.
I agree, nevertheless, that it is a necessary implication from the notice which D
was sent that a term of seven years was being asked for. Actually the tenant
did not want seven years; he wanted fourteen, and, by giving evidence of that
sought to say that what appeared to have been a notice giving his proposals
did not really give them and was therefore no effective request. I must protest
against that method of construing a document. Such evidence is inadmissible,
and moreover irrelevant. What a man has written he has written, and, if E
what he has written be a request for a term of seven years, it does not become
less his request because he did it by mistake. The person who receives it must
read it according to its true construction and is entitled to receive it as such.
I cannot think that it could be right to go behind a document of this sort and
say: As in his inmost heart the writer intended something else, he must not
be taken to have meant what he wrote. If that were accepted, a state of chaos F
in regard to all documents would soon be produced.

As for the question of estoppel, I agree with what my Lord has said.

Appeal allowed.

Solicitors: *Stanley Brent & Co.* (for the landlords); *Berry Tompkins & Co.*
(for the tenants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

BRADLEY v. BRADLEY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), November 25, February 13, 1956.]

Husband and Wife—Maintenance—Application to High Court “Reasonable maintenance”—Amount—Considerations—Security for life of wife—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 23 (1) (2).

The parties were married in 1929. In 1955 the husband purchased for £5,000 the lease of a house in London which became the matrimonial home. On July 23, 1955, the husband left the matrimonial home and had since that date lived apart from the wife. The husband had capital assets amounting to about £100,000 and his average income for the last three years was about £8,000, though for the last year it was only slightly over £6,000. The husband had continued after July 23 to pay the outgoings on the house, including ground rent, rates and taxes, electricity and heating, which amounted to about £250 a year. In addition he had continued to pay the wife £7 a week in cash, although he knew that she did not consider this to be a sufficient sum. On an application by the wife for maintenance under the Matrimonial Causes Act, 1950, s. 23,

Held: (i) a reasonable sum for the wife's maintenance would be £1,800 per annum less income tax, having regard to all the circumstances and taking into consideration not only what rate of housekeeping and style of house were appropriate to the position of a wife of a man so placed, but also that she might reasonably expect to spend a substantial sum of money each year on clothes, to have domestic assistance, to have the facility for obtaining motor transport and to be able to afford a holiday from time to time (see p. 545, letter B, p. 546, letter G, post); and

(ii) the husband had wilfully failed to provide this sum for the wife and she was entitled to an order for periodical payments of that amount.

(iii) the court had power under s. 23 (2) to order that the periodical payments should be secured to the wife for her life, not merely during the joint lives of the parties (dictum of DENNING, L.J., in *King v. King* ([1953] 2 All E.R. at p. 1030) applied, and *McLellan v. McLellan* ([1954] 1 All E.R. 1) followed; see p. 547, letters D to I, post); in the present case the husband would be ordered to secure the sum of £500 per annum (part of the periodical payments) for the life of the wife.

[For the Matrimonial Causes Act, 1950, s. 23, see 29 HALSBURY'S STATUTES (2nd Edn.) 410; and for cases on the subject, see 27 DIGEST (Repl.) 84, 85, 631-636.]

Cases referred to:

- (1) *Scott v. Scott*, [1951] 1 All E.R. 216; [1951] P. 245; 27 Digest (Repl.) 85, 634.
- (2) *King v. King*, [1953] 2 All E.R. 1029; [1954] P. 55; 3rd Digest Supp.
- (3) *McLellan v. McLellan*, [1954] 1 All E.R. 1; [1954] P. 138; 3rd Digest Supp.

Summons.

The wife applied under the Matrimonial Causes Act, 1950, s. 23, for an order for periodical payments on the ground that the husband had been guilty of wilful neglect to provide reasonable maintenance for her, and for an order that the periodical payments should be secured.

R. F. G. Ormrod for the wife.

D. A. Fairweather for the husband.

WILLMER, J.: The parties were married as long ago as 1929. They are both, therefore, persons of mature age. The marriage took place in Australia

but the parties have been, for all practical purposes, resident in this country throughout. They have resided mainly in the neighbourhood of Oxford, where the husband has his business. Early in 1955 the husband acquired the lease of a house in St. John's Wood in London and the matrimonial home was moved there. For a few months the parties resided there, in the sense that the wife lived there all the time and the husband resided with her during such periods as his business did not require him to be in Oxford. There was also a period when he went away for a holiday by himself. The parties were, however, quarrelling about, amongst other things, the amount of money that the husband was giving to the wife. Matters came to a head on July 23, 1955, when there was a final quarrel, the wife alleging (although the husband denies it) that it was accompanied by some sort of assault on her. The upshot was that thereafter the husband left the wife, and they have not since resided together.

The wife has continued to reside in the matrimonial home in St. John's Wood. The husband has continued to pay all the outgoings in relation to that house, including the ground rent, Schedule A tax, rates, electricity, heating, and so forth. The lease was purchased, I understand, for a figure of round about £5,000. I am informed that the outgoings which the husband pays represent about £250 a year. In addition to that the husband has been paying the wife the sum of £7 a week in cash since the separation. He had in fact been paying the wife the same amount per week for some time before the separation. The wife complains that that provision for her is not sufficient and does not provide her, in all the circumstances, with reasonable maintenance. The husband, she alleges, and it is not denied, is a man of very considerable means. The figures put forward in his affidavit of means are not challenged by the wife. That affidavit shows that he has capital assets amounting in value to very nearly £100,000. His average income for the last three years is put as £8,051 odd. It is fair, however, to observe that in fact the last of the three years which form the average is the year with the smallest income. His affidavit says that for the year ended Apr. 5, 1955, his income was only £6,163. In those circumstances it is said that £7 per week plus the discharge of the outgoings in respect of the matrimonial home is far from being reasonable maintenance for the wife of such a husband. As a matter of arithmetic I think both counsel substantially agree that, roughly speaking, the £7 per week plus the use of the house is worth to the wife somewhere about £650 net per annum. I think that it is also agreed that that figure if it were fully grossed up, allowing for income tax at the standard rate, would be about £1,062 per annum.

Counsel for the husband has contended, first, that on the figures which we have in the present case it is not possible to say that the wife has been given other than reasonable maintenance. Secondly, counsel has contended that there is nothing to show that there has been any wilful failure on the part of the husband. In support of his argument he has called my attention to the decision of HODSON, J., in *Scott v. Scott* (1) ([1951] 1 All E.R. 216). The point in relation to which that decision has been cited to me is that, as was pointed out by HODSON, J., the jurisdiction which I am exercising under s. 23 of the Matrimonial Causes Act, 1950, is something different from that which is exercised by the court in assessing maintenance where there has been, for instance, a decree of divorce. HODSON, J., is reported as saying (*ibid.*, at p. 218):

"It seems to me that, provided the existing state of affairs is that the husband is paying what is *prima facie* reasonable maintenance for his wife and two children, as I find is the fact in this case, the maintenance does not become unreasonable when tested against what could be obtained if the wife had succeeded in some proceedings which she might have taken, or, indeed, which she might yet take . . . Wilful neglect is not automatically established when it is found that the amount paid is less than the court might

- A order in the case of a guilty husband and an innocent wife in proceedings brought, say, on the ground of cruelty or adultery or desertion . . . ”

Applying that statement of principle, therefore, counsel for the husband contends that it would be wrong for me to approach the present case on the basis of what I might think would be a reasonable amount to award by way of maintenance if there had, for instance, been a decree of dissolution.

- B Counsel for the wife does not dispute that proposition but he contends that one must approach the problem in a case such as the present by deciding, in the first instance, what is a reasonable sum for a wife in this position, having regard to all the circumstances of the case, and he contends that, bearing in mind that this marriage has subsisted for over twenty-five years and that the husband is a man of substantial property with a very substantial income, the wife of such a person should reasonably be expected to spend quite a substantial sum of money per annum on clothes, for instance. It would be expected, he contends, that she would have some modicum of domestic assistance, and that if she did not actually possess a motor car, she would at least have the facility for obtaining motor transport. Lastly he contends that it would be reasonable to expect a wife in that position to be able to afford a holiday from time to time. All that has to be considered, as well as the rate of housekeeping which would be appropriate to a woman in this position and the style of house in which she could be expected to live. Counsel for the wife contends, contrary to the argument of counsel for the husband, that in the circumstances he has abundantly established that the amount which the husband has been allowing the wife cannot be regarded as reasonable maintenance in the circumstances of these parties.

- E On the other aspect of the case it should be put on record that there has been a previous hearing of the present case when counsel for the husband clearly took the point in argument that there had never been any wilful failure on the part of the husband for the reason that he had never been even asked to provide more maintenance than he has been providing. As I understood it, what was alleged was that the first he knew of any dissatisfaction on the part of the wife was the issue of the present summons. There was some controversy between counsel on that occasion as to what the true facts were and I allowed an adjournment to enable further evidence to be filed in the shape of affidavits sworn by the representatives of the solicitors on both sides. I must say at once that those affidavits do not carry the matter any further because they are restricted to what took place by way of negotiation between the solicitors subsequent to the date when the summons was issued. That, of course, does not help me because, as was pointed out by counsel for the husband, I must look at the case as at the time of the issue of the summons. However, on the resumption of the hearing today, counsel for the wife applied for leave to call his client to give evidence and I acceded to that on the basis that counsel for the husband should have equal facilities for calling his client. The wife did give evidence and was cross-examined. The husband was not called to give evidence. The wife said that during the time the parties were at Oxford the husband was in the habit of providing her with £4 every week simply as pocket money. She was not expected to keep house out of that, for the reason that the husband, who is in the catering trade, himself purchased all the food requirements for the household. So the wife was living without any financial responsibility to keep house or anything of that sort, and had £4 per week in her pocket to spend as she liked. After the removal to London at the beginning of last year the wife says she found that the £4 a week, which she had had in Oxford, was not sufficient, and I gather it was not sufficient for two reasons: first, she found living more expensive in London, and secondly, she did not have her husband with her all the time providing all the food. He was normally only there during week-ends, and it was only during week-ends that he would bring foodstuffs

with him for the household. The rest of the time she had to look after herself. A
In those circumstances she says that she found £4 a week was not enough,
and she told her husband so.

The result of that complaint on her part was that about April, 1955, the
husband increased his allowance to £7 per week, otherwise the arrangement
still went on as before. The wife was left substantially by herself except for B
week-ends. The husband continued to supply foodstuffs at week-ends. The
wife also, as I understand it, had an account at one of the well-known London
stores where she was able to obtain clothing on credit, the husband paying
the accounts from time to time. The wife's case is that £7 per week was not
nearly enough for one living in those conditions. She says that that was the
cause of the quarrel on July 23. The husband, however, refused to consider C
an increase, and, as I have already said, he in fact left her on that date, following
what, from both sides' stories, must have been a very bitter scene. The wife
says that the parties met again at the Cumberland Hotel on a Sunday about
the end of August. At that interview she says that the husband asked her for
a separation and said that if she would agree to it he would see that she was
well provided for, but that if she would not agree to it he would thereupon D
desert her and leave her with no money at all. The wife did not agree to a
separation. She said then as she has said today, that she would still like to have
her husband back. It is fair to say that the husband, although he did not
return to cohabitation with the wife, has not in fact carried out his threat to
give the wife no money at all, for he continued to pay the £7 per week; but
that, on the wife's evidence, was a sum which to his knowledge the wife was
saying was inadequate, even when taken in conjunction with her continuing E
to reside at the husband's expense in the matrimonial home. That is the wife's
case and, as I have said, the husband was not called to give any evidence to the
contrary. I must, therefore, conclude that something on the lines of what
the wife has described must have taken place at that interview in August of 1955.

In those circumstances it seems to me that whatever the husband has done
he has done wilfully and knowing that what he has done has been something F
which which the wife did not agree. The only question, therefore, is whether
the amount with which he has been providing the wife is reasonable in the circum-
stances. If it was not, it seems to me that the only conclusion that I could
come to is that there has been a wilful failure on his part to provide what would
have been reasonable. Notwithstanding the observations of HODSON, J., in
Scott v. Scott (1), which I have taken fully into consideration, I am of the opinion G
that the argument of counsel for the wife is well-founded. I reach that con-
clusion quite regardless of what such a wife might be expected to get in the event
of successful divorce proceedings. It seems to me that reasonable maintenance
for the present wife would be something considerably in excess of that which
she is in fact getting from the husband.

How much she ought to get is, I suppose, very much a jury question, and I H
can only make my own assessment, for what it is worth. There was some talk
at one time about the possibility that I might adjourn this matter to a registrar
to quantify the amount which the husband should pay, if I were of the opinion
that the charge of wilful failure to provide reasonable maintenance had been
made out. I see no point, however, in putting the parties to further costs in
having another hearing before the registrar, particularly as all the facts on which I
the registrar could decide are already before the court. Having already arrived
at the opinion that the husband did fail, and wilfully fail, to provide the wife
with reasonable maintenance, I propose to make an order for payment of
maintenance at the rate of £1,800 a year less tax.

A further point to be considered is whether part, at any rate, of that sum
should be secured. That point has given rise to yet a further argument, because
the parties are at issue whether I can order security only for joint lives, or

- A whether the wife is entitled to a secured provision for her life, as she would be, for instance, in the event of divorce proceedings. I would say at once that, having regard to the husband's capital assets, I have no doubt the present is a case in which a part of the periodical payments I have ordered ought to be secured. I will deal first with the question whether the security should be for joint lives only or for the life of the wife. On that counsel for the husband
- B draws my attention to the wording of s. 23 (2) of the Matrimonial Causes Act, 1950—which provides that all the court can do is to secure to the wife “the periodical payments”. That necessarily implies, as I follow the argument, that the security shall be limited to the periodical payments previously mentioned, i.e., payments to be made during the joint lives of the parties. The curious thing is that counsel have been able to refer me to reports of cases in which there have been
- C dicta by learned judges on both sides. In *Scott v. Scott* (1), to which I have already referred, HODSON, J., said ([1951] 1 All E.R. at p. 218):

- “In the event of divorce, she [the wife] is entitled to claim maintenance to be secured to her for her life as opposed to the period of joint lives, which appears to be the utmost that can be obtained under s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949.”
- D

Section 5 of the Act of 1949 is the same as s. 23 of the Act of 1950. On the other side I have the observations made by DENNING, L.J., in *King v. King* (2) ([1953] 2 All E.R. at p. 1030):

- “Under s. 23 the court can order the husband to secure the payments
- E by a deed of covenant, depositing some of his property as security and covering her, not only during their joint lives, but also during widowhood . . .”

- It should be said straight away that both the remark of HODSON, J., in the one case and those of DENNING, L.J., in the other, were made obiter. Counsel for the husband, who was himself engaged in *King v. King* (2), said that to the best
- F of his recollection there had been no argument on that point. Certainly it was not necessary for the decision of the case, and he asks me to say that that passage in the judgment, which was a reserved judgment delivered only after the intervention of the long vacation, was inserted per incuriam. I am bound to note, however, that although the phrase occurs only in the judgment of DENNING, L.J., it was a judgment which was concurred in by both the other
- G members of the court, neither of whom gave any separate judgment beyond expressing concurrence.

- The matter does not stop there because I have been referred to one case where an actual order has been made providing a wife with security for her life. That is *McLellan v. McLellan* (3). The only place where this particular point appears is in [1954] 1 All E.R. 1. In that case it is reported that KARMINSKI, J.,
- H found the husband's annual income to be £3,750, the wife's to be £250, and ordered the husband to pay £850 a year less tax during joint lives, together with a further £150 a year less tax to be secured to the wife for her life. It is fair to say that that is merely set out in the recital of the facts of the case; the judgment is reported only on another point and I have not had the benefit of reading what KARMINSKI, J., may have actually said with regard to this
- I particular point in the course of his judgment, nor do I even know what argument, if any, was addressed to him on the subject. Faced as I am with dicta both ways, I think the only course I can take is to follow what has been already done by KARMINSKI, J., especially as that course is supported by a dictum pronounced in the Court of Appeal. In the circumstances it is proper, in my judgment, following that decision of KARMINSKI, J., to make an order in the present case that part of the wife's periodical payments shall be secured for her life.

The only other matter to refer to now is the question of quantum. It is, I think, accepted by both sides that if I am to make any order with regard to furnishing security it would be convenient to include with the order for security some provision for security of tenure of the house. Counsel for the wife has suggested that that object could be achieved by requiring the husband to convey his interest in the house to trustees to hold for the benefit of the wife during her life. I think that that is a proper provision to make. I order that of the total of £1,800 a year, which I have already ordered, the sum of £500 a year shall be secured for the life of the wife. I will leave the parties to agree, if they can, or, failing that, to take before the learned registrar, the question of how much of that £500 is represented by the annual value of the house.

Order accordingly.

Solicitors: *Kenneth Brown, Baker, Baker* (for the wife); *Herbert & Gowers & Co.* (for the husband).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

NOTE.

R. v. DEVINE.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Byrne, JJ.), February 13, 1956.]

Criminal Law—Practice—Probation order—Breach—Matters to be put to prisoner when arraigned for breach.

BYRNE, J., delivered the judgment of the court: There is nothing in this application for leave to appeal against sentence, and it is dismissed. The court, however, desires notice to be taken with regard to a point of procedure which it has observed as the result of considering this application. The point is this: Where a prisoner is brought before a court for breach of a probation order, it should be put to him, when he is arraigned before the court, in the clearest possible terms and he should be asked to say whether he admits it or not. The terms in which the matter should be put to him are: first to say where he was convicted and what happened to him, then to tell him how the breach is alleged to have taken place, and, if it be by a further conviction, then to tell him the time of the conviction and the adjudication of the court. He should next be asked to say whether he admits those facts. If that is done, there is no further difficulty. If that is not done, then, of course, it being a trial, albeit without a jury, the prisoner will have to be asked whether he desires to give evidence or call witnesses, and the court will have to pronounce on whether they find the breach of the order has been proved. But it is desirable that the proceedings should begin by the matter being put clearly to the prisoner and for him to be asked whether he admits the allegation with regard to it.

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

A

RADIO CORPORATION OF AMERICA v. RAULAND CORPORATION AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Devlin, JJ.), February 6, 7, 1956.]

B *Evidence—Examination of witnesses in relation to matters pending before foreign tribunal—Production of documents—Discovery against persons not parties to foreign action—Foreign Tribunals Evidence Act, 1856 (19 & 20 Vict. c. 113), s. 1.*

C In the course of pre-trial discovery proceedings in the United States of America, the defendants to the proceedings there were granted by the District Court for the Northern District of Illinois letters rogatory to obtain discovery of documents from two English limited companies and discovery of documents and oral evidence from directors of those companies. Neither of the companies nor any of their directors was a party to the proceedings in the United States. In granting the letters rogatory the judge of the District Court stated among his reasons "it seems obvious that examination of the officers and agents of alleged co-conspirators may lead to the discovery of relevant evidence, and that is all that is required". Application for an order for the disclosure of certain documents by the English companies and for the examination on oath of certain directors having been made under s. 1 of the Foreign Tribunals Evidence Act, 1856*, on the ground that, in the words of the section "a court of competent jurisdiction in a foreign country, before which a civil or commercial matter was pending, was desirous of obtaining the testimony in relation to such matter" of witnesses in England,

E **Held:** the application failed because (a) on the true construction of s. 1 of the Foreign Tribunals Evidence Act, 1856, the words "testimony in relation to such matter" meant testimony relevant to the issues to be tried in the foreign action, but did not extend to other material the disclosure of which merely might lead to a line of inquiry which itself might disclose relevant testimony, and (b) it was apparent that in the present case the purpose was merely to obtain discovery of material which might lead to the obtaining of evidence relevant to the issues ultimately to be tried by the foreign court.

G *Eccles & Co. v. Louisville & Nashville Railroad Co.* ([1912] 1 K.B. 135) followed.

Dicta of LORD HALSBURY, L.C., LORD ESHER, M.R., and FRY, L.J., in *Burchard v. Macfarlane, Ex p. Tindall* ([1891] 2 Q.B. at pp. 244, 247, 250) applied.

Decision of BARRY, J. (ante, p. 260) reversed in part.

H [As to evidence for use before foreign tribunals, see 13 HALSBURY'S LAWS (2nd Edn.) 795, para. 874; and for cases on the subject, see 22 DIGEST (Repl.) 603, 6940-6942.

As to production of documents at proceedings other than trial, see 13 HALSBURY'S LAWS (2nd Edn.) 739, para. 813.

I For the Foreign Tribunals Evidence Act, 1856, s. 1, see 9 HALSBURY'S STATUTES (2nd Edn.) 576.]

Cases referred to:

(1) *Board v. Thomas Hedley & Co., Ltd.*, [1951] 2 All E.R. 431; 2nd Digest Supp.

(2) *Eccles & Co. v. Louisville & Nashville Railroad Co.*, [1912] 1 K.B. 135; 81 L.J.K.B. 445; 105 L.T. 928; 22 Digest (Repl.) 603, 6942.

* The text of s. 1 of the Foreign Tribunals Evidence Act, 1856, is printed at p. 550, letters D to F, post.

(3) *Burchard v. Macfarlane, Ex p. Tindall*, [1891] 2 Q.B. 241; 60 L.J.Q.B. 587; 65 L.T. 282; 18 Digest 56, 136. A

Appeal.

This was an appeal by the respondents, English Electric Co., Ltd., and its subsidiary, Marconi's Wireless Telegraph Co., Ltd., and two directors of those companies, from an order of BARRY, J., dated Dec. 21, 1955, reported ante p. 260, whereby the two directors were ordered under the Foreign Tribunals Evidence Act, 1856, s. 1, to attend before a master for examination on oath on specified matters and to produce specified documents on notice given twenty-eight days before the examination. B

Sir Hartley Shawcross, Q.C., and *R. J. Parker* for the respondents.

Sir Frank Soskice, Q.C., and *J. G. Le Quesne* for the applicants. C

LORD GODDARD, C.J.: I will ask DEVLIN, J., to give the first judgment.

DEVLIN, J.: This case concerns the proper construction of the Foreign Tribunals Evidence Act, 1856, which, by s. 1, provides:

"Where, upon an application for this purpose, it is made to appear to any court or judge having authority under this Act that any court or tribunal of competent jurisdiction in a foreign country, before which any civil or commercial matter is pending, is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction of such first-mentioned court, or of the court to which such judge belongs, or of such judge, it shall be lawful for such court or judge to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly" D

That is the first limb of s. 1. In its second limb the section goes on to say:

" . . . it shall be lawful for the said court or judge, by the same order, or for such court or judge, or any other judge having authority under this Act, by any subsequent order to command the attendance of any person to be named in such order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order" E

This section has been invoked by the applicants in this case, who are the defendants in an action which has been proceeding in the United States District Court for the Northern District of Illinois for some very considerable time, and they desire to obtain from certain witnesses in this country information, and originally they desired to obtain documents, in order to assist the proceedings now pending in the court in Illinois. G

I think it necessary to indicate generally what those proceedings at the present stage are. They are concerned with discovery. We have not had any evidence of American law and practice in relation to discovery, but we can get sufficient information for the purposes of this case from the documents that have been put in front of us. The essential principles of discovery do not seem to me to be very different in the United States from those in this country; viz., discovery is not limited merely to the obtaining by means of disclosure of such material as may be strictly relevant to the issues in the action, i.e., such material as might be admissible on the hearing of the action, but also covers material which might lead to a line of inquiry which would itself disclose relevant material. It will be convenient for the purposes of this judgment if I talk of the first as direct material, i.e., material which might be put in evidence in the issue, and of the second as indirect material. H

Recent cases in this country—I have in mind one decided by the Court of Appeal a year or two ago, *Board v. Thomas Hedley & Co., Ltd.* (1) ([1951] 2 All E.R. 431)—have shown that one may sometimes obtain discovery of documents not because they are relevant in the case itself, but because they may fairly lead I

- A to a line of inquiry which would disclose relevant material. It is plain that that principle has been carried very much further in the United States of America than it has been carried in this country. It is not restricted merely to obtaining disclosure of documents from the other party to the suit. It is plain that there is a procedure, what might be called a pre-trial procedure, in the courts of the United States, which allows interrogation not merely of the parties to the suit but also of
- B persons who may be witnesses in the suit or whom it may be thought may be witnesses in the suit to require them to answer questions and produce documents. It seems to me to be plain enough that those questions would not necessarily be restricted to matters which were relevant in the suit or to produce necessarily what was admissible evidence, but might be used to lead to a train of inquiry which may of itself lead to relevant material. It is plain that that pre-trial
- C procedure, the obtaining of depositions from witnesses with a view to discovery, is what the Federal Court at Illinois is at present engaged on, and accordingly the applicants, the Rauland Corporation, applied to the court for process, which under English law they could not possibly get, to obtain discovery, in effect, from witnesses in this country, from the English Electric Co., the Marconi Co. and a number of directors of those companies. In accordance with the ordinary
- D American procedure, they were allowed to obtain that. The application, therefore, which we have to consider is not an application to examine witnesses for the purpose of their evidence being used directly in the suit but to examine witnesses - in connection with this discovery proceeding. The question which we have to consider is whether the testimony which those witnesses may be expected to give is "testimony in relation to such matter" within the meaning of s. 1 of the
- E Act. Before we have any jurisdiction to grant this application it must be made to appear that the foreign court is desirous of obtaining "testimony in relation to such matter" of these witnesses, and, I think, that the question that we have to determine is whether this testimony which it is sought to obtain is testimony within the meaning of the statute.

- Some authority is available on the meaning of the Act and in particular it has
- F been made clear, by authorities which counsel for the applicants does not challenge in this court, that he could not ask for discovery of documents. That was made clear by VAUGHAN WILLIAMS, L.J., in the judgment which he gave in *Eccles & Co. v. Louisville & Nashville Railroad Co.* (2) ([1912] 1 K.B. 135). In the course of his judgment he said (*ibid.*, at p. 142):

- G "It is enough for the present purpose to say that [the Foreign Tribunals Evidence Act, 1856] is an Act which, in the case of an action pending in the court of a foreign country, enables that court to request the English court to take part in the trial of the action brought in the foreign country to this extent, namely that, on the request of the foreign court, it empowers the English court to make such an order as will enable the evidence of a witness in this country to be given before a commissioner appointed to take his evidence. This is not a power given to the court in this country to order
- H discovery of documents. It is a power to make an order for the taking of evidence . . ."

- In that case all that was being considered was the discovery of documents and it is plain that the view of the court was that the testimony to which the Act referred could not include the discovery of documents. Equally, in my judgment,
- I it could not include examining witnesses in order to ascertain what certain documents contained or examining witnesses in order to ask them questions arising out of matters relating to the documents. The distinction is not whether what is to be obtained is documentary material or oral material. The distinction is whether it is a process by way of discovery and testimony for that purpose or whether it is testimony for the trial itself. That distinction is brought out most clearly in *Burchard v. Macfarlane, Ex p. Tindall* (3) ([1891] 2 Q.B. 241). It is not a case on s. 1 of the Act of 1856, but is on s. 5 of a very similar Act, the Evidence

by Commission Act, 1843, which dealt with the obtaining of evidence in England or in any part of the United Kingdom for the purpose of another part of the United Kingdom, such as obtaining evidence in Scotland for the purposes of the English court. The distinction that I am seeking to make was, I think, made quite clearly in all the judgments in that case. LORD HALSBURY, L.C., said (*ibid.*, at p. 244):

“ . . . I am remitted consequently to the inquiry, whether or not this is in substance an order for inspection and discovery, or whether it is part of a procedure to examine witnesses in the course of proof for the purpose of establishing the facts . . . I am led to the conclusion that it is inspection and discovery that is sought, and not proof.”

LORD ESHER, M.R., said (*ibid.*, at p. 247):

“ Even supposing that the documents had been identified, and that the witnesses had been asked to produce a document which it is admitted, or shown clearly, is not the document of either the plaintiff or the defendant, and had been ordered to produce it for the purpose of its being read, not at the trial, but before the trial, not before the examiner as part of the trial but as preliminary to the trial, then in that case also I should have thought that it is beyond the jurisdiction of the judge to make the order.”

FRY, L.J., said (*ibid.*, at p. 250):

“ It is analogous to a bill of discovery against a mere witness. Now is such an order as that within the meaning of the statute . . . ? In my judgment it plainly is not. That statute enables the court in England or Scotland or Ireland to direct a commission for the examination of witnesses—that means persons who are able to bear testimony with regard to the issues in controversy between the litigant parties. It does not mean that they may be examined with regard to the possession of documents which may be relevant to the controversy between the parties.”

In that authority the distinction is made plain between what I have called discovery or indirect material on the one hand, and proof or direct material on the other hand. That is, I think, the true distinction with which one must approach the word “ testimony ” in this Act. Testimony which is in the nature of proof for the purpose of the trial is permissible. Testimony, if it can be called “ testimony ”, which is mere answers to questions on the discovery proceeding designed to lead to a train of inquiry, is not permissible. Into which category does the present fall ? It might perhaps be enough to say that it is plain enough from what I have said of the nature of proceedings in the court in Illinois that they fall into the category of pre-trial proceedings, proceedings by way of discovery, but if there be any doubt about that I do not think that one has to go further than to look at the reasons which the learned judge in the District Court of Illinois, JUDGE IGOE, gave when he granted the letters rogatory in this case. One passage is sufficient for my purpose. He said:

“ I can find no authority, and none has been cited, for the proposition that a party must show what relevant and material evidence proposed witnesses have in their possession as a condition precedent to taking of depositions of alleged co-conspirators in an anti-trust case. It seems obvious that examination of the officers and agents of alleged co-conspirators may lead to the discovery of relevant evidence, and that is all that is required.”

That shows, I think, plainly enough what the object of this procedure is.

An application for the enforcement of the letters rogatory was made to Master GRUNDY and he made the order *ex parte*. An application was made to Master BURNAND to discharge the order and, on hearing argument, he discharged it. The applicants appealed from that order of Master BURNAND and their appeal was very largely unsuccessful. BARRY, J., who heard the appeal in chambers,

- A allowed the appeal only to a limited extent. The applicants sought the discovery or disclosure of a large number of documents. They had originally sought in the very widest terms for documents which merely by a general description might relate to the issues in the action. In the course of the proceedings before the judge in chambers they limited their application to a specified number of documents, and sought from the English Electric Co. and the Marconi Co. disclosure of those documents. That was in Part A of the request as limited. In Part B they sought for oral testimony and they asked for an order

“ that Sir George Horatio Nelson and Mr. Henry George Nelson [two out of the many directors named in the original letters rogatory] do attend and submit to be examined upon oath upon (i) such of the above-mentioned agreements and documents, and the conversations, transactions, activities and negotiations referred to therein, as may be within the knowledge of them, or either of them . . . ”

- D and then various other classes of documents were enumerated. The learned judge, as I have said, disallowed the appeal to a very considerable extent in that he did not allow any part of the order that required the companies to give discovery of documents, but he did allow Part B of the request subject to certain safeguards. He allowed, subject to certain conditions, that part which required Sir George Nelson and Mr. Nelson to give oral testimony, and he provided in the order that the applicants should be allowed to specify any of the documents that they had listed in Part A and to require Sir George Nelson or Mr. Nelson as directors of the company to produce them provided that notice was given twenty-eight days before the examination.

- E I dealt at some length with the principles which affect both parts of the application because, in my judgment, they are quite indistinguishable, and it is only when one sees what is the true principle that one sees how indistinguishable they are. Once it is accepted that an order of this sort may not be made so far as documents are concerned it appears to me to follow that it cannot be made so far as oral testimony is concerned. The relevant distinction is not between written documents and oral testimony. If the testimony happened to be direct testimony which was immediately relevant to the issue it could not matter whether it was in a document or not. If the document was the best evidence then the document would have to be produced. The section itself provides for the production of documents. When in *Eccles & Co. v. Louisville & Nashville Railroad Co.* (2) and similar cases VAUGHAN WILLIAMS, L.J., and the other judges refer to discovery or to inspection on discovery they do not mean that all forms of production of any document will be disallowed, because s. 1 itself provides for production. What they are saying is that under s. 1 discovery is not permissible of indirect material. That, in my judgment, is the true distinction.

- H Accordingly, I think that counsel for the respondents is right in his submission that the learned judge, having disallowed the documents, ought logically to have gone on and to have disallowed the order for the examination of Sir George Nelson and Mr. Nelson, because exactly the same principle applied to both. If he had not power to do one, he had not power to do the other. He had not power because it was not made clear to him that the foreign court was desirous of obtaining the “ testimony in relation to such matter ” within the proper construction of s. 1. On its proper construction the phrase “ in relation to such matter ”, means as evidence which may be used at the trial and not in proceedings for inspection and discovery before the trial.

I Whether the evidence is relevant or not would depend on the rules of evidence that are appropriate in the foreign court. Counsel for the respondents did not argue otherwise; but whether it is relevant testimony within the meaning of s. 1 depends on whether it is testimony that is relevant to an issue in the matter and not whether it is testimony—if, as I say, “ testimony ” can be used in this sense at all—which is material only in the sense that it might lead to a line of

inquiry which would in fact disclose the testimony. The learned judge, I think, was distinguishing perhaps between oral material and written material; but the difficulties to which such a distinction leads are manifest when one considers the order that has been made and the way in which counsel for the applicants sought to justify it. A

The learned judge has refused to order that the company by its proper officer, the secretary, should disclose a number of documents. Let me take as an example of that the agreement of 1902 which we heard discussed in the course of the case. Having ordered that the company, through its proper officer, should not be liable to disclose that document, the order that he has made is one which empowers the applicants to put one of the directors of the company in the box and to give him notice to produce the document which the company has not been ordered to produce. In other words, instead of producing it through its proper officer, it is to be required to produce it through a director. The company can pass quite properly a resolution—and counsel for the applicants did not argue otherwise—saying that its director, Sir George Nelson, is not to have any authority to produce the document. The company itself has been told that it need not produce it by its proper officer and it can deprive Sir George Nelson of any power or authority to produce it. What could counsel do in that event? The answer is that he would ask Sir George Nelson questions about the document. In other words, the effect of the order is that, although the company may not be ordered to produce the document itself, its servants may be compelled to go into the witness-box and answer questions about it. The primary evidence not being allowed, secondary evidence would be brought in instead. That cannot, in my judgment, be the right distinction. There is in fact no distinction between the two Parts A and B of the request. There is no distinction as far as principle is concerned and the learned judge, I think with respect, ought to have applied the same principle to both. The consequence, in my judgment, is that the appeal ought to be allowed and the order of Master BURNAND restored. B C D E

LORD GODDARD, C.J.: I agree. I would only add that I base my judgment on two short points. First, whichever way you look at this case it is in effect an application that the respondents should give discovery of their documents. It is agreed now that the order could not be made on the companies because they are not parties to the action, and the device, if I may use that expression without offence to anybody, of saying that the director is to be called and can be examined with regard to these documents seems to me only to be trying in another way to get discovery which cannot be ordered under the Act. Secondly, it seems to me perfectly clear from the passage in the learned federal judge's judgment, to which DEVLIN, J., has referred, that this is merely an attempt to get evidence in the course of the discovery proceedings which are known to the American courts and which are known, as I know, also to the Canadian courts, which is a sort of pre-trial before the main trial. It is an endeavour to get in evidence by examining people who may be able to put the parties in the way of getting evidence. That is what we should call mainly a fishing proceeding, which is never allowed in the English courts. I think that that of itself would be a complete objection and ought to justify this court in refusing to make the order. For the rest, I have nothing to add to the judgment which DEVLIN, J., has given. F G H

HILBERY, J.: I agree with both judgments which have been given. I

Appeal allowed.

Solicitors: *Linklaters & Paines* (for the respondents); *Theodore Goddard & Co.* (for the applicants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

PARROCK v. PARROCK.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), March 28, May 23, November 21, 1955.]

Divorce—Desertion—Petitioner's adultery—Effect on deserting spouse's mind—Conduct of deserting spouse leading to inference of adultery—Exercise of discretion.

The parties were married in 1920. In 1945 or 1946 the husband started an association with a Mrs. M., which the wife suspected to be adulterous. The association ceased in 1946. In 1950 the wife brought to the matrimonial home as a lodger one H., who subsequently went into hospital. In February, 1951, the wife left the husband and in March, 1951, she began to live in the same town in H.'s caravan as his housekeeper. In April, 1952, the husband presented a petition for divorce on the ground of the wife's adultery with H. Both the wife and H. denied the charge. In December, 1952, Mrs. M. began to act as the husband's housekeeper. In February, 1953, the husband's petition was dismissed as the charge of adultery had not been proved. The wife then complained to the justices that the husband had wilfully neglected to provide reasonable maintenance for her but in March, 1953, the complaint was dismissed. In the divorce proceedings and before the justices the wife made it clear that she suspected the husband of committing adultery with Mrs. M. Soon afterwards the husband in fact began to commit adultery with Mrs. M. and since that date the adultery had continued. The husband now petitioned for divorce on the ground of the wife's desertion and prayed for the exercise of the court's discretion in his favour. The wife, who was still living in the same town as the husband, did not defend the petition.

Held: the wife had withdrawn from cohabitation to start life with another man in circumstances which raised the suspicion that adultery had been committed; the true inference from the facts was therefore that the wife was thereafter indifferent to the fact, which she must have known, that Mrs. M. became the husband's mistress; accordingly the court's discretion would be exercised in the husband's favour and a decree granted.

Herod v. Herod ([1938] 3 All E.R. 722) applied; *Williams v. Williams* ([1943] 2 All E.R. 746) distinguished.

[As to adultery of deserted party after desertion, see 12 HALSBURY'S LAWS (3rd Edn.) 259, para. 489, notes (i) (k) (l); and for cases on the subject, see 27 DIGEST (Repl.) 346, 2875, 360, 2978, 2979.]

Cases referred to:

- (1) *Herod v. Herod*, [1938] 3 All E.R. 722; [1939] P. 11; 108 L.J.P. 27; 159 L.T. 530; 27 Digest (Repl.) 360, 2978.
- (2) *Earnshaw v. Earnshaw*, [1939] 2 All E.R. 698; 27 Digest (Repl.) 360, 2979.
- (3) *Marshall (or Wilkinson) v. Wilkinson*, [1943] 2 All E.R. 175; 1943 S.C. (H.L.) 61; 27 Digest (Repl.) 432, 3608.
- (4) *Williams v. Williams*, [1943] 2 All E.R. 746; 113 L.J.P. 18; 169 L.T. 375; 27 Digest (Repl.) 346, 2875.

Petition.

The parties were married on July 4, 1920, and there were three children of the marriage. In February, 1951, the wife left the matrimonial home. On Apr. 19, 1952, the husband filed a petition for divorce on the ground of the wife's adultery with one Horbacz. The allegation of adultery was denied by the wife and by Mr. Horbacz. The suit came before Mr. Commissioner LATEY, Q.C., on Feb. 19, 1953, and on Feb. 23, 1953, the commissioner found that the charge had not been proved and dismissed the petition. On Mar. 12, 1953, the Berkhamsted justices heard a complaint by the wife for an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, but the complaint was dismissed.

On Dec. 13, 1954, the husband presented a petition for divorce on the ground of the wife's desertion as from Feb. 27, 1951, and prayed for the exercise of the court's discretion in his favour. The petition was undefended and came before KARMINSKI, J., on Mar. 28 and May 23, 1955, when it was adjourned for argument by the Queen's Proctor. A

The facts appear in the judgment.

T. J. Kelly for the husband. B

Colin Duncan for the Queen's Proctor.

KARMINSKI, J.: When the case first came before me, I was a good deal troubled by the position created by the husband's own admitted adultery, because as he said in his discretion statement, and as he has repeated on oath in this court, he has in effect been living in adultery with Mrs. Mephram from about the middle of the year 1953 right up to the present time. Mrs. Mephram had been from December, 1952, his housekeeper, but it is not suggested, and it certainly is not admitted by the husband, that adultery commenced until about six months after she first came to his house as his housekeeper. There have been other proceedings between these parties which in no way diminish the difficulties of the court in deciding first whether or not desertion had ever commenced; and, secondly, if it had commenced, whether it had continued up till the time of the petition at the end of 1954, notwithstanding the husband's own admitted adultery. C

The parties were married in July, 1920, and the marriage endured until the beginning of 1951. So that including the period when the husband was on war service they were together for rather more than thirty years. The husband, when serving in the Royal Air Force during the war, had met Mrs. Maidment, who was at that time a widow, her first husband having been killed in the war in 1940 at Dunkirk in the course of his service. I have not the slightest doubt that they became a good deal attached to each other. In April, 1945, Mrs. Maidment married Mr. John Stephen Mephram, and the husband was in fact best man at that wedding. The marriage between Mr. and Mrs. Mephram for some reason or other appears to have been very short-lived and they lived together for not more than three months. In 1948 Mr. Mephram obtained from this court a decree of divorce against his wife on the ground of her desertion. I have no doubt that in 1945 or 1946 there was some form of attachment between the husband and Mrs. Mephram. It is perhaps unfortunate that the husband has added to his own difficulties, and indeed to mine, by his extreme reluctance to tell me what really happened. With a little persistence on my part, however, the story has now largely, if not perhaps entirely, emerged. The wife intercepted, a letter from Mrs. Mephram to the husband about 1946, which she said was only one of many. The letter is of an affectionate nature and one which I have not the slightest doubt she was fully entitled to resent. Her anxieties as to the relations between her husband and Mrs. Mephram were not diminished by a somewhat angry letter written in September, 1946, from or near Hastings by Mr. Mephram to the husband. Mr. Mephram apparently was taking a serious view of his wife's relations with the husband. Those letters were intercepted by the wife, as is now at last admitted by the husband. I think that the husband has now told me the real truth, which is simply this. It may be that very wisely he dropped Mrs. Mephram, or that she dropped him; the correspondence ceased and they did not see each other again until some months after the wife had left him in February, 1951. Indeed, the husband did not know where Mrs. Mephram was in the autumn of 1951 and found her only after he had caused inquiries to be made by an inquiry agent on his behalf. The wife had said in the earlier divorce proceedings that she was complaining from time to time not, as I understand it, of the husband's association with Mrs. Mephram, which I think ceased in 1946, but because when there was other trouble between them the husband used to say to the wife how infinitely preferable Mrs. Mephram was. The wife also said that D E F G H I

A there was trouble over another woman whom I shall refer to as Mrs. W.; but her complaints about that woman seem to be very nebulous, and I do not think that there was anything very serious in that association.

The last trouble between the husband and the wife arose out of the wife's friendship and, I think, affection for one Horbacz. That man had come originally as a lodger to her house; he had been ill in hospital subsequently and the wife
B had been good to him, but in February, 1951 the wife left the husband, having sold up a portion of the household furniture, took with her her personal belongings, went for a few weeks to lodgings, and then set up house with Mr. Horbacz in a caravan in Hemel Hempstead, where in fact I am quite satisfied they have resided ever since. The husband learned of the wife's living in this caravan with the man to whom he had objected from time to time and brought a suit for dissolution
C of the marriage in April, 1952, alleging that the wife had committed adultery with Mr. Horbacz, whom he named as co-respondent. The matter was tried for several days by Mr. Commissioner LATEY, Q.C., who, having heard the evidence, came to the conclusion that the husband had not proved his case and on Feb. 23, 1953, dismissed that petition. Immediately after that the husband was summoned before the justices on the wife's complaint that he had wilfully neglected
D to provide reasonable maintenance for her. That complaint by her, after evidence had been taken, was dismissed on Mar. 12, 1953. The husband now says that the wife has deserted him. The wife has not appeared or taken any part in these proceedings, but the relevant facts having been brought to my notice I felt it was a case where I should have assistance from the Queen's Proctor. I am told that the Queen's Proctor has made what I may term the
E usual inquiries and has discovered no grounds for intervening.

The law on this difficult subject of desertion where the petitioner has committed adultery is now tolerably well-established. The leading case is, and no doubt will be for many years, *Herod v. Herod* (1) ([1938] 3 All E.R. 722) where LORD
MERRIMAN, P., in a well-known, considered judgment held that if a spouse commits adultery after he or she has been deserted, the desertion is not necessarily
F terminated as a matter of law, regardless of the question whether the deserting spouse knew of the adultery or whether it had any influence on his or her conduct. If it is doubtful whether the respondent knew of the adultery or, if he or she knew whether his or her conduct was affected by it, the petitioner fails to discharge the burden of proof. The question is to be determined according to the circumstances of each case. A spouse cannot be heard to say that adultery at which he
G or she has connived or to which his or her conduct has conduced is a reasonable case for desertion. That, I am satisfied, accurately summarises the law as laid down in *Herod v. Herod* (1), and as subsequently approved by the Court of Appeal in *Earnshaw v. Earnshaw* (2) ([1939] 2 All E.R. 698).

Counsel for the Queen's Proctor has rightly pointed out that the law in Scotland is different, and that indeed there is an authority in the House of Lords to show
H that in Scotland a pursuer who has committed adultery within three years is in no circumstances entitled to obtain a decree of divorce: *Marshall (or Wilkinson) v. Wilkinson* (3) ([1943] 2 All E.R. 175). An examination of the judgments in that case makes it tolerably clear that their Lordships were dealing with the law of Scotland as it was in 1943, and as, in the view of the majority of their Lordships, it has been since the Scots Act, 1573. No query appears to have been
I raised in that case by their Lordships as to the correctness or otherwise of the decision of *Herod v. Herod* (1), which was referred to in argument and was also mentioned in the speech of VISCOUNT SIMON, L.C. (*ibid.*, at p. 177), where it appears that *Herod v. Herod* (1) was quoted with approval. English law, however, is clear to this extent at least, that adultery by a petitioner within three years of the desertion which he alleges does not preclude him from succeeding.

Counsel for the Queen's Proctor called my attention to the decision of the Court of Appeal in *Williams v. Williams* (4) ([1943] 2 All E.R. 746). In that case

the facts were somewhat different from the present in that the husband had greatly upset the wife in 1938 by staying for a number of nights with a young woman, Miss Hooper, in hotels in London and Brighton, a fact which, when it came to the wife's notice, not unnaturally caused her to wonder if, indeed to suspect that, her husband had committed adultery with that woman. In fact it was found that no adultery had then been committed by the husband with that young woman but that in 1939 till the end of 1941 he had gone off with the same young woman and had committed adultery with her. In 1942 he filed a petition for divorce on the ground that the wife had deserted him for three years immediately preceding the presentation of the petition, and the wife did not defend the suit. On the facts *HENN COLLINS, J.*, dismissed the petition and his decision was affirmed by the Court of Appeal. The peculiar feature of that case, and that which perhaps distinguishes it from the present, was that the wife had persuaded herself that adultery had been committed in 1938 although in fact it had not. When the husband sought to rely on that he was met with the answer that his subsequent adultery must have had some effect on the wife's mind. I think that the matter can be most conveniently summarised by a brief reference to the judgment of *DU PARCQ, L.J.*, who said ([1943] 2 All E.R. at p. 752):

"The question is whether, because of her firm refusal to justify her desertion of her husband by anything subsequent to the events of 1938, it can be said with reasonable certainty that what happened later made no difference to her conduct. For myself, I find it impossible to say that, if the petitioner had kept aloof from Miss Hooper for a longer period, and if he had persevered in his attempts at reconciliation, or continued to desire it, for as long as even one year out of the statutory period of three years, his wife would still have refused inexorably to receive him back. No one can say with certainty either that she would, or that she would not, have relented, and it is after all the act of the petitioner which has made it impossible to give a certain answer."

The burden in cases of this kind must always be on the petitioner who has been committing adultery to satisfy the court of the matters required in *Herod v. Herod* (1), in the present case that the wife either did not know that adultery had been committed or that if that knowledge was present to her mind she was quite uninfluenced by it in her decision to remain apart and not return to the husband. The difference between the present case and *Williams v. Williams* (4) is this: In *Williams v. Williams* (4) the wife was the respondent and could not in any way be attacked because of her matrimonial conduct apart from the alleged desertion. It was not suggested, as it is in the present case, that she had gone to live against the wishes of her husband in a caravan with another man in circumstances which might not unreasonably arouse the suspicion that adultery had been committed in that caravan. In the present case the wife did so withdraw herself from cohabitation to start life in a caravan although, as Mr. Commissioner *LATEY, Q.C.*, found, she did not commit adultery there.

I have to consider the present case, as *Herod v. Herod* (1) says I must, in the light of all the circumstances known to the court. So far as the wife's knowledge in the present case is concerned, it is tolerably clear that she knew that the husband was living in the same house with Mrs. Mephram as his housekeeper, and she made her suspicions clear, both before the trial before Mr. Commissioner *LATEY, Q.C.*, and subsequently before the justices, that adultery was quite probably being committed. On the facts as I know them now, the adultery did not commence until almost immediately after the wife's proceedings before the justices had been dismissed. I have no reason to doubt the accuracy of the husband's evidence on that, the more especially since the Queen's Proctor has been good enough to investigate the facts and has not found anything which he thinks ought to be brought to the court's notice on those matters. The wife lived, and still lives, in the same town, Hemel Hempstead, as the husband does,

- A** and it is improbable in all the circumstances that the wife was at any rate free from suspicions as to what was going on between the husband and Mrs. Mephram. It would indeed be strange if some friend or acquaintance had not told her what was going on, and the husband as early as 1951, when he had resumed his acquaintance with Mrs. Mephram, made a frank disclosure to the married daughter of himself and the wife that he was in love with Mrs. Mephram and hoped one day to be able to marry her. I have no doubt that the reason for these proceedings is because he and Mrs. Mephram do in fact want to marry. I have equally no doubt that the wife knew that the husband was living with Mrs. Mephram not merely under the same roof as employer and housekeeper but as lover and mistress. She has taken no part in defending these proceedings. That may have some, though not much, significance; but it certainly does not relieve me of my obligations to decide the present case in the light of the wife's knowledge and of her attitude.

- C** I do not think myself, having now had the opportunity of considering the facts and the law with the great assistance of the Queen's Proctor, that the wife was affected by the knowledge of the husband's adultery, which I find as a fact she had. I think that the present is a case where, confronted with charges against herself, she not unnaturally counter-attacked not only in this court but before the justices, and pointed out that the husband's conduct in the past was by no means free from blame. I have not had in the present case the advantage of any evidence from the wife, but I am satisfied that I have had read to me all the relevant passages of evidence which she gave before the learned commissioner and also the note of the evidence which she gave before the justices of Berkhamsted. Mr. Commissioner LATEY, Q.C., who had the advantage of seeing her in the witness-box for some time, found her to be in some matters an unreliable witness, and I have to try to decide the present case in the absence of a witness even of the quality of the wife.

- D** In my view the present is a case where the wife, perhaps because she was tired of her marriage and of her husband, and perhaps because she had a good deal of affection for Mr. Horbacz, decided to leave the husband and to set up home in this caravan. Once she decided to do that I do not think that the wife really cared at all whether Mrs. Mephram, originally a housekeeper, subsequently became the husband's mistress. In my view the wife was quite indifferent to what went on in the husband's home or what the husband did with other women once she had gone to set up house with Mr. Horbacz. Having satisfied myself as well as I can of what went on in the mind of a woman whom I have not seen in the witness-box I think that my duty is clear. This has not been an easy case and it has not been made easier by a certain reluctance on the part of the husband to give away anything in evidence which he thought might injure his case. Indeed, my own task would have been infinitely easier had he been a rather more candid witness. I hope that I have now found where the truth lies. In my view, for the reasons which I have given, I am satisfied that the husband has proved the contents of his petition. I think that it is right that the court's discretion should be exercised in the husband's favour if only to enable him, if he so desires, to marry Mrs. Mephram. I therefore pronounce a decree nisi on the prayer of the petition on the ground of desertion.

Decree nisi.

Solicitors: *Church, Adams, Tatham & Co.*, agents for *Matthew Arnold & Baldwin*, Watford (for the husband); *Queen's Proctor*.

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

GUINNESS v. GUINNESS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), January 26, 1956.]

Justices—Husband and wife—Separation order—Variation—Deletion of non-cohabitation clause—No physical violence—Possibility of reconciliation.

The parties were married in 1953, and in November, 1954, the justices made an order in the wife's favour under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on the grounds of persistent cruelty, desertion and wilful neglect to maintain. The justices included in the order a non-cohabitation clause. At that time the wife was pregnant and in February, 1955, the child of the marriage was born. On an application by the husband to vary the order by deleting the non-cohabitation clause, the justices found that the husband had not, while the parties had been separated, offered any physical violence to the wife and that there could be a reconciliation "if only the husband would approach the wife with an entirely different attitude, showing her that he recognised the error of his ways, that he regretted his past conduct and that such conduct would not recur . . ." The justices, however, considered that the wife should still have the protection of the non-cohabitation clause and dismissed the husband's application. On appeal,

Held: the wife was entitled to resist any overtures by the husband with a view to a reconciliation in which he did not recognise the error of his ways; to achieve that purpose, however, it was not necessary to maintain in the order the non-cohabitation clause which precluded the husband from making any overtures at all; accordingly, the clause should be deleted.

Appeal allowed.

[As to the effect of an offer to return where a non-cohabitation clause exists, see 12 HALSBURY'S LAWS (3rd Edn.) 268, para. 511, note (d); and for cases on the subject, see 27 DIGEST (Repl.) 704, 705, 6726, 6728.]

As to varying an order by deleting a non-cohabitation clause, see 12 HALSBURY'S LAWS (3rd Edn.) 491, para. 1091, note (u); and for cases on the subject, see 27 DIGEST (Repl.) 707, 6754, 6755, 728, 6949.]

Case referred to:

(1) *Haynes v. Haynes*, [1952] 2 All E.R. 439; [1952] P. 272; 116 J.P. 450; 3rd Digest Supp.

Appeal.

The husband appealed against an order of the Wimbledon justices dated Sept. 1, 1955.

The parties were married in October, 1953. On Nov. 18, 1954, the justices made an order in favour of the wife under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on the grounds that the husband had been guilty of persistent cruelty towards her, had deserted her, and had wilfully neglected to provide reasonable maintenance for her. That order contained a non-cohabitation clause. In February, 1955, the child of the marriage was born. The husband applied by complaint to the justices to discharge the order or to vary the order by deleting the non-cohabitation clause. The justices dismissed both complaints. The husband now appealed only in respect of their dismissal of the second complaint, relating to the deletion of the non-cohabitation clause.

S. Seuffert and *M. A. Gregory* for the husband.

D. R. Ellison for the wife.

LORD MERRIMAN, P.: As in one, though vital, respect, I differ from the justices, I wish to say without the slightest reservation that I have absolutely nothing but praise for the scrupulous care and attention which they have

- A obviously given to this matter. The statement of their reasons and the notes of the evidence are models of what such things should be, and in saying that I include also the note of the earlier hearing, at which the original order was made. As there is no challenge to the validity of the original order, and as the history of that is so clearly set out in the reasons which the justices give in connection with the present application, the accuracy of which is not challenged in any particular, I am really absolved from going in great detail into this matter.

- B The parties, who are both young, were married in October, 1953. It is an important factor in the case that, in relation to the Matrimonial Causes Act, 1950, they are still under the statutory bar to bringing proceedings for divorce. Another important factor which I think should be mentioned, and one which counsel for the wife in his clear argument did not dispute, though he did not expressly admit it, and which, as I see it, is now common ground, is that the last act of ill-treatment of a physical nature occurred at or about Whitsuntide, 1954. It is also a curious circumstance that when in November, 1954, the justices made the original order on the grounds of persistent cruelty, desertion and wilful neglect to maintain, they held that although the cruelty had been condoned and there had been a resumption of cohabitation, so that for either of those two reasons it was out of the picture, it had been revived by desertion. From this it follows that we are dealing with what would be a continuous charge of desertion, albeit coupled, in the background, with a finding of conduct which amounted to persistent cruelty, and that the desertion would have been running all this time in favour of the wife had it not been that there was this non-cohabitation clause in the order. When the matter was first dealt with, in November, 1954, the wife, in whose favour the finding of persistent cruelty was made, was still an expectant mother. The child was born in February, 1955. I mention this because plainly that was one valid reason, if there were no other, for holding that it was necessary to protect the wife, who had been treated with cruelty which consisted to a large extent of physical violence, from any possible repetition of that conduct at a time when she was an expectant mother. There is no challenge against the validity or propriety of the original order and the inclusion in it of the non-cohabitation clause, and we are concerned solely to deal with the question whether that clause should now be retained.
- F The justices have realised one aspect of the matter correctly, and in this respect they are supported by a passage in my own judgment in the case to which they were referred by their clerk, namely, *Haynes v. Haynes* (1) ([1952] 2 All E.R. 439) in which I said (*ibid.*, at p. 440):

" . . . I recognise that, so long as this non-cohabitation clause stands, the wife can resist any overtures [by the husband to effect a reconciliation]."

- The justices state in their reasons that they recognise that. They go on to say that they are satisfied that the wife, who was, of course, the defendant to this particular summons,

" really wanted a reconciliation if only the husband would, by his conduct and attitude towards her, show that he was sorry for his past actions and assure her by his words and conduct that he wished to make amends and that he would treat her with reasonableness in the future."

- I In the next paragraph they set out the facts, which I think are very important. They say that there was no question, during the separation, that the husband had shown any signs of physical violence towards the wife, and she had not been frightened of any physical violence from him during that period. She expressly said that in her evidence. They go on:

" However, the husband had not either by his words or conduct shown the [wife] that he had learned his lesson and realised the error of his ways and he had not shown his regret for his past conduct."

He had not spoken to her in a proper tone, and, in the wife's words, had treated her "like a bit of dirt". They add: A

"His general attitude is also shown by the fact that he visited her with his brother, with whom the wife was not on friendly terms."

The whole of that paragraph can, apart from the statement that the wife was not, and had not been during this period, frightened of any violence, be summed up in the sentence that he had not learned his lesson and that, in effect, he could not ask to be taken back until he showed that he had done so. The justices come back to that again in what I think is a perfectly unimpeachable statement of the position in para. 10. They say, after dealing with the preceding paragraph, with which I will deal in a moment: B

"The justices felt, however, that this marriage could be saved and there could be a reconciliation, if only the husband would approach the wife with an entirely different attitude, showing her that he recognised the error of his ways, that he regretted his past conduct and that such conduct would not recur, and that he would provide a suitable home for the wife away from his or her relations." C

With that in mind they add that they informed both parties that they could, if they so wished, invoke the assistance of the probation officer. With every word of that paragraph I agree. It exactly sums up the position of this husband. Unless he proves that he has recognised the error of his ways, does regret his past conduct, and gives his wife assurance that such conduct will not recur, and so forth, he will not get very far with any overtures for a reconciliation. He has to satisfy the court before whom he goes that that really is his attitude. Let it be recalled that earlier in their reasons the justices rightly said: D

"As there was a non-cohabitation clause in the order the [wife] was entitled to resist any overtures made by the husband for reconciliation." E

That is why, quite rightly, they dismissed his application to revoke the whole order on the ground that he had made such overtures, which she was entitled, by the very existence of the non-cohabitation clause, to resist. F

I now come to the one statement in their reasons with which I differ. In the paragraph immediately preceding para. 10, which I read a moment ago, they say: G

"In view of the above facts and conclusions the justices felt that the [wife] should still have the protection of the non-cohabitation clause, and, therefore, they dismissed the second complaint applying for variation of the order by striking out the said clause." H

Then they say (in para. 10) that they felt that the marriage could be saved, and they set out the handicap under which the husband still laboured. In my opinion they have made an error of judgment in the way in which they have justified the retention of the non-cohabitation clause. The wife's protection to which she is entitled is that which was set out in para. 10. She is entitled to resist any overtures in which the husband does not recognise the error of his ways. If he does not show the justices that he has learned his lesson, or does not succeed in showing them the contrary, there is an end to any overtures for reconciliation on his part. It is not necessary, in order to achieve a reconciliation, to maintain a clause in the order which effectually precludes the making of any overtures at all, because the wife is entitled to resist them by virtue of the very existence of the clause. I

I think that we must differ from the justices in that respect, and allow the appeal, and order that the non-cohabitation clause be eliminated from the earlier order.

COLLINGWOOD, J.: I agree. Counsel for the husband does not suggest for a moment that it was not perfectly proper that this non-cohabitation clause should have been inserted in the original order of November, 1954. But the

A subsequent history, the relationship which has arisen between these parties since then, gives rise to considerable hope that they may be reconciled. The marriage took place only in October, 1953, and, without going into details, the parties have been meeting in circumstances which indicate that there is a good chance of their becoming reconciled. One only has to look at one or two sentences in the evidence of the wife. She says:

B "I think if my husband encouraged me, and did not treat me like a bit of dirt, we would get on fine."

And later:

"It is only my husband's attitude towards me. I am not frightened of him at all. I would probably go back if he would encourage me more."

C Then follows a very significant phrase:

"If my husband changed his attitude and the way he spoke to me, and courted me again, most probably I would go back. I would then consider going to a new town",

the suggestion having been that in no circumstances would she leave the district in which her parents were.

D That being so, in my opinion it is obvious that anything which militates against that possible reconciliation is undesirable, and clearly this clause is an impediment to the very overtures which the wife says might very well be successful were they made in the right way.

E The husband is a young man and seems to be somewhat uncouth in his manners, but possibly, it having been brought home to him, as it clearly is brought home to him in para. 10 of the justices' reasons, the respect in which his previous efforts and advances leave much to be desired, he will see the manner in which he ought to mend his ways with regard to his future advances towards the wife.

F The presence of this clause clearly does handicap him in the making of those advances, and I agree that having regard to what has happened since the order was made it is now desirable that the non-cohabitation clause should be removed.

Appeal allowed.

Solicitors: *R. W. Platt* (for the husband); *Sowman, Wells & Potter* (for the wife).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

G

NOTE.

R. v. STOKESLEY (YORKS.) JUSTICES, *Ex parte* BARTRAM.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Devlin, JJ.), January 25, 26, February 15, 1956.]

H

Certiorari—*Cross-examination of deponents to affidavits*—*Special circumstances*—*R.S.C., Ord. 59, r. 47*—*R.S.C., Ord. 38.*

[As to affidavits by justices on application for a prerogative order, see 11 HALSBURY'S LAWS (3rd Edn.) 76, para. 139.]

Case referred to:

I (1) *R. v. Kent JJ., Ex p. Smith*, [1928] W.N. 137; Digest Supp.

Motion for certiorari.

On Mar. 12, 1947, an order was made by the magistrates' court sitting at Stokesley, Yorks., whereby the applicant, Thomas Edward Bartram, was adjudged to be the putative father of a bastard child of which Muriel Hannah Bowes was the mother, and was ordered to pay 12s. 6d. per week for the maintenance and education of the child until the child should attain the age of sixteen years, together with expenses incidental to the birth of the child and the costs

incurred in obtaining the order. On Sept. 14, 1955, on the hearing of a complaint that no payments had been made under the order of Mar. 12, 1947, the same court made an order whereby the applicant was ordered to pay £5 in respect of the arrears totalling £281 2s. 6d. under the order of Mar. 12, 1947. The applicant now moved for an order of certiorari to bring up and quash both these orders on the grounds that (i) no summons had been served on him to appear before the magistrates' court on Mar. 12, 1947, or at any time, on complaint that he was the putative father of a bastard child; (ii) having no knowledge that proceedings were taking place, he did not appear on Mar. 12, 1947, when the complaint was heard and the order made; (iii) in the premises, the justices had no jurisdiction to make the order of Mar. 12, 1947; (iv) no order made on that day was served on him at any time; (v) he was not the father of any child of Muriel Hannah Bowes; and (vi) the first he heard of the order was on Sept. 7, 1955, when a summons dated Aug. 24, 1955, was served on him to appear before the magistrates' court on complaint that payments directed to be made under the order of Mar. 12, 1947, had not been made.

At the hearing of the motion on Jan. 25, 1956, the Divisional Court (LORD GODDARD, C.J., HILBERY and STABLE, JJ.) had before it, inter alia, the original of the order of Mar. 12, 1947, which followed the statutory form* but in which the words "the appearance of the defendant" were struck out, so that it read "on proof that a summons to answer the said complaint was duly served on the defendant". The court gave judgment dismissing the motion, but, LORD GODDARD, C.J., having later been informed that the order had been altered and that those words had not been deleted when the order was drawn up, on Jan. 26, 1956, the court directed that the order of Jan. 25 should not be drawn up and ordered that the deponents should attend in court on Feb. 15, 1956.

The case is reported only for the cross-examination of deponents on an application for a prerogative order.

A. J. Irvine for the applicant.

A. Garfitt for the respondents.

LORD GODDARD, C.J.: This is probably the first case in recent history in which application has been made in Crown proceedings for leave to call evidence on affidavits. It has never been done, or, at least, not for a great number of years. In *R. v. Kent JJ., Ex p. Smith* (1) ([1928] W.N. 137), LORD HEWART, C.J., sitting with AVORY and SHEARMAN, JJ., said (ibid., at p. 138):

"For something like fifty or sixty years no order had been made on the Crown side for the cross-examination of a deponent. It was enough to add that such an order was not likely to be made except in very special circumstances, and that no such special circumstances had been shown in the present case."

I have no doubt that the court has power to allow cross-examination, because R.S.C., Ord. 59, which took the place of the Crown Office Rules, 1906, and is the order under which the court deals with Crown matters, expressly provides, by r. 47, that:

"Subject to the provisions of this order, the Rules of the Supreme Court, 1883, shall apply, so far as applicable, to proceedings to which this order relates, in like manner as they apply to other proceedings in the Supreme Court."

It is well known that there is another order, R.S.C., Ord. 38, which provides for cross-examination on affidavits.

This is an exceptional case. The applicant is seeking to set aside an order which was obtained eight years ago and on which the woman who had obtained the order had never acted. She has good reasons why she never acted. There

* I.e., the form prescribed by the Bastardy (Forms) Order, 1915 (S.R. & O. 1915 No. 208), form A 11.

A are other matters, which I need not refer to yet, but of which counsel are well aware, which have given this court a great deal of anxiety and some displeasure, and we must get to the bottom of this matter.

We think, therefore, that cross-examination should be allowed.

The court read the affidavits and the deponents were examined and cross-examined.

B

LORD GODDARD, C.J., in the course of the main judgment, with which HILBERY and DEVLIN, JJ., agreed, said: As this was such a remarkable case, and there was this unfortunate incident of an altered order having been put before the court, on which, at any rate to some extent, the court relied, we accordingly ordered that the deponents should attend in court today. They have attended, and they have been cross-examined. It is the first time in my experience and, I think, the first time in anyone else's experience in Crown practice matters, viz., applications for prerogative orders or writs, that cross-examination has ever taken place. I do not want this to be thought to be an easy precedent. We allowed cross-examination in this case because it is one of a very remarkable character. [His Lordship reviewed the evidence and concluded that the application failed.]

Motion dismissed.

Solicitors: R. A. Rotherham & Co., agents for Pearsons & Ward, Helmsley, Yorks. (for the applicant); Torr & Co., agents for W. Lowther Carrick & Co., Stokesley, Yorks. (for the respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

E

R. v. WARD.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Stable and Ashworth, JJ.), January 11, 1956.]

F

Criminal Law—Murder—Intent—Child's death caused by prisoner—Defence that prisoner had no intention to kill or to do grievous bodily harm—Whether test of intention is what a reasonable man would have contemplated as likely to result from the act done.

G

The appellant had been convicted of the murder of a child of the woman with whom he was living. The child was eighteen months old. His case was that, when alone in the house with the child, he had been put into a violent temper by the child's crying and had shaken the child and that, when he had put the child on a bed, the child's head fell forward and the child appeared to be dead, killed through shaking. He testified that he had intended to make the child be quiet but had not intended to hurt or to kill the child. He was a man of low intelligence. The judge directed the jury that if, when the prisoner did the act, he must as a reasonable man have contemplated that death or grievous bodily harm was likely to result, he was guilty of murder; but that if the prisoner did not so contemplate that, he would be guilty only of manslaughter. The appellant appealed on the ground of misdirection in that the test of his intention was thus referred to what a reasonable man would have contemplated, but not to what the appellant had in fact contemplated.

H

I

Held: the direction to the jury was unimpeachable, for the only measure which could be brought to bear in such cases on all alike was what a reasonable man would contemplate.

Appeal dismissed.

[**Editorial Note.** The test thus upheld is the objective test of what a reasonable man in the circumstances would have contemplated, as distinct from the subjective test of what the prisoner himself did contemplate. The direction

given in the present case accords with that given by AVORY, J., in *R. v. Lumley* (1911) (22 Cox C.C. 635), in which case there was no intention on the prisoner's part to do harm (see *R. v. Stone*, [1937] 3 All E.R. 920 at p. 921, letter H). The relevant propositions of law were summarised and stated by HUMPHREYS, J., in *R. v. Larkin* ([1943] 1 All E.R. 217 at p. 219, letters C-F). Both this case and *R. v. Lumley* were cited in argument before the Court of Criminal Appeal. A

As to causing death in the course of committing a felony or in the course of an unlawful act, see 10 HALSBURY'S LAWS (3rd Edn.) 714, 715, paras. 1368, 1369; and for cases on the subject, see 15 DIGEST 787-789, 8486-8515.] B

Appeal against conviction.

The appellant, Clarence Walter Ward, was convicted before PILCHER, J., at assizes for the West Riding of Yorkshire of the murder of the child of a woman with whom the appellant was living. The child was eighteen months old. At the time when the appellant killed the child they were alone in the house. With the help of the woman with whom the appellant was living he buried the child in a slag heap. The body was not discovered until more than a year had elapsed since the child died. It was then found that the child's skull was fractured in two places; after it was moved the skull disintegrated. Medical evidence for the prosecution at the trial showed that the fractures of the skull were not, probably, enough to cause death, but the theory put forward by the doctor who gave evidence was that something more had happened to the child which must have caused death, the most probable cause being that the child had been asphyxiated. The case for the defence was that the prisoner had been put into a violent temper by the child's crying and had shaken the child to such an extent that when he put the child's head on the bed in the room where they were, the child's head seemed to fall forward and thereupon the child appeared to be dead, killed through shaking. The appellant testified that he had no intention to hurt or to kill the child but that his intention was to make the child be quiet. The appellant was a man of low intelligence. C D E

R. Lyons, Q.C., and *E. Lyons* for the appellant.

G. Veale, Q.C., and *J. R. Cumming-Bruce* for the Crown. Counsel for the Crown were not called on to argue. F

LORD GODDARD, C.J., delivered the judgment of the court in which, after briefly reviewing the facts, he continued: Whatever was the cause of death was a matter for the jury. The learned judge started the earlier part of his summing-up by saying this: G

"... but if when [the prisoner] did the act which he did do, he must as a reasonable man have contemplated that death or grievous bodily harm was likely to result to the child as a result of what he did, then, members of the jury, if you are satisfied about that he is guilty of murder. If, on the other hand he could not, as a reasonable man, have contemplated that death would result in consequence of what he did, then he is guilty of manslaughter." H

I can only say that that seems to me to be an unimpeachable summing-up, and it is the direction which has been given to juries to one's own knowledge in scores of cases.

The jury considered their verdict for a long time. They sent a note to the learned judge asking for a further direction, and the final direction given by the judge to the jury was: I

"... If when the prisoner did the act he must as a reasonable man have contemplated that death or grievous bodily harm was likely to result, he was guilty of murder."

The objection which counsel for the appellant takes to that is that it brings in the test of a reasonable man, but that it is necessary to say whether the particular

- A man knew. The test must be applied to all alike, and the only measure that can be brought to bear in these matters is what a reasonable man would contemplate or would not contemplate. If the act is one about which the jury can find that a reasonable man would say: "It would never occur to me that death would result or grievous bodily harm would result", then the jury can find him guilty of manslaughter. If, however, the jury come to the conclusion that any reasonable person (that is to say, a person who cannot set up a plea of insanity) must have known that what he was doing would cause at least grievous bodily harm, and if the child died of that grievous bodily harm, then a verdict of murder is justified and what was done does amount to murder in law.

- In these circumstances, the court cannot find any fault with the learned judge's summing-up. He gave the jury every opportunity of finding manslaughter if they thought fit, and the summing-up was eminently fair and correct. In these circumstances, the appeal fails and is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions.*

[Reported by A. P. PRINGLE, Esq., Barrister-at-Law.]

WILLOW WREN CANAL CARRYING CO., LTD. v. BRITISH TRANSPORT COMMISSION.

[CHANCERY DIVISION (Upjohn, J.), January 17, 18, 1956.]

- E *Practice—Stay of proceedings—Action to enforce defendants' statutory obligations—Bill before Parliament affecting rights of parties—Whether action should be stayed pending passing of Bill into law.*

The plaintiffs carried on the business of operating vessels for the purpose of carrying merchandise on canals. The Kennet and Avon Canal had, by virtue of the Transport Act, 1947, become vested in the defendants who became bound by a statutory obligation to keep the canal open and navigable for all persons desiring to use it. The canal had become unfit for navigation and the plaintiffs desired to use it. The plaintiffs brought an action against the defendants alleging that the defendants were wilfully refusing to carry out their statutory obligations in regard to the canal and claiming, among other relief, injunctions to prevent the defendants allowing the canal to remain unnavigable. The defendants admitted that the canal was not in navigable condition but denied any default on their part. They applied for a stay of the action, except for the purpose of obtaining an inquiry as to damages, until a Bill, which was then before Parliament and which in its then form would relieve the defendants of their statutory obligations, might become law.

- H **Held:** the plaintiffs were entitled to have their action tried and the court would not take into account the possible effect of the Bill then before Parliament; accordingly the defendants' application would be refused.

A.-G. v. Racecourse Betting Control Board (1935) (152 L.T. 146) and *British & Colonial Furniture Co., Ltd. v. William McIlroy, Ltd. (No. 1)* ([1951] 1 All E.R. 404) applied.

- I Cases referred to:

- (1) *A.-G. v. Racecourse Betting Control Board*, [1935] Ch. 34; 104 L.J.Ch. 13; 152 L.T. 146; Digest Supp.
- (2) *British & Colonial Furniture Co., Ltd. v. William McIlroy, Ltd. (No. 1)*, [1951] 1 All E.R. 404; 2nd Digest Supp.

Procedure Summons.

The defendants, the British Transport Commission, applied for a stay of the action brought against them by the plaintiffs, the Willow Wren Canal Carrying

Co., Ltd., except for the purposes of obtaining an inquiry as to damages, until the defendants' Bill, 4 & 5 Eliz. 2 c. 2, British Transport Commission (No. 2), might be passed into law with such amendments thereto as Parliament might make.

The facts appear in the judgment.

Denys B. Buckley for the defendants.

J. G. Strangman, Q.C., and *M. J. A. Franks* for the plaintiffs.

UPJOHN, J.: This is an application by the defendants, the British Transport Commission, to stay an action except for the purposes of obtaining an inquiry as to damages, until a Bill which I am informed has been deposited in the appropriate place has received the royal assent. Very shortly, the nature of the action is this; the plaintiff company, the Willow Wren Canal Carrying Co., Ltd., is a company whose business is operating vessels on canals in England for the purpose of carrying merchandise by water from one part of England to another. The canal in question is the Kennet and Avon Canal, which was constructed under a number of Acts some 150 years ago, and ultimately vested in the Great Western Railway under the Great Western Railway Act, 1852, No. 1. That company under and by virtue of s. 27 of that Act and by s. 17 of the Regulation of Railways Act, 1873, became bound to keep the canal and every part thereof at all times open and navigable for the use of all persons desiring to use and navigate the same. Under the provisions of the Transport Act, 1947, which came into force on Jan. 1, 1948, the canal became vested in the defendants, the British Transport Commission, on the terms and under the obligations on and under which it had vested in the Great Western Railway.

The plaintiffs have asked the defendants to quote tolls for certain merchandise that they are anxious to carry along the canal from Reading to Bristol and have been refused. The plaintiffs say that the canal is now not in a fit condition and is in fact incapable of bearing traffic; and that is admitted by the defendants. The plaintiffs allege that the unfitness of the canal is the result of a deliberate process of producing neglect on the part of the defendants. The object of the defendants in preventing access to the canal section was to ensure that the canal would deteriorate through lack of use, as the defendants well knew it would, in order that the defendants could then purport to justify the abandonment of the canal on the ground that the canal was not being used for the purposes of navigation and that to restore it to good order would involve the expenditure of sums of money incommensurate with the financial return. The plaintiffs then allege that as a result of these matters the defendants refused to comply with their statutory duties as to the canal and had no intention of doing so unless compelled by order of the court. Further that they intended unless restrained by such order to close and abandon the canal.

The plaintiffs claim a declaration that the defendants are bound to keep and maintain the canal in good order and condition and an injunction to restrain them from obstructing any part of the canal, from closing the canal, from failing to maintain a proper depth of water in the canal, and from causing or permitting the canal to be and remain impassable.

The defendants' case is that the canal is admittedly unnavigable, that the defendants have not complied and are not complying with their statutory obligations, but they are willing to pay damages, and to submit to an inquiry as to the amount of such damages. The defendants, however, strenuously deny that there has been any wilful default on their part to maintain the canal. They have pleaded that the canal has been unnavigable in some parts for over fifty years, that the various ways in which it is alleged that the canal was out of repair is due to no fault or neglect on their part.

The defendants say they are awaiting a Bill now before Parliament, the effect of which they hope will be to relieve them from their statutory obligations, and therefore it is submitted that it is right that this action should be stayed, not permanently, but until the fate of that Bill in Parliament is known.

- A The writ in this action was issued on Nov. 9, 1954. It was, I think, faintly suggested that the action was intended to embarrass the defendant commission in regard to their Bill for relief from their statutory duties. The dates do not bear that out, for the Bill was in fact deposited a year after the action had been begun and indeed more than six months after the defence in its original form had been delivered. It is said that if this action comes on, much unnecessary expense will
- B be incurred if the Bill goes through in the form in which its sponsors, the defendants, hope that it will go through. The pleadings are closed; discovery has been made, and it is said in evidence that the action would normally be fit for hearing in March or April of this year. I have no doubt that the action will be of a very heavy nature and will take many days to hear; the pleadings are of a most detailed character—I have given only a brief outline of them—the
- C particulars are voluminous; experts will no doubt be called; there is a great deal of correspondence, and I accept at once that it will be a most expensive action to try. It is said that at the end of that action a judge would be bound to suspend an injunction, if he thinks that the plaintiffs have established their right to one, until the fate of the Bill is known. It is argued that the proper course, therefore, is to let this action be stayed until the fate of the Bill is known.
- D A preliminary objection is taken to that, which seems to me to be fatal to the application, and it is this: sitting in this court, it is my duty to see that litigants have their cases tried, as they are entitled to, and I cannot take into account the possible effect of some Bill now before Parliament which, if passed into law in its present form, may have some effect on the rights of the parties. That seems to me to be a correct formulation of the law. This court is not concerned
- E with what Parliament may think it wise to do in relation to the rights of the parties, but the plaintiff is entitled to come to this court and say, "In the normal course of events my action will very soon be ripe for hearing. I desire that the court should hear it." If subsequently to that Parliament in its wisdom thinks it right by some enactment to affect the rights of the parties even to the extent of modifying or abrogating the effects of any judgment which the plaintiffs
- F may be fortunate enough to obtain, no one doubts the right and power of Parliament to do so. It is plain, however, that it is not right for this court either now or at the hearing to take into account the possible effect of a Bill which is at present before Parliament and which, so far as this court is concerned, may never become law, or, if passed into law, may contain provisions which ultimately do not affect the rights of the parties before the court. In other
- G words, it is a matter of speculation on which this court will not embark whether a Bill at present before Parliament will be passed into law in its present form.

Authority is not wanting for that proposition. In *A.-G. v. Racecourse Betting Control Board* (1) (1935), reported on this point only in 152 L.T. 146, a question arose as to the powers of the Racecourse Betting Control Board and with regard to its powers to make payments and so forth. It was held by EVE, J., that

- H certain payments which they had made were ultra vires and that decision was affirmed by the Court of Appeal. At the conclusion of the hearing before the Court of Appeal the appellants, who had only been partly successful, asked for leave to appeal, and on that matter counsel for the respondents said this (152 L.T. at p. 154):

- I "... your Lordships may be aware that there is now before the House of Commons a Bill, which has already passed your Lordships' House, [that was referring to Lord HANWORTH, M.R.] and is now in committee in the House of Commons, and I understand it is going to be taken immediately on the floor of the whole House, which provides [he then read the provisions of the Bill.] It is interesting to observe that that exactly agrees with your Lordships' judgment, legalising that which your Lordships have held to be lawful, and I think not covering the payment which your Lordships have held not to be lawful. With that Bill in the state in which it is,

I venture to submit to your Lordships that it is not a case in which leave to appeal to the House of Lords should be given, putting us to further expense."

And LORD HANWORTH, M.R., said:

"But, Mr. Gavin Simonds, I think you are imputing to me cognisance, or at any rate knowledge, which, seated here, I do not possess. The position here is that my colleagues and I are seated here as a Court of Appeal. Does not the point which you raise go to the question as to whether it would be wise, or whether it would be worth while, for the appellants to proceed with their appeal? They might be minded to appeal, and if that clause were, for example, struck out, they might wish to go on. On the other hand, if it was incorporated in a Bill which received the royal assent, they might desire not to go on with the appeal."

Then Sir Stafford Cripps said:

"Quite obviously, if that provision passed into an Act of Parliament there would be no point in anybody proceeding with an appeal; but there are many slips between cup and lip, and that clause may never be passed into an Act of Parliament. Therefore, we do desire to have leave to appeal in case it is necessary."

LORD HANWORTH, M.R., said, "I think that is right . . ." and leave to appeal was given. That was a different case, but it seems to me to illustrate very well the principle which the court adopts in these circumstances.

There is the more recent case of *British & Colonial Furniture Co., Ltd. v. William McIlroy, Ltd.* (No. 1) (2) ([1951] 1 All E.R. 404) which case came before the Court of Appeal on an interlocutory application. It was under the Landlord and Tenant Act, 1927, and asked for an interim order under s. 5 of that Act, authorising the tenants to stay in possession of the premises pending completion of proceedings taken for grant of a new lease, and that matter was discussed. JENKINS, L.J., said ([1951] 1 All E.R. at p. 405):

"Counsel for the tenants say, however, that in these two cases the orders ought to have been made because certain pending legislation, namely, the Leasehold Property (Temporary Provisions) Bill, if, and when, it comes into force, and providing it comes into force in the form in which the Bill now stands, will give some advantage to a tenant in occupation under an interim order which would be denied to a tenant who is in possession under an undertaking given to the court in lieu of an actual order under sub-s. (13). To demonstrate that this pending legislation would, or might have, that effect we were invited to look at and to construe the print of the Bill. We refused to do that. In my judgment, it is contrary to all principles that we should decide these two cases not simply on matters relevant to the particular landlord and tenant legislation as it stands, but by reference to possible alterations in the law which may be made under legislation yet to be passed."

That again, I think, illustrates the principle.

I cannot, therefore, possibly grant this application and the plaintiffs are entitled to have their action heard in the ordinary course of events. Without prejudice to the point with which I have already dealt, I was invited to and did look at the Bill. I do not propose to review it in any detail, but when it is found that the principal object of that Bill, should it go through Parliament in its present form, is to prevent this action from ever coming to trial, and that is one of its admitted objects, it would, I think, be a grave injustice if I were to prevent the plaintiffs from obtaining from this court such judgment as they may on the facts be entitled to. If I stand this action over until the fate of the Bill is known and the Bill goes through, this action can never come to trial. The only other observation that I would make on the Bill, is that it shows how sound is the rule of this court that it will not look at possible future legislation. During the course of argument, much

- A time has been taken up with a discussion as to what some obscure phrases in the Bill mean and what their precise effect will be on the plaintiffs if they succeed. It shows that it is useless speculation to look at a Bill and try to formulate or guess what Parliament is going to do in the future. As I have said, no harm will be done to the defendants by the action proceeding. Parliament in its wisdom can put such provisions into the Act dealing with any judgment that the
- B plaintiffs may obtain if it thinks proper to do so. I therefore refuse this application.

Application dismissed.

Solicitors: *M. H. B. Gilmour* (for the defendants); *Pothecary & Barratt* (for the plaintiffs).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

C WARD AND OTHERS v. COMMISSIONER OF INLAND REVENUE.

[PRIVY COUNCIL (Viscount Kilmuir, L.C., Lord Oaksey, Lord Morton of Henryton, Lord Radcliffe and Lord Cohen), January 17, 18, 19, February 14, 1956.]

Privy Council—New Zealand—Estate duty—Transfer of property by deceased to his sons in 1932—Covenant by sons to pay deceased annuity for his life—Deceased dying in 1949—Whether property liable to duty—New Zealand Death Duties Act, 1921 (1921, No. 21), s. 5 (1) (j).

- D
- E In 1932, W. transferred property, of which he was the owner and which was subject to two mortgages and a lease, to his four sons as tenants in common in equal shares, in consideration of which transfer the sons, by a memorandum of mortgage, covenanted to pay W. an annuity during the remainder of his life and, after his death, to pay an annuity to W.'s wife for the remainder of her life so long as she should remain unmarried. In 1949, W. died, and it was agreed that the value of the property at his death, less the amounts owing under the mortgages at the date of the transfer, was £17,265. The respondent, in computing the final balance of W.'s estate, included the £17,265, in pursuance of the New Zealand Death Duties Act, 1921, s. 5 (1) (j)*. On appeal by the administrators of W.'s estate,
- F

Held: the respondent had correctly included the £17,265 in computing the final balance of W.'s estate since the property transferred in 1932 was then comprised in a disposition of property made by the deceased which was accompanied by a contract for a benefit to the deceased for the term of his life within s. 5 (1) (j) (ii); and, therefore, the property must be included as part of the deceased's estate notwithstanding that the deceased had received full consideration in money or money's worth from his sons for the property transferred.

Lethbridge v. A.-G. ([1907] A.C. 19) considered.

Appeal dismissed.

- H [**Editorial Note.** The New Zealand Death Duties Act, 1921, s. 5 (1) (j) (i) and (iii), is based on the United Kingdom Customs and Inland Revenue Act, 1881, s. 38 (2) (c), as amended by the Customs and Inland Revenue Act, 1889, s. 11, and re-enacted by the Finance Act, 1894, s. 2 (1) (d), for which, see 9 HALSBURY'S STATUTES (2nd Edn.) 333, 344, 350; and s. 5 (1) (j) (ii) of the New Zealand Act is based on the United Kingdom Succession Duty Act, 1853, s. 7 (for which, see 9 HALSBURY'S STATUTES (2nd Edn.) 273), which was repealed by the Finance Act, 1949, s. 52 and Sch. 11, Part 4.]
- I

Cases referred to:

(1) *Lethbridge v. A.-G.*, [1907] A.C. 19; 76 L.J.K.B. 84; 95 L.T. 842; 21 Digest 18, 99.

(2) *Comr. of Stamp Duties v. Russell*, [1948] N.Z.L.R. 520.

(3) *Craven v. Comr. of Stamp Duties*, [1948] N.Z.L.R. 550.

* The relevant portions of s. 5 are set out at p. 573, letters F to I, post.

Appeal.

Appeal by administrators of an estate from an order of the Court of Appeal of New Zealand, dated Oct. 29, 1954, reversing an order of the Supreme Court of New Zealand, dated Sept. 7, 1953, in favour of the appellants on a Case Stated under the New Zealand Death Duties Act, 1921, s. 62. The following facts are taken from the Case Stated. The deceased, Charles Cameron Ward, died on Apr. 18, 1949, and probate of his will was granted to the appellants, Florence Emma Ward, Ronald Stanley Ward and Lionel Moran Ward, on June 4, 1949. On June 21, 1899, the deceased married Selina Stanley, but separated from her in 1921, and in 1932 divorced her. There were four sons of the marriage, Ronald Stanley Ward, Mervyn Keith Ward, Lionel Moran Ward and Neal Aubrey Ward, all of whom survived the deceased. Up to June 15, 1932, the deceased was the beneficial owner and registered proprietor of property in Devon Street, New Plymouth (hereinafter called "the Devon Street property"), which was subject to two mortgages and was leased for a term of ten years from Feb. 17, 1930, to a private limited company, the shares of which were owned by the deceased and his four sons. By a memorandum of transfer dated June 15, 1932, the deceased transferred the Devon Street property (subject to the mortgages and the lease) to his sons as tenants in common in equal shares, in consideration of his sons executing a memorandum of mortgage of the property securing to the deceased an annuity for the remainder of his life of £650, payable by weekly instalments of £12 10s. and further securing after his death a weekly payment of £6 to Selina Ward during the remainder of her life as long as she should remain unmarried. By a memorandum of mortgage dated June 15, 1932, the sons, in consideration of the contemporaneous execution of the memorandum of transfer, covenanted to pay the deceased during the remainder of his life an annuity of £650, payable by weekly instalments of £12 10s. as from Aug. 25, 1932, and, after his death, to pay to Selina Ward for the remainder of her life and so long as she should not have married an annuity of £416, payable by weekly instalments of £8 if and while the youngest member should be a minor, and thereafter an annuity of £312, payable by weekly instalments of £6. For the better securing of these annuities, the sons mortgaged to the deceased and Selina Ward all their estate and interest in the property. The youngest son attained the age of twenty-one years on May 15, 1934. On the expiry of the lease, and up to the date of the deceased's death, the private limited company continued to occupy the Devon Street property. The sons paid the annuity of £650 to the deceased regularly up to Mar. 17, 1949. The amount accrued for the period from that date to the date of the deceased's death was duly accounted for as part of the deceased's assets for death duty purposes.

It was common ground between the parties that (i) the value of the Devon Street property at the time of the transfer was £11,195; (ii) the amount owing under the mortgages on the Devon Street property was £5,000 at the time of the transfer; (iii) the value of the annuities as assessed by the Commissioner of Stamp Duties at the time of the transfer was £7,247; (iv) the transfer did not constitute a gift within the meaning of the Death Duties Act, 1921, and (v) as at the date of the deceased's death, the value of the Devon Street property was £22,265. In computing the final balance of the deceased's dutiable estate, the respondent, the Commissioner of Inland Revenue, pursuant to s. 5 (1) (j) of the Act of 1921, included £17,265, representing the value at the deceased's death of the Devon Street property, less the amounts owing under the mortgages on the property as at the date of the transfer. The question for determination was whether the respondent, in computing the final balance of the deceased's dutiable estate, was entitled, pursuant to s. 5 (1) (j) of the Act of 1921, to include the £17,265.

R. Borneman, Q.C., and R. L. McEwen for the appellants.

Geoffrey Cross, Q.C., and J. Byrne (of the New Zealand Bar) for the respondent.

A LORD MORTON OF HENRYTON: The property which is the subject of this appeal is situate in Devon Street, New Plymouth, New Zealand. Prior to June 15, 1932, Charles Cameron Ward was the owner and registered proprietor of the Devon Street property, subject to two mortgages for an aggregate sum of £5,000 and to a lease thereof to C. C. Ward, Ltd. for a term of ten years from Feb. 17, 1930, at a rental of £600 a year. On June 15, 1932, Mr. Ward transferred the Devon Street property (subject to the mortgages and the lease) to his four sons as tenants in common in equal shares. The consideration for which this transfer was executed and the other relevant facts of the case are fully set out in the Case Stated, and need not be here repeated. Charles Cameron Ward died on Apr. 18, 1949, and the respondent, in computing the final balance of his estate, included a sum of £17,265, representing the value of the Devon Street property on the death of the deceased (£22,265) less the aggregate amount of the said two mortgages. In so acting, the respondent relied on the terms of para. (j) of s. 5 (1) of the Death Duties Act, 1921. The appellants contend that this paragraph has no application to the present case. There is no dispute as to facts or figures, and the question for decision turns entirely on the construction of the relevant statutory provisions.

D Section 2 of the Act of 1921 contains a number of definitions introduced by the words "In this Act, unless a contrary intention appears". Section 3 imposes estate duty in the following terms:

"In the case of every person who dies after the commencement of this Act, whether in New Zealand or elsewhere, and wherever the deceased was domiciled, there shall be payable to the Crown on the final balance of the estate of the deceased, as determined in accordance with this Act, a duty (hereinafter called estate duty) at the rate and in accordance with the provisions prescribed by this Act."

E Section 5 is the vital section, and their Lordships have carefully considered it as a whole, but, for the present purpose, it is sufficient to quote the following portions:

F "(1) In computing for the purposes of this Act the final balance of the estate of a deceased person his estate shall be deemed to include and consist of the following classes of property . . . (g) Any annuity or other interest purchased or provided by the deceased, whether before or after the commencement of this Act, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased, if that annuity or other interest is property situated in New Zealand at the death of the deceased: . . . (j) Any property comprised in any settlement, trust, or other disposition of property made by the deceased, whether before or after the commencement of this Act, and situated in New Zealand at the death of the deceased,—(i) By which an interest in that property, or in the proceeds of the sale thereof, is reserved either expressly or by implication to the deceased for his life or for the life of any other person, or for any period determined by reference to the death of the deceased or of any other person; or (ii) Which is accompanied by the reservation or assurance of, or a contract for, any benefit to the deceased for the term of his life or of the life of any other person, or for any period determined by reference to the death of the deceased or of any other person; or (iii) By which the deceased has reserved to himself the right, by the exercise of any power, to restore to himself or to reclaim that property or the proceeds of the sale thereof."

I Section 39 begins: "In this Act the term 'disposition of property' means," and there follows a definition in extremely wide terms. Paragraph (a) may be quoted:

"Any conveyance, transfer, assignment, settlement, delivery, payment, or other alienation of property, whether at law or in equity."

Having set out these statutory provisions, their Lordships are now able to state in precise terms the question which has to be decided. The Devon Street property was clearly "comprised" in the transfer of June 15, 1932, and the question is whether, on the true construction of s. 5 (1) (j) of the Act, that transfer was either: (a) a "settlement" coming within sub-para. (i) or sub-para. (ii) or sub-para. (iii) of para. (j); or (b) a "trust" coming within any one or more of these sub-paragraphs; or (c) a "disposition of property" coming within any one or more of these sub-paragraphs. A
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It has not been suggested that the transfer was a "trust" within the meaning of para. (j), and their Lordships find it unnecessary to decide whether it was or was not a "settlement" within the meaning of that paragraph, because they are clearly of opinion that, if the transfer was not a settlement, it was a "disposition of property" within the meaning of para. (j). Similarly, their Lordships find it unnecessary to decide whether or not the transfer came within sub-para. (i) of para. (j), since they are clearly of opinion that it came within sub-para. (ii), whether or not it also came within sub-para. (i). In their Lordships' opinion, the transfer exactly answers the description of a C

"disposition of property . . . Which is accompanied by . . . a contract for any benefit to the deceased for the term of his life", D

and, consequently, the property comprised therein comes within s. 5 (1) (j) (ii) of the Act of 1921. They will now set out the steps by which they arrive at this conclusion.

First, was the transfer a disposition of property? Counsel for the appellants submitted that the wide definition contained in s. 39 did not apply to the words "disposition of property" in s. 5 (1) (j), but their Lordships again find it unnecessary to decide this point, since, in their view, the words in their ordinary meaning are wide enough to include this transfer. As GRESSION, J., observed in the Supreme Court, the word "disposition" is not a technical word, but an ordinary English word of very wide meaning, and their Lordships see no good reason for giving to it a restricted meaning in para. (j). In their opinion, any transfer of property which possesses the characteristics described in sub-para. (i) or sub-para. (ii) or sub-para. (iii) is a disposition to which para. (j) applies. Counsel for the appellants argued that, if this meaning were attached to the word "disposition", the words "settlement" and "trust" were unnecessary. This is so, but their Lordships agree with HUTCHISON, J., when he observed ([1955] N.Z.L.R. at p. 384): E
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" . . . I think that the legislature might very well, and understandably, have specially mentioned settlements and trusts as being the types of disposition that would the more likely be used for the purposes set out in the sub-paragraphs without thereby intending to exclude from the operation of the provision any other dispositions that might be used for those purposes." H

Turning to sub-para. (ii), their Lordships are of opinion that the transfer was undoubtedly accompanied by a contract for a benefit to the deceased for the term of his life, since it was executed

"for the consideration of the purchasers executing a memorandum of mortgage . . . securing to the [deceased] an annuity for the remainder of his life of the sum of £650 payable in instalments of £12 10s. per week", I

and further securing after the death of the said Charles Cameron Ward a weekly payment to Selina Ward, his wife, during the remainder of her life, so long as she should remain unmarried. A mortgage was executed on the same day by the four sons to secure the two annuities. It is difficult to imagine circumstances in which a transfer could more plainly be "accompanied by" a contract, and it is obvious that the contract was a contract for a "benefit to the deceased for the term of his life."

- A Counsel for the appellants, however, contended that, even if the transfer was within the actual words of para. (j), that paragraph should not be construed as covering a disposition for which full commercial consideration was given. He described the transaction as a commercial one of bargain and sale, and contended that there was to be found in s. 5 of the Act a context which should induce their Lordships to hold that such a transaction was outside the scope of the section.
- B Their Lordships cannot accept this argument. They find no such context in the section. On the contrary, a transfer accompanied by a contract for a benefit to the deceased for the term of his life is within the express terms of the section, and their Lordships see no reason for excluding from its operation a case in which the value of the benefit is equal to, or greater than, the value of the property transferred.
- C Counsel relied strongly on *Lethbridge v. A.-G.* (1) ([1907] A.C. 19), and, in particular, on a passage in the judgment of LORD LOREBURN, L.C. In that case, the House of Lords had to consider whether certain policies assigned by a father to his son were “purchased or provided” by the father within the meaning of s. 2 (1) (d) of the Finance Act, 1894, and LORD LOREBURN, L.C., said (*ibid.*, at p. 23):
- D “The general purpose of this sub-section is to prevent a man escaping estate duty by subtracting from his means, during life, moneys or money’s worth, which, when he dies, are to reappear in the form of a beneficial interest accruing or arising on his death. Now it is not subtracting from his means if the deceased has received a full equivalent in return for whatever he has laid out.”
- E Counsel pointed out that, in the present case, the deceased “received a full equivalent” for the Devon Street property. This is so, on the figures set out in para. 10 of the Case Stated, but, in their Lordships’ view, the observations of LORD LOREBURN, L.C., have no bearing on the present case. The learned lord chancellor was there stating the general purpose of s. 2 (1) (d) of the Finance Act, 1894. He uses the word “sub-section”, but it is clear that he was not referring to the whole of s. 2 (1), but only to para. (d) thereof. This is clear from the context and, further, his words would be quite inappropriate in reference to (e.g.) para. (a) of the sub-section. Paragraph (d) is clearly the forerunner of para. (g) of s. 5 (1) of the New Zealand Act of 1921. The wording of the two paragraphs is identical, save that some words are added at the end of para. (g) in the New Zealand Act. The problem under each of these two paragraphs is whether the deceased “purchased or provided” certain property and, in *Lethbridge v. A.-G.* (1), the House of Lords construed the word “provided” as carrying with it the idea of bounty on the part of the deceased. Thus it became relevant to consider whether the deceased had “subtracted from his means”, and LORD LOREBURN pointed out ([1907] A.C. at p. 23) that a man does not subtract from his means if he receives a full equivalent in return for whatever he has laid out. See also the observation of LORD MACNAGHTEN (*ibid.*, at p. 25):

I “. . . it appears to me that the policies were not ‘provided’ by the father within the meaning of that expression in the Act. It was not by the father’s gift, or at his cost, or by means of any expenditure on his part, that the policies were vested in the son.”

Under s. 5 (1) (j) (ii) of the New Zealand Act of 1921, however, it is immaterial to consider whether the deceased “purchased or provided” anything. The question is whether he did, or did not, make a disposition which answers the description contained in sub-para. (ii), and for the purpose of answering this question it does not matter whether the deceased did, or did not, receive “a full equivalent” for the property comprised in the disposition. Sub-paragraph (ii) is concerned only with the nature of the consideration, not with its amount, and

its object is, in their Lordships' view, clear. It is to prevent a man escaping estate duty by subtracting property from his means during his life, and replacing it with property which comes to an end on his death, with the result that neither the property transferred, nor the property which replaces it, forms part of his estate on his death. That is why the sub-paragraph imposes estate duty on the transferred property if the consideration for the transfer is (e.g.) an annuity for the life of the transferor, but not if the consideration is (e.g.) cash. A

The result is that, in their Lordships' view, there is no good reason for implying, in s. 5 (1) (j) of the Act of 1921, an exception in the case of a purchase for full consideration in money or money's worth, and the view which they have formed is strongly supported by the United Kingdom statutes which preceded the New Zealand Death Duties Act, 1909, wherein this paragraph first appeared. The wording of s. 5 (1) (j) (ii) of the Acts of 1909 and 1921 is obviously based on s. 7 of the United Kingdom Succession Duty Act, 1853 (16 & 17 Vict. c. 51), but the words "not being a bona fide sale", which appear in the last-mentioned section, are omitted from s. 5 (1) (j) (ii). It is surely reasonable to surmise that they were omitted because the New Zealand provision was intended to extend to a bona fide sale. Similarly, sub-para. (i) and sub-para. (iii) of s. 5 (1) (j) of the New Zealand Acts of 1909 and 1921 are obviously based on s. 38 (2) (c) of the United Kingdom Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, and re-enacted by s. 2 (1) (c) of the Finance Act, 1894. It is significant that, although the New Zealand legislation reproduced, in effect, s. 2 (1) (c) of the Act of 1894, it did not reproduce s. 3 (1) of the same Act, which contains an exemption from estate duty in the case of a bona fide purchase for full consideration in money or money's worth. B C D E

Their Lordships have not, of course, overlooked *Comr. of Stamp Duties v. Russell* (2) ([1948] N.Z.L.R. 520) and *Craven v. Comr. of Stamp Duties* (3) ([1948] N.Z.L.R. 550). In each of these cases it was held, rightly in their Lordships' view, that the transfer of property in question came within s. 5 (1) (j) (ii) of the Act of 1921. These cases are not, however, of assistance in considering the argument now under review, for the court in each case held that the transaction was not a commercial transaction for full consideration, and did not express any view on the question whether such a transaction would, or would not, come within s. 5 (1) (j) (ii). F

Counsel for the appellants suggested that, if the respondent's argument was correct, great hardship would result in the present case and in other cases, and he quoted the language of GRESSON, J., in the present case ([1955] N.Z.L.R. at p. 366): G

"If the unrestricted interpretation of the sub-section contended for by the respondent were correct, it would produce results which one hesitates to believe the legislature could have intended. Upon the basis of such a wide interpretation, if a man should expend his capital of say £5,000 in payment to an insurance company in the purchase of an annuity, that sum would fall to be included as dutiable estate when he died. He might, in fact, have consumed the whole of his capital in this way, yet, at his death, be assessed as having a notional capital, although in fact it had ceased to exist in any traceable form." H I

As the case put by the learned judge as an example may come before the court for consideration in the future, their Lordships express no opinion on it. They would, however, point out that s. 5 (1) (j) only applies to property situate in New Zealand at the death of the deceased.

For the reasons which they have stated, their Lordships are of opinion that the transaction now in question comes exactly within the words of the statute, and considerations of possible hardship in individual cases cannot affect their

A decision. Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs of this appeal.

Appeal dismissed.

Solicitors: *Shaen, Roscoe & Co.* (for the appellants); *Mackrell, Maton & Co.* (for the respondent).

B [Reported by G. A. KIDNER, Esq., *Barrister-at-Law.*]

NOTE.

LIEBRICH v. CASSELL & CO., LTD.

C [QUEEN'S BENCH DIVISION (Slade, J.), February 21, 1956.]

Libel—Statement in open court—No money paid into court—Statement to be approved by judge in chambers—R.S.C., Ord. 22, r. 2 (4) and note.

[For forms of summons and order for leave to make a statement in open court and for a form of such a statement, see 10 ENC. COURT FORMS 555-557,

D Forms 68-70.]

Libel Action.

E The plaintiff had alleged in his statement of claim that certain statements appearing in a book published by the defendants were defamatory. The defendants did not deliver a defence but agreed terms of settlement with the plaintiff; the defendants undertook to pay a sum of money to the plaintiff and a form of statement to be made in open court was agreed. No money was paid into court. On the hearing of the summons for directions the action was ordered to be set down for the purpose of making an agreed statement; the form of the statement was not disclosed. The practice followed was as described in the note to R.S.C., Ord. 22, r. 2 (4), at p. 395 of the ANNUAL PRACTICE (1956 Edn.).

F When counsel for the plaintiff explained the circumstances in which the statement was being read, SLADE, J., made the observations set out below on the practice that should be followed in such cases.

P. Goodenday for the plaintiff.

A. T. Hoolahan for the defendants.

G **SLADE, J.:** In my view, whenever it is desired, on the settlement of an action for libel or slander, to make a statement in open court, any such statement should (i) be approved by a judge in chambers before it is made in open court, and (ii) normally be made before the judge who has so approved it. This practice should be followed whether the statement follows the acceptance and taking out of money which has been paid into court so as to be strictly within the terms of R.S.C., Ord. 22, r. 2 (4), or whether the statement is a term of a settlement

H which includes an agreement to pay money not paid into court (or costs) but which is to be paid before or after the statement is made.

I I say that the statement should "normally" be made before the judge who has approved it in chambers, because I can envisage circumstances where it is essential that the plaintiff's reputation should be vindicated at the earliest possible moment, and the judge in chambers may not be readily accessible, e.g. he may have gone on circuit. In those circumstances it would be perfectly proper to obtain the permission of some other judge for the statement to be made before him, and he should then be shown the statement which it is desired to make and which will already have been approved by his brother judge.

Solicitors: *Buckeridge & Braune* (for the plaintiff); *Oswald Hickson, Collier & Co.* (for the defendants).

[Reported by A. P. PRINGLE, Esq., *Barrister-at-Law.*]

HARE AND ANOTHER v. BRITISH TRANSPORT COMMISSION.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), February 14, 22, 1956.]

Railway—Negligence—Door of guard's van—Plaintiff on platform injured by open door when train was starting—Whether any duty to shut door before departure of train—Contributory negligence.

The plaintiff, Mrs. H., came to the station to see her husband off. As the train moved off she remained standing close to the train facing the direction in which it was moving and waving to him. After the train had travelled some sixty yards she was struck from behind by the open door of the guard's van. She had not moved appreciably from the position she was in when the train started. In a claim by her against the British Transport Commission for personal injuries she relied on the railway rules which stated* that doors must be fastened before the train leaves the station and that the guard in charge of the train must see that the doors are properly closed.

Held: (i) the defendants were negligent because the door of the guard's van should not have been allowed to remain open while the train travelled so great a distance, although the rules of the railway, being designed for the protection of passengers, did not require a guard of a passenger train to be in his van with the door closed at the moment when the train started.

(ii) in the circumstances Mrs. H. was not guilty of contributory negligence. *Thatcher v. Great Western Ry. Co.* (1893) (10 T.L.R. 13) applied.

[**Editorial Note.** In the present case the plaintiffs' claims included a claim by the husband for loss of consortium as result of the injuries to his wife. That such a claim may be good in law has been long established (see 16 HALSBURY'S LAWS (2nd Edn.) 611, para. 958). LORD GODDARD, C.J., intimates that the cause of action is not one, however, for which generous compensation should be given in addition to such legitimate expenses as the husband has incurred through his wife's absence (see p. 579, letter G, post).]

As to the liability of a railway undertaking for the negligence of its servants, see 23 HALSBURY'S LAWS (2nd Edn.) 657, para. 928; and for cases on the subject, see 36 DIGEST (Repl.) 50, 51, 274, 275, 65, 353, and 8 DIGEST (Repl.) 103, 104, 673-684.

As to the liability of carriers of passengers for negligence in relation to carriage doors and windows, see 4 HALSBURY'S LAWS (3rd Edn.) 179, paras. 452, 453; and for cases on the subject, see 8 DIGEST (Repl.) 83, 550 et seq.]

Cases referred to:

- (1) *Thatcher v. Great Western Ry. Co.*, (1893), 10 T.L.R. 13; 36 Digest (Repl.) 65, 353.
- (2) *Tough v. North British Ry. Co.*, 1914 S.C. 291; 36 Digest (Repl.) 64, 322.
- (3) *Toal v. North British Ry. Co.*, [1908] A.C. 352; 77 L.J.P.C. 119; 99 L.T. 173; *reversg.* 1908 S.C. 48; 8 Digest (Repl.) 84, 557.

Action.

The plaintiffs, Albert Cyril Hare and Edith Wilhelmina Hare (his wife) claimed against the defendants, the British Transport Commission, damages for their negligence or that of their servants as a result of which Mrs. Hare received personal injuries. Mr. Hare claimed for certain items of special damage and also for the loss of his wife's consortium while she was in hospital. The special damage claimed by Mr. Hare amounted to £57 14s. and included fares for visiting his wife in hospital, laundry for himself and board and lodging for his son while his wife was in hospital, loss of overtime earnings while visiting his wife in

* See footnote p. 579, post.

A hospital and out-of-pocket expenses (i.e., meals, etc.) when so doing. The sum awarded by the court for this special damage was £58.

The facts are stated in the judgment.

Leonard Caplan, Q.C., and T. H. M. Whipham for the plaintiffs.

John Stephenson for the defendants.

B

Cur. adv. vult.

Feb. 22. LORD GODDARD, C.J., read the following judgment: On June 8, 1954, the plaintiff, Mrs. Hare, went to Euston Station to see her husband off to Chester by the 4.15 p.m. train. She was carrying a baby and was accompanied by her mother-in-law. The train, apparently one of the important expresses, was made up of ten coaches and filled the length of No. 13 platform.

C No one was at all sure as to the coach in which the plaintiff, Mr. Hare, took a seat, but it is clear, I think, that it was well to the rear of the train and was either the first or second coach in front of the guard's van. He stood at the window talking to his wife until the train started; then she continued to wave to him as the train drew away, and while doing so she received a sudden blow on the back of the shoulder which caused her to fall from the platform. There is no doubt

D what hit her; it was the door of the guard's van which the guard was just closing, as I will later describe.

Mrs. Hare, as she fell, managed to throw her baby on to the platform. She lay between the inner rail and the wall of the platform and she must have fallen in the space between the end of the van and the front of the pushing engine which followed the train to assist it up the steep incline outside the station. It must

E indeed have been a terrifying experience and little short of a miracle that she was not killed. As it was, she was in hospital for twelve weeks and was more or less of an invalid for a considerable time, as there were certain complications and injuries undetected at first. She still has some small measure of permanent disablement, but after what was doubtless a trying and occasionally a painful period she is now happily substantially recovered.

F Fortunately, there was no great pecuniary loss, and I think a fair sum to award her, if the defendants are liable for her injuries, is £750 in addition to £26 special damage and £58 special damage to the husband. There is a claim by the husband for loss of consortium. No doubt he had to fend for himself while the wife was in hospital and during periods of her incapacity at home. Loss of consortium still survives as a cause of action but it is not one, I think, for which

G the courts should give generous compensation in addition to such legitimate expenses as a husband has had to incur on account of his wife's absence. In addition to his special damage, I award him £20.

There is no doubt that Mrs. Hare was struck by the door of the guard's van and reliance is naturally placed on the rules* for the working of the railway which provide that doors are to be closed before the train starts. The particular rules

H are r. 25 (a) and r. 130, para. (ii).

The facts of this case appear to me to be indistinguishable from those in *Thatcher v. Great Western Ry. Co.* (1) (1893) (10 T.L.R. 13). In that case no doubt LOPES, L.J., attached importance to similar rules as supplying evidence of negligence when it was shown that a door was open. For myself, I should not regard this as conclusive, because in my opinion these rules are designed for the protection

I

* These are the rules for observance by employees, which were adopted by resolution of the Railway Executive passed on June 13, 1949.

Rule 25 (a) provides: The doors of vehicles must be fastened before the train leaves the station, and no door must be opened to allow a passenger to alight from or enter a train before it has come to a stand, or after it has started.

Rule 130 provides so far as is relevant: Every guard when in charge of a passenger train must . . . (ii) see that the doors of the carriages and other vehicles are properly closed and fastened, and assist the station staff in this duty; also in the case of any unusual stoppage, request the passengers not to alight except when it is necessary for them to do so . . .

of passengers in the train, so that they should not be exposed to the risk of an open or insecurely fastened door. I cannot think that these rules compel the guard of a passenger train to be in his van with the door closed the moment the train starts. It is common knowledge that the guard gives the signal to start standing on the platform and, as a rule, boards the train as it begins to move, and this seems to me not only an ordinary practice but one which works for safety, as he can see that all is well as the train actually starts. A

It would, however, be another thing if the train were allowed to go some distance along the platform with the door open. The principal difficulty which I have had in this case is a question of fact which I have not found easy of determination, viz., to come to a conclusion how far the train had moved before Mrs. Hare was struck. No one is sure where on the train Mr. Hare had taken a seat; his recollection is only that he was somewhere near the bookstall. I can only say that I think that he was somewhere either in the first or second coach in front of the van, and I also think more probably in the second, which would be nearer the bookstall. B

I had no evidence from the defendants where Mrs. Hare was picked up beyond what the fireman of the banking engine could tell me. I have no doubt that when Mrs. Hare was struck she was spun round as the witness Mr. Wright described, and that she fell between the end of the van and the banking engine. The latter was evidently not of the tank or shunting type but had a tender attached, and according to the fireman's evidence it must have come into the station tender first as it was that which was against the buffers. His evidence was that the engine was an engine-length beyond the bridge which crosses the platform when Mrs. Hare fell. C

To try to get a clearer picture of the place than that which is conveyed by plans or photographs, I visited the station and went to the platform to take particular notice of the distance from the buffers to the bridge, and of the position of the bookstall, and I am satisfied that the train must have travelled at least sixty yards by the time Mrs. Hare was struck. D

In these circumstances, I am bound to hold, on the authority of *Thatcher v. Great Western Ry. Co.* (1), which was followed with approval by the Court of Session in *Tough v. North British Ry. Co.* (2) (1914 S.C. 291), that the plaintiffs have established a cause of action. Counsel for the defendants cited *Toal v. North British Ry. Co.* (3) ([1908] A.C. 352), and contended that from that case it appeared that there was not an absolute rule to be derived from *Thatcher v. Great Western Ry. Co.* (1), which was there cited, but that each case must be decided on its own facts. While there may be cases of open doors causing injury which can be distinguished, the facts here are identical, so it seems to me, with those in *Thatcher v. Great Western Ry. Co.* (1); moreover, in *Toal v. North British Ry. Co.* (3) the Court of Session had rejected a proof and the House of Lords sent the case back for trial, saying that it was for the jury to consider whether there was a duty and whether it was broken. E

In this case I feel obliged to find that, considering the distance the train had travelled before Mrs. Hare was struck, the van door ought not to have been open. The case for the defendants really was, in my opinion, that Mrs. Hare had been guilty of contributory negligence, or rather that it was her negligence that was wholly the cause of the accident; but as it is established that a duty is owed to persons allowed to be on the platform, Mrs. Hare was entitled to assume that the doors would be closed. She was looking not to the back of the train but in the direction in which it was travelling and was not bound to anticipate an open door coming up behind her. I think she did take a step back, as Mr. Wright described, but I cannot hold that that of itself was negligent. F

I have ascertained from the Record Office, where the pleadings in *Thatcher v. Great Western Ry. Co.* (1) are still preserved, that there was in that case a plea of contributory negligence which must have been found against the railway G

A company and was not even mentioned in the Court of Appeal. The facts in that case seem to be at least as strong to support a plea of contributory negligence as in the present case, but they did not avail the defendants.

I must accordingly give judgment for the sums I have mentioned, namely, £776 for Mrs. Hare and £78 for her husband, with costs.

Judgment for the plaintiffs.

B Solicitors: *S. M. Fruitman* (for the plaintiffs); *M. H. B. Gilmour* (for the defendants).

[Reported by A. P. PRINGLE, Esq., Barrister-at-Law.]

C DYER v. ILFRACOMBE URBAN DISTRICT COUNCIL.

[COURT OF APPEAL (Singleton, Jenkins and Parker, L.J.J.), November 15, 1955.]

Child—Negligence—Allurement—Children's playground controlled by local authority and open to children of all ages—Chute with platform—Child of four and a half years falling through gap between rails on platform—Whether local authority liable.

D The defendant council controlled and managed a children's playground to which children of all ages were admitted. The playground contained a chute comprising a platform some twelve feet above ground level, a stairway leading up to it and a slide descending from the platform to the ground on the side opposite to the stairway. On the other two sides of the platform there were two horizontal rails attached to the platform by a vertical bar. E The chute had been supplied by a reputable firm, was of excellent design and sound construction. There was no notice in the playground prohibiting the use of the chute by young children unless accompanied. On June 26, 1953, the infant plaintiff went unaccompanied to the playground from his home nearby, ascended the steps on to the platform of the chute and fell F through the rails on to the ground, sustaining injury. No other accident on the chute had occurred. In an action by the infant plaintiff for damages on the ground of the negligence of the defendant council as the occupier of the playground, it being conceded that the infant plaintiff was a licensee,

Held: an occupier (a licensor) on whose land there was an object, such as the chute, alluring to children and to them apparently safe was not liable to a child licensee who sustained injury therefrom unless the object contained a concealed danger, that is to say, possessed some attribute which rendered it dangerous in itself, and unless the injury resulted from that attribute (dictum of ACTON, J., in *Donovan v. Union Cartage Co., Ltd.*, [1933] 2 K.B. at p. 74 applied); in the present case the chute had no such attribute (or, per JENKINS, L.J., if it had, knowledge thereof was not brought home to the defendant council), and moreover the danger of falling from a high platform was a danger that was obvious to a child of the age of the infant plaintiff, and therefore the defendant council were not liable.

Phipps v. Rochester Corpn., [1955] 1 All E.R. 129, *Latham v. R. Johnson & Nephew, Ltd.*, [1931] 1 K.B. 398, considered; *Bates v. Stone Parish Council*, [1954] 3 All E.R. 38 distinguished.

Appeal allowed.

I [Editorial Note. In *Phipps v. Rochester Corpn.* ([1955] 1 All E.R. at p. 143) DEVLIN, J., said that the responsibility for the safety of little children must rest primarily on their parents. A local authority managing a playground, and thus being an occupier of land, is not under a duty at common law to protect children, licensees of the occupier, against dangers obvious to them in the amenities of the playground, although a prudent parent might protect his child against misuse of objects on the playground. The distinction is concisely illustrated by PARKER, L.J., at p. 592, letter G, post. There are also dicta that

local authorities are not under a duty to provide keepers for small playgrounds, or to put up notices that very young children are not permitted on chutes or swings or, in effect, to provide nurses for the children there (see p. 589, letter E, post).

As to the degree of care required towards children, see 23 HALSBURY'S LAWS (2nd Edn.) 584, para. 836; and for cases on the subject, see 36 DIGEST (Repl.) 115-122, 577-619.]

Cases referred to:

- (1) *Phipps v. Rochester Corpn.*, [1955] 1 All E.R. 129; [1955] 1 Q.B. 450; 119 J.P. 92.
- (2) *Latham v. Johnson (R.) & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 36 Digest (Repl.) 49, 262.
- (3) *Cooke v. Midland Great Western Ry. of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 36 Digest (Repl.) 118, 590.
- (4) *Bolch v. Smith*, (1862), 7 H. & N. 736; 31 L.J.Ex. 201; 158 E.R. 666; sub nom. *Bolett v. Smith*, 6 L.T. 158; 36 Digest (Repl.) 66, 358.
- (5) *Purkis v. Walthamstow Borough Council*, (1934), 151 L.T. 30; 98 J.P. 244; 36 Digest (Repl.) 115, 570.
- (6) *Hayward v. Drury Lane Theatre, Ltd. & Moss' Empires, Ltd.*, [1917] 2 K.B. 899; 87 L.J.K.B. 18; 117 L.T. 523; 36 Digest (Repl.) 48, 255.
- (7) *Hastie v. Edinburgh Magistrates*, 1907 S.C. 1102; 44 Sc.L.R. 829; 15 S.L.T. 194; 36 Digest (Repl.) 119, 869.
- (8) *Stevenson v. Glasgow Corpn.*, 1908 S.C. 1034; 45 Sc.L.R. 860; 16 S.L.T. 302; 36 Digest (Repl.) 74, 423.
- (9) *Glasgow Corpn. v. Taylor*, [1922] 1 A.C. 44; 91 L.J.P.C. 49; 126 L.T. 262; 86 J.P. 89; 36 Digest (Repl.) 119, 597.
- (10) *Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K.B. 101; 103 L.J.K.B. 527; 151 L.T. 202; 98 J.P. 319; 36 Digest (Repl.) 120, 607.
- (11) *Donovan v. Union Cartage Co., Ltd.*, [1933] 2 K.B. 71; 102 L.J.K.B. 270; 148 L.T. 333; 36 Digest (Repl.) 109, 547.
- (12) *Lynch v. Nurdin*, (1841), 1 Q.B. 29; 10 L.J.Q.B. 73; 5 J.P. 319; 113 E.R. 1041; 36 Digest (Repl.) 33, 150.
- (13) *Bates v. Stone Parish Council*, [1954] 3 All E.R. 38; 118 J.P. 502; 3rd Digest Supp.
- (14) *Sutton v. Bootle Corpn.*, [1947] 1 All E.R. 92; [1947] K.B. 359; 177 L.T. 168; 111 J.P. 81; 36 Digest (Repl.) 122, 619.
- (15) *Addie (R.) & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358; 98 L.J.P.C. 119; 140 L.T. 650; 36 Digest (Repl.) 120, 604.
- (16) *Coates v. Rawtenstall Borough Council*, [1937] 3 All E.R. 602; 157 L.T. 415; 101 J.P. 483; 36 Digest (Repl.) 118, 593.
- (17) *Ellis v. Fulham Borough Council*, [1937] 3 All E.R. 454; [1938] 1 K.B. 212; 107 L.J.K.B. 84; 157 L.T. 380; 101 J.P. 469; 36 Digest (Repl.) 121, 618.

Appeal.

The defendant council appealed from an order of PILCHER, J., at Exeter Assizes dated June 18, 1955, whereby he held that the defendant council were guilty of negligence and liable in damages to the infant plaintiff.

The facts appear in the judgment of SINGLETON, L.J.

Neil Lawson, Q.C., and *M. D. Van Oss* for the defendant council.

P. M. Wright, Q.C., and *T. Dewar* for the plaintiff.

SINGLETON, L.J.: This is an appeal from a judgment of PILCHER, J., given at Exeter Assizes on June 18, 1955. He had before him a claim by a small boy, David Dyer, who sued by his next friend, for damages for personal injuries which, it was alleged, were caused through the negligence of the defendants, the

A Ilfracombe Urban District Council. PILCHER, J., gave judgment for the plaintiff for the sum of £100 damages to the boy and some £12 out-of-pocket expenses to his mother, and held that the defendant council were guilty of negligence which brought about the injury which the boy suffered. The defendant council appeal against that judgment.

B The defendant council had had for some years a recreation ground in which there was a chute, by which children could ascend steps on to a small platform at a height of twelve feet and then slide down on the other side, and there had been no accident on it. Before the Coronation in 1953, the defendant council made two or three more recreation grounds and installed a chute in each of them. We, however, are concerned with only one of them, the Slade Lane recreation ground, which was in a new housing estate of the defendant council. The chute was put up in June, 1953. On June 26, 1953, the boy, David Dyer, who was then four and a half years old, went from his home to the recreation ground nearby, fell from the chute and broke his arm. It is not easy to see precisely how he fell, but it seems that he climbed up to the top of the chute on to the platform, twelve feet above ground level, and in some way climbed through between the lower and the upper rail, which surrounded the platform. He was seen by an older boy falling through those two rails.

D There was little evidence given on behalf of the plaintiff. The mother of the boy gave evidence as to his condition and age. She was not asked whether she allowed the boy to go to the recreation ground nearby, or whether she had warned him to be careful, or not to use any of the swings or other things provided for entertainment unless he had someone older with him. The boy was not called, but if he had been he might have been able to say what happened. Suffice it to say, however, that he fell from the platform to the ground and he broke his arm. On behalf of the defendant council only one witness was called; he was Mr. Jemmett, the chairman of the defendant council, who said that the members of the council were anxious to increase the number of recreation grounds, that there had been a petition in regard to those matters, and that the defendant council, accordingly, made more recreation grounds and took advice as to what was the best form of chute. The boy appears to have been alone although there were other boys nearby. The witness for the plaintiff, Terence Moss, said that there were other children going up the steps of the chute when the boy Dyer was at the top. However, no one saw any jostling or pushing and the boy fell for no reason that can be given. There is nothing to show whether he had been up the chute before or not; no information whatever.

G The learned judge was obviously impressed by some evidence given by the chairman of the defendant council, who was asked by him:

H “Q.—Did it strike you that the accident might have been caused because the child was too young to play on a thing like this? A.—It struck me perhaps that the child was too young to be there unaccompanied. Q.—But you did not put any notice about that up? A.—No, because obviously the child could not read it, being under five years old. (Counsel): No notice or regulations of any kind saying: ‘Parents are advised not to let children under five use this apparatus’ were put up? A.—No.”

I He was then referred to a photograph of the chute and asked by counsel:

“Q.—Are you a parent? A.—Yes. Q.—Would you let one of your toddlers go there and climb up there without anybody there? A.—What age would you call a toddler? Q.—Four years. A.—My sons have been on there since they were four. Q.—You take the view that you would let your children, even though you were not there, climb up there when they were four years of age? A.—I said if I were there I would permit them to do it. (The learned judge): Would you allow a child of four to go and climb on this thing unaccompanied by a responsible adult? A.—No.

Q.—Why not—because it is not safe? A.—No, I do not agree. Q.—Then why? A.—Because they do not appreciate always that the way to approach this thing is up the steps in a proper manner. Q.—They may hurt themselves? A.—They may misuse it. Q.—Are you afraid of a four-year-old damaging your slide? A.—No, I am suggesting they may misuse it other than as a chute. Q.—Because they may hurt themselves, is that what you say? They are not going to hurt the chute? A.—No. Q.—Is it because they may hurt themselves? A.—Yes.”

The learned judge, having referred to those answers, said in the course of his judgment:

“That qualification was, I think, added because it had been suggested that if a child, even of four and a half years, bravely walked up the steps of the chute, on to the platform and sat down on the chute, it was unlikely that it would come to any harm, and with that I wholeheartedly agree. But, unfortunately, unattended children of four and a half years do not act in that fashion; they do not perceive the dangers of playing, perhaps swinging, on the little guard-rails provided, and it does not want much of a push or a jostle to cause a small body to go through these rails, as happened in this case. That, no doubt, is the reason why Mr. Jemmett said what he did. Mr. Jemmett expressed a view which entirely coincides with my own. As I said at an early stage in the case, whilst this was no doubt a very excellently constructed chute, the only point in the case was whether any condition ought to have been applied to the licence regarding the use of this chute by very small children. I do not propose to lay down any age below which some conditions should be attached to the licence granted to children to use this chute, but I am satisfied that the chute was not safe for the use of an unattended, small child of the infant plaintiff’s age; and in face of what Mr. Jemmett said in the witness-box, I find it quite impossible to say that Mr. Jemmett did not appreciate that, because he quite clearly did.”

The learned judge found that the chute was bought from experienced manufacturers, that it was of excellent design, that it was of perfectly sound construction, and that it was properly installed. Counsel on behalf of the plaintiff added that the judge found that the chute was not safe for an unattended small child, and that the defendant council knew that.

A question of law arises which has been discussed in the courts frequently. It is agreed on both sides that the boy who was hurt was a licensee and that he had all the rights of one who was permitted by the defendant council to go on their recreation ground. The duty towards a licensee is that the occupier (the defendant council in this case) must warn him of any concealed danger or trap of which the occupier knows. One question for consideration is: Is there a distinction for this purpose between the case of a grown licensee and one who is quite young? May there be a danger which is not a concealed danger in the ordinary sense, but which ought to be regarded as a concealed danger if the licensee is of tender years? That question was considered by DEVLIN, J., in *Phipps v. Rochester Corpn.* (1) ([1955] 1 All E.R. 129), where he reviewed the authorities, and said (*ibid.*, at p. 143):

“A licensor who tacitly permits the public to use his land without discriminating between its members must assume that the public may include little children. But as a general rule he will have discharged his duty towards them if the dangers which they may encounter are only those which are obvious to a guardian or of which he has given a warning comprehensible by a guardian. To every general rule there are, of course, exceptions. A licensor cannot divest himself of the obligation of finding out something about the sort of people who are availing themselves of his permission and the sort of use they are making of it. He may have to take into account the

- A social habits of the neighbourhood. No doubt, there are places where little children go to play unaccompanied. If the licensor knows or ought to anticipate that, he may have to take steps accordingly. But the responsibility for the safety of little children must rest primarily on the parents; it is their duty to see that such children are not allowed to wander about by themselves, or, at the least, to satisfy themselves that the places to which they
- B do allow their children to go unaccompanied are safe for them to go to. It would not be socially desirable if parents were, as a matter of course, able to shift the burden of looking after their children from their own shoulders to those of persons who happen to have accessible bits of land. Different considerations may well apply to public parks or to recognised playing grounds where parents allow their children to go unaccompanied in the
- C reasonable belief that they are safe."

When counsel for the plaintiff cited those words of DEVLIN, J., it occurred to me to ask how one is to judge whether this is a case in which the parents allowed the child to go unaccompanied in the reasonable belief that he would be safe, if there was not one question as to that asked of the mother by the learned

D counsel who called her or by learned counsel on the other side, and the boy was not called. Whether the mother had given the boy any instructions or whether she had any belief that the place was safe, I do not know. I should think it is quite likely that he had been there regularly since the place was opened, but I do not know.

It has generally been recognised that there are three classes—invitees, licensees and trespassers. Some parts of the judgment of DEVLIN, J., would appear to point to a view that licensees may be divided up into licensees of age and licensees of tender years. It does not appear to be necessary to consider that in this case, for on either view it seems to me that on the facts the plaintiff in this case ought not to succeed. A boy four and a half years old who strikes a bigger boy knows what may come to him; he knows that if he falls from a height he is likely to hurt himself: he knows that if he falls into deep water he may be drowned. He

F is old enough to appreciate those things. Children do fall about. Sometimes when a child falls he cries. Why? Because he is hurt; he does not like it. That is something which occurs very early in his life. I refer to that because of the expressions in various authorities, to which I shall refer, such as "concealed danger" or "trap". If a boy of four and a half goes up the steps

G to a platform at the top of a chute and looks around him, he knows that if he falls he will be hurt. This plaintiff knew that before he went up, and he is old enough to know why the handrails are put there.

A case to which reference is often made is *Latham v. R. Johnson & Nephew, Ltd.* (2) ([1913] 1 K.B. 398), in which the defendants were the owners of a plot of unfenced land from which some houses had been cleared. It was accessible

H by a path leading from the back of the house in which the plaintiff, a child between two and three years old, lived with her parents. The public were allowed by the defendants to traverse the land, and children of all ages were in the habit of playing on heaps of sand, stone, and other materials which from time to time were deposited there by the defendants. The plaintiff went on the land unaccompanied by any older person and was shortly afterwards found on a

I heap of paving stones, one of which had fallen on her hand and injured it. There was no evidence to show how the accident happened. In an action for negligence the jury found that children played on the land with the knowledge and permission of the defendants, that there was no invitation to the plaintiff to use the land unaccompanied, that the defendants ought to have known that there was a likelihood of children being injured by the stones and that the defendants did not take reasonable care to prevent children being injured thereby. On these findings SCRUTTON, J., held that the case came within *Cooke v. Midland Great Western Ry. of Ireland* (3) ([1909] A.C. 229), and gave judgment for the plaintiff

with damages. On appeal it was held that, there being neither allurement nor trap, nor invitation, nor dangerous object placed on the land, the defendants were not liable, and the judgment was set aside. FARWELL, L.J., said ([1913] 1 K.B. at p. 404):

"Now the law as to mere licensees is well settled. The grant of the licence to go on the land creates no right, but merely affords an answer to a charge of trespass: *Bolch v. Smith* (4) (1862) (7 H. & N. 736). It is a mere permission, and those who take it must take it with all chances of meeting with accidents . . . [then, [1913] 1 K.B. at p. 407]: I am not aware of any case that imposes any greater liability on the owner towards children than towards adults: the exceptions apply to all alike and the adult is as much entitled to protection as the child. If the child is too young to understand danger, the licence ought not to be held to extend to such a child unless accompanied by a competent guardian."

HAMILTON, L.J., said (*ibid.*, at p. 411):

"The rule as to licensees, too, is that they must take the premises as they find them apart from concealed sources of danger; where dangers are obvious they run the risk of them . . . Two other terms must be alluded to—a 'trap' and 'attraction' or 'allurement'. A trap is a figure of speech, not a formula. It involves the idea of concealment and surprise of an appearance of safety under circumstances cloaking a reality of danger. Owners and occupiers alike expose licensees and visitors to traps on their premises at their peril, but a trap is a relative term. In the case of an infant, there are moral as well as physical traps. There may accordingly be a duty towards infants not merely not to dig pitfalls for them, but not to lead them into temptation . . . Finally, what objects which attract infants to their hurt are traps even to them? Not all objects with which children hurt themselves simpliciter. A child can get into mischief and hurt itself with anything if it is young enough. In some cases the answer may rest with the jury, but it must be matter of law to say whether a given object can be a trap in the double sense of being fascinating and fatal. No strict answer has been, or perhaps ever will be, given to the question, but I am convinced that a heap of paving stones in broad daylight in a private close cannot so combine the properties of temptation and retribution as to be properly called a trap."

I come to two judgments of SCRUTTON, L.J. The first is *Purkis v. Walthamstow Borough Council* (5) (1934) (151 L.T. 30). In that case a boy just over the age of twelve years entered a recreation ground provided by the defendant local authority "for the use of children under twelve years only". He fell off a swing and was injured by the swing in motion hitting him twice before he could get away. In an action against the defendants he was awarded damages for these personal injuries on the ground that there being approximately two hundred children in the recreation ground and but one attendant provided by the defendants, the plaintiff's injuries were the result of lack of adequate supervision on the part of the defendants, and judgment was entered for him. The defendants did not contend that the plaintiff was a trespasser in the recreation ground. On appeal, judgment was entered for the defendants on the ground that the plaintiff's fall from the swing, as appeared from the evidence, was due to his sickness and fainting and that there was no evidence on which the jury could find that the plaintiff's injuries were due to lack of supervision on the part of the defendants. SCRUTTON, L.J., said (151 L.T. at p. 32):

"Taking this view, I do not think it necessary to essay a complete exposition of the liability of local authorities who provide recreation grounds, including playgrounds for children. I have stated to the best of my ability the grades of variety from trespassers to invitees for payment in *Hayward v. Drury Lane Theatre, Ltd. & Moss' Empires, Ltd.* (6) ([1917] 2 K.B. 899)

- A and HAMILTON, L.J., did the same in *Latham v. Johnson* (2). It is not easy to decide in the case of a local authority providing a recreation ground whether it licenses or invites. It has a power, but not a duty, to provide, and may regulate by attendants and by-laws. The cases appear to show that the authority is not liable for the consequences of dangers obvious to children. It is not liable if a child, even of four-and-a-half years tumbles into either
- B natural or artificial water: (see *Hastie v. Edinburgh Magistrates* (7) (1907 S.C. 1102); and *Stevenson v. Glasgow Corpn.* (8) (1908 S.C. 1034)). The authority is liable if it provides 'traps' accessible to children, such as shrubs with attractive but poisonous berries: (*Glasgow Corpn. v. Taylor* (9) ([1922] 1 A.C. 44)). It would be liable for defective or dangerous premises or implements for play. But, in my opinion, the authority which has
- C provided unobjectionable structures or implements for play is under no duty to supervise their employment, still less to ascertain that each child using them is physically fit to stand a swinging or revolving motion."

In *Liddle v. North Riding of Yorkshire County Council* (10) ([1934] 2 K.B. 101), a case in which a little boy fell off a wall, on to which he had climbed by means of a heap of stones which the defendants had put there, SCRUTTON, L.J., said

D (ibid., at p. 112):

- "In my opinion, to make the landowner liable for injury to a child on his land, it must be proved that he expressly or impliedly invited children on to his land, and either did an act which caused damage with knowledge that it might injure the children, or knowingly permitted the existence on his
- E land of a hidden danger or trap. The invitation might be implied from knowledge that children frequented the land without interference. For obvious dangers, such as unguarded water, natural or artificial, he will not be liable."

- I see no distinction in principle between the case of the chute in the recreation ground and an artificial lake or water in a recreation ground. Neither can
- F properly be regarded as a concealed danger to a boy four and a half years old. Again, *Donovan v. Union Cartage Co., Ltd.* (11) ([1933] 2 K.B. 71) shows the view of the Divisional Court, consisting of ACTON and TALBOT, JJ., on the case of the unhorsed van belonging to the defendants left by them unattended in a public street outside their premises. The younger plaintiff, an infant, aged seven years, while playing in the street with other children, climbed on to the van, fell and was injured. It was held that the defendants, the owners of the van, were not liable, because there was no inherent danger in a sound, stationary and immobile vehicle, left unattended in the street. ACTON, J., said ([1933] 2 K.B. at p. 74):
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- "There is, however, a distinction between these cases and the present
- H case, which, in our opinion, is a valid distinction, and, as indicated by LORD ATKINSON, it is supported by authority. The cases in which it has been held that liability arises appear to have one common feature—namely, that the object left unattended and accessible to children, and likely to be an allurement to them, possessed some attribute which rendered it dangerous in itself, and it was in consequence of its possession of this attribute that the accident happened and the injury ensued. It may be that the object is dangerous through being actually in motion, or liable to be easily set in motion, or poisonous or deleterious to eat or handle, or explosive, or so defective in some way as to be inherently dangerous. There is, in our judgment, no such element of inherent danger in a sound, stationary and immobile vehicle, such as the van in the present case. To extend the principle of *Lynch v. Nurdin* (12) (1841) (1 Q.B. 29) to things in no way dangerous in themselves, left unattended in a street (or in other places open to the public, such as parks, pleasure grounds, or open spaces), would
- I

be to impose burdens of responsibility so far-reaching and incalculable as to be unreasonable and intolerable. It cannot be said that, even if such things are likely to attract children, there is in them anything in the nature of a trap or a concealed peril."

In that case the infant was able to climb up on to an unattended van left in the street. I suppose someone might have said that he did not appreciate that it was dangerous although he was seven years old. It is, however, the measure of duty stated by ACROX, J., to which I refer. The principles stated in that case cover the case before this court.

More recently there has been *Bates v. Stone Parish Council* (13) ([1954] 3 All E. R. 38) on which the plaintiff's counsel places great reliance. The facts of that case were that the plaintiff, then three and a half years of age, was permitted by his mother to go to the children's playground in a recreation ground provided by the local parish council, accompanied only by another child of six years. In the playground was provided a chute or slide, the use of which necessitated ascending stairs to a platform which was about twelve feet from the ground. After making several descents with the other child the plaintiff went up by himself and while sitting on the platform fell through a space some 13½ inches square between the upright and horizontal rails on the side of the platform, suffering injuries which resulted in permanent blindness. Some thirteen years previously a boy of four years had fallen from the platform when the rails were in the same condition. Additional rails had then been added as a measure of safety, but in the interval the additional rails had either rusted or broken away and had not been replaced. At the trial of the action the jury found that the plaintiff was a licensee and that the council, having knowledge of the danger, was liable. They awarded the plaintiff £17,500 damages. On appeal the council contended that the licence to use the playground did not apply to very young children unless accompanied by a competent guardian; that the plaintiff was in the circumstances a trespasser and the council was not liable. It was held that although, in certain circumstances, a licence to young children to enter on property on which there was a source of potential danger was assumed to be conditional on their being accompanied by a competent guardian, in the present case it was clear from the council's own evidence that no restriction had been placed on the admission to the playground of children, however young and whether accompanied or not; that the plaintiff entered the playground as a licensee and did not become a trespasser when he went on to the chute; and that the council knowing of the dangerous quality of the aperture through which the plaintiff fell were liable in damages. There were a number of questions put to the jury in order to ascertain first whether the boy was a licensee or a trespasser. On the jury's answers it was clear that he was to be treated as a licensee. Much of the discussion in the Court of Appeal was on that subject and on the fact that there had been a previous accident on the same chute after which the defendants had put up new rails which in turn came into disrepair before the accident to the plaintiff. It was also contended that the direction given to the jury by CASSELS, J., was faulty. The appeal failed, except as to the amount of damages. It is interesting to notice one question to the jury and the answer to it. It was (*ibid.*, at p. 40):

"If answers to 4 and 5 are 'yes' was the slide a danger to the infant plaintiff which he would not appreciate?"

and the jury answered "Yes". It does not appear that the question "Was this a concealed danger or trap?" was put; nor does it appear from the report that that question was argued. There is a passage in the judgment of ROMER, L.J., which I ought to read ([1954] 3 All E.R. at p. 49):

"On the question of liability I only desire to say in conclusion that, had it not been for the accident to Donald Rixson in 1934 and the defendants'

- A** knowledge, or presumed knowledge of it, the plaintiff would, in my judgment, have had no ground of action. The evidence shows that the possibility of an accident happening such as that which unfortunately did occur would not have presented itself to the mind of any reasonably prudent person who was unaware of the previous mishap. It would, in the long run, be disadvantageous in the extreme to the public and to children in general
- B** if such a person, or body of persons, were to be held liable for an accident of so improbable and unforeseeable a nature as that which befell the plaintiff; for the prospect of being sued for heavy damages (insurable, perhaps, but, only at considerable cost) would in all probability result in the disappearance altogether of amenities which many local authorities and private persons voluntarily provide for the entertainment and amusement of children.
- C** In *Latham's* case (2) FARWELL, L.J., said ([1913] 1 K.B. at p. 407): 'It is impossible to hold the defendants liable unless we are prepared to say that they are bound to employ a groundkeeper to look after the safety of their licensees, and the result of such a finding would be disastrous, for it would drive all landowners to discontinue the kindly treatment so largely extended to children and others all over the country.' That which the lord justice envisaged as disastrous in 1913 would, at least, be equally so today when the dangers of the street, which in many cases would become the substitutes for playgrounds, considerably exceed such perils as exist in chutes and swings."
- D**

I agree with the lord justice.

- E** More and more as the years go on local authorities are encouraged to extend recreational facilities and amenities, and they do so. It is in the interest of the people. In the ordinary case of a small recreation ground such as this it is not their duty to provide a groundsman or keeper. If they did so they would have to provide two or three in the summer, for daylight lasts a long time. Nor do I think it is their duty to put up notices to the effect that children under five—or whatever the age may be—are not permitted on the chutes or swings. If they
- F** did so, children would not take much notice, and if an accident happened it would be said: "What is the good of their putting up notices unless you see they are observed?" Nor is it the duty of the local authority to provide nurses for young children who go to recreation grounds. The parents of young children still have some responsibility. There was no trap; there was no concealed danger; there was nothing which was not obvious to a child four and a half
- G** years old. My view of this case is that the danger (if that is the correct term) was the ordinary danger which is present to the mind of anyone if he or she climbs to a height. For these reasons, it appears to me that the appeal should be allowed.

- H** JENKINS, L.J.: I agree, and there is very little I can usefully add. I might, however, cite some passages from *Sutton v. Bootle Corpn.* (14) ([1947] 1 All E.R. 92), to which the learned judge referred in his judgment. That was a case of a girl of nine years of age who was injured in a children's playground while endeavouring to stop a swing. She was dragged off her legs and in attempting to save herself sustained an injury to one of her fingers. STABLE, J., found that the finger was caught and crushed between the unguarded lug and socket of a checking device designed to prevent the swing from going too far.
- I** The swing had been supplied to the corporation by a firm of repute who had supplied a very large number of such appliances all over the country and in connection with which no similar accident had happened. The corporation had no knowledge of the alleged defect in the swing. The learned judge decided in favour of the plaintiff and awarded her damages. On appeal to this court, however, it was held that the defendant corporation owed the plaintiff only the duty of a licensor to a licensee, that as licensors they were under a duty to do no more than warn the plaintiff of dangers actually known to them and that as

they had no knowledge of any danger they were under no liability. The basis of the learned judge's decision was his holding that the plaintiff was a licensee, and that the defendants had no knowledge of the danger, but that it was the duty of a local authority which provided implements for children to play with in a public recreation ground maintained by them, to provide safe and proper implements so far as care and skill could do so. He awarded the plaintiff damages. He was thus placing visitors to a recreation ground such as the one in the present case in a better position, and the occupiers of such a ground in a more onerous position, than that ordinarily obtaining as between licensor and licensee. On appeal to this court that view was held to be erroneous, and the appeal was allowed. ASQUITH, L.J., discussed the law at considerable length and said ([1947] 1 All E.R. at p. 96):

"The suggestion that persons entering on publicly or municipally owned parks or recreation grounds enjoy a special privileged status superior to that of licensees would seem to be ill-founded. Text-book authority is opposed to the existence of such a separate class: see SALMOND ON TORTS (10th Edn.), pp. 485-487, WINFIELD ON THE LAW OF TORTS (2nd Edn.), pp. 616-620. As to the authorities, *R. Addie & Sons (Collieries) v. Dumbreck* (15) ([1929] A.C. 358) appears to decide that persons entering on premises in the occupation of others (otherwise than under a contract) are classifiable exhaustively as either trespassers, licensees, or invitees, and that there are no intermediate or hybrid classes, such as that envisaged by MAUGHAM, L.J., in *Purkis v. Walthamstow Borough Council* (5). *Coates v. Rawtenstall Borough Council* (16) ([1937] 3 All E.R. 602) is a direct decision of this court that a municipal authority owning or occupying a recreation ground (in that case, as in this, supplying thereon swings for children) is a licensor and not an invitor. I know of no decision of the Court of Appeal to the contrary."

Later in his judgment, ASQUITH, L.J., went on to consider a further ground on which it was alleged that the duty owed by the corporation in that case to the plaintiff was higher than that owed by a licensor to a licensee, and said (*ibid.*, at p. 97):

"Before, however, passing to the issue of knowledge . . . I must briefly deal with the issue raised by the word 'allurement'—the other factor relied on as raising the obligations of the defendants to a higher level than that of licensors. The presence of this element, which is, of course, only relevant when the entrant on the defendant's premises is a child, would seem, where it exists, to affect the occupier's duty to this extent, that a danger which is patent to an adult may not be apparent to a child. To a child it may be a concealed trap, accordingly and a warning or other preventive measure may be called for in the case of a child when it would not be called for in the case of an adult, or a warning of a more emphatic or coercive character than would suffice in the case of an adult. What objects are and what are not in law 'allurements'? An exhaustive catalogue has not been laid down. Turntables, escalators and paddling pools have been held to 'allure.' Rivers, ponds and piles of paving stones have been held insufficiently seductive. CLERK AND LINDSELL ON TORTS (10th Edn.), pp. 545, 546, place swings in the unalluring class, citing as authority *Ellis v. Fulham Borough Council* (17) ([1937] 3 All E.R. 454). If this classification is right it disposes of this branch of the argument, but I doubt if the case goes so far. If a swing or this swing is an allurement it is sufficient to say that no case would appear to exist in which a plaintiff relying on allurement has succeeded, save where there was actual knowledge by the defendants that the alluring object was dangerous."

After some further citations, he concludes that part of his judgment: "It would seem, then, that the plaintiff was a mere licensee."

A Accordingly, as it seems to me, the present case resolves itself into this. Was there a trap or concealed danger in this chute and if so was it known to the defendant council? Even if it would be right to treat the chute as an allurement, and accordingly to judge from the standpoint of a child the question whether any danger there may have been was in the nature of a trap or concealed danger, in my view, any such danger in order to be relevant here must be a danger of the kind referred to in the passage quoted by my Lord from the judgment of ACTON, J., in *Donovan v. Union Cartage Co., Ltd.* (11). In that passage the learned judge said ([1933] 2 K.B. at p. 74):

C "The cases in which it has been held that liability arises appear to have one common feature—namely, that the object left unattended and accessible to children, and likely to be an allurement to them, possessed some attribute which rendered it dangerous in itself, and it was in consequence of its possession of this attribute that the accident happened and the injury ensued. It may be that the object is dangerous through being actually in motion, or liable to be easily set in motion, or poisonous or deleterious to eat or handle, or explosive, or so defective in some way as to be inherently dangerous. There is, in our judgment, no such element of inherent danger in a sound, stationary and immobile vehicle . . ."

D Similarly, it can be said that there was no such element of inherent danger in a sound stationary and immobile chute such as the chute installed by the council in the present case. There was, however, the possibility, as events proved, that some small child using this chute might climb over or get through the railings and fall from the platform at the top of the chute, and that possibility might be looked on as a danger inherent in the design of the railings. However, there is no ground for holding that the defendant council knew of that danger, that is to say, appreciated the possibility that a small child would climb over or get through the railings and fall. There was an obvious danger in the general sense that anyone who has attained a height may fall from it, but that was not an element of inherent danger due to any defect in the chute; it was simply a quality possessed in common by every building, erection or piece of apparatus which enables a person to climb to a height above the ground.

F As to the actual danger, if it can be so called, which brought about the accident, that was a danger knowledge of which cannot in my view fairly be brought home to the defendant council. In *Sutton v. Bootle Corpn.* (14) ASQUITH, L.J., said ([1947] 1 All E.R. at p. 98):

G "Having regard to its [the swing's] construction and working, the occurrence of an accident to a small child with a very limited reach was, in my view, extremely unlikely and there were ample materials on which to base a finding that neither through the attendant nor otherwise can knowledge of its dangerous character—if, indeed, it can be held to have possessed any—be properly imputed to the defendants."

H It seems to me that here equally it would, on the face of it, be so extremely unlikely that a child should get through between the top and the second bars of the railings on the platform and so fall to the ground that one cannot fairly impute to the defendant council knowledge of this risk in advance of the event. I Accordingly, I am of opinion that this appeal should be allowed on the ground that when the relationship of licensor and licensee is applied in this case there has been no breach of duty on the part of the defendant council, because if there were anything in this chute amounting to a trap or concealed danger vis-à-vis the infant plaintiff it was not a trap or concealed danger of which the defendant council can be held to have known; consequently, there was no danger of which they were under any duty to give warning to the infant plaintiff.

It is satisfactory that the result at which we have arrived accords with the substantial justice of the case. It will be remembered that the learned judge

found that the chute was acquired from reputable manufacturers, that it was of excellent design and sound construction, and had been properly installed. In other words, the defendant council had done all they could reasonably be expected to do to ensure that this piece of apparatus would be suitable and safe for children to use and the unfortunate accident which occurred was certainly not due to anything which could reasonably be described as a dereliction of duty on their part. I agree that this appeal should be allowed. A
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PARKER, L.J.: I agree. The duty of an occupier of land to a licensee applies equally to children as to adults and the occupier will not be liable for the consequences of dangers obvious, in the case of adults obvious to adults, and, in the case of children, obvious to children. The scope of the duty, however, in the case of children is wider because what may not be an unusual danger or trap to an adult may be one to a child. Again, a warning of the danger in question may be insufficient if the child were too young to take advantage of it. This wider duty, however, exists only when there is something on the premises, or, in this case, in the implement provided, which amounts to a hidden danger or a trap, or where the implement is an allurement in the sense in which that word is used. Now, quite clearly, this implement—this chute—was an allurement in the sense that it was attractive to children and indeed was there for their use. However, the fact that a child using it might injure himself does not make it an allurement in the sense in which that word is used. A child may hurt himself on anything. Adopting the test laid down by ACTON, J., in *Donovan v. Union Cartage Co., Ltd.* (11) I cannot persuade myself that this chute was an allurement in the sense that it was inherently dangerous, any more than was the van in that case. C
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The learned judge was clearly very much influenced by the evidence given by Mr. Jemmett, the chairman of the council, where he said that he would not allow his own child of four to play on this chute unaccompanied by a responsible adult, and when asked why, he said: "Because the child might hurt himself." The learned judge, after referring to that, said: F

"That, no doubt, is the reason why Mr. Jemmett said what he did. Mr. Jemmett expressed a view which entirely coincides with my own."

Now, be it observed, Mr. Jemmett, in giving that evidence, was giving evidence as a reasonably prudent parent, not as an occupier of land. It may well be that the reasonably prudent parent would insist on the child being accompanied by an adult, not because there was any concealed danger, not because the danger was not obvious, but because the danger although obvious was not such as the child was old enough to protect himself against. That is not the consideration of the licenser, although it may well be, and no doubt is, the consideration of the reasonably prudent parent. Accordingly, for these and for the reasons given by my Lords, I would allow this appeal. G

Appeal allowed. Leave to appeal to the House of Lords refused. H

Solicitors: *William Charles Crocker*, agents for *Bazeley, Barnes & Bazeley*, Bideford (for the defendant council); *Gibson & Weldon*, agents for *S. A. Copp & Son*, Barnstaple (for the plaintiff).

[Reported by *PHILIPPA PRICE*, *Barrister-at-Law*.]

A

Re BOSTON'S (LORD) WILL TRUSTS.
INGLIS v. BOSTON (LORD) AND ANOTHER.

[CHANCERY DIVISION (Vaisey, J.), January 26, 27, 31, February 22, 1956.]

B

Trust and Trustee—Trust for sale of land—Repairs and improvements to agricultural land—Capital and income—Incidence of cost—Discretion of trustee—Principles on which discretion should be exercised—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 28—Settled Land Act, 1925 (15 & 16 Geo. 5 c. 18), s. 73 (1) (iv), s. 75 (2)—Agricultural Holdings Act, 1948 (11 & 12 Geo. 6 c. 63), s. 81 (1), s. 96 (1), Sch. 3, para. 23.

C

Where both a tenant for life's statutory power to direct repairs for agricultural holdings to be paid for out of capital moneys subject to the Settled Land Act, 1925, and the settlement trustees' duty of controlling the exercise of a tenant for life's powers are vested in the same persons, e.g., in trustees for sale of land, they ought not to apply capital money in paying for "income" repairs to agricultural holdings without regard to their duty to preserve the capital value of the estate of which they are trustees.

D

Re Wynn ([1955] 2 All E.R. 865) followed.

Re Duke of Northumberland ([1950] 2 All E.R. 1181) distinguished.

Considerations to which trustees for sale may have regard in exercising their discretion instanced (see p. 597, letter C, post).

E

The decision in *Re Duke of Northumberland* ([1950] 2 All E.R. 1181) encroached on the general principle that a tenant for life of settled land when exercising his powers under the Settled Land Act, 1925, was bound to hold the balance fairly between his own interests in income and those of persons interested in capital, e.g., by not allowing the cost of unimportant and impermanent reparations, ordinarily defrayed out of income, to fall on capital. The decision showed that settlement trustees, who ordinarily could control any unfair exercise of powers by a tenant for life and were primarily

F

(but not exclusively) concerned to conserve the settled property for the remaindermen, could not legally prevent a tenant for life causing income repairs to agricultural holdings to be paid for out of capital (viz., by directing under s. 75 (2) and s. 73 (1) (iv) of the Settled Land Act, 1925, payment for the repairs as for an improvement by virtue of s. 81 (1), s. 96 (1) of and Sch. 3, para. 23, to the Agricultural Holdings Act, 1948). The position is different, however, where by virtue of s. 28 of the Law of Property Act, 1925,

G

both the power of the tenant for life and the duty of the settlement trustees are vested in the same persons as trustees for sale of land. In such circumstances the position is as stated in the first paragraph above. (See p. 596, letters B, G and I, p. 597, letter A, post).

H

[As to the application of capital money, see 29 HALSBURY'S LAWS (2nd Edn.) 704-714, paras. 985-991; and for cases on the subject, see 40 DIGEST 748-753, 2778-2822.

For the Law of Property Act, 1925, s. 28, see 20 HALSBURY'S STATUTES (2nd Edn.) 475; for the Settled Land Act, 1925, ss. 73 (1) (iv), 75 (2), see 23 HALSBURY'S STATUTES (2nd Edn.) 161, 173; and for the Agricultural Holdings Act, 1948, ss. 81 (1), 96 (1), and Sch. 3, para. 23, see 28 HALSBURY'S STATUTES (2nd Edn.) 86, 96, 103.]

I

Cases referred to:

(1) *Re Northumberland (Duke)*, [1950] 2 All E.R. 1181; [1951] Ch. 202; 30 Digest (Repl.) 319, 87.

(2) *Re Sutherland Settlement Trusts*, [1953] 2 All E.R. 27; [1953] Ch. 792; 3rd Digest Supp.

(3) *Re Wynn*, [1955] 2 All E.R. 865.

- (4) *Re Whiteley*, (1886), 33 Ch.D. 347; *affd.* H.L. sub nom. *Learoyd v. Whiteley*, (1887), 12 App. Cas. 727; 57 L.J.Ch. 390; 58 L.T. 93; 43 Digest 856, 3038. A
- (5) *Re Hunt's Settled Estates*, [1905] 2 Ch. 418; *on appeal*, [1906] 2 Ch. 11; 75 L.J.Ch. 496; 94 L.T. 747; 40 Digest 748, 2783.
- (6) *Re Smith*, [1930] 1 Ch. 88; 99 L.J.Ch. 27; 142 L.T. 178; 30 Digest (Repl.) 230, 764. B
- (7) *Morcom v. Campbell-Johnson*, [1955] 3 All E.R. 264.

Adjourned Summons.

The plaintiff, as an executor and trustee of the will of the testator, the Right Honourable George Florance (sixth) Baron Boston, deceased, applied to the court by originating summons for the determination of the following questions (amongst other questions): (i) Whether the trustees of the will had a discretion pursuant to the Settled Land Act, 1925, s. 75 (2), to direct the application of capital moneys arising under the said Act in payment for repairs such as were specified in the Agricultural Holdings Act, 1948, Sch. 3, para. 23, and notwithstanding that apart from the provisions of that Act such application would not have been an authorised application of such capital moneys; and (ii) if the trustees had such discretion, whether they ought to exercise such discretion without regard to the interests of the persons who ultimately became entitled to the capital of the testator's residuary estate and, if not, on what principle they ought to exercise such discretion. C D

E. B. Stamp for the plaintiff, one of the executors and trustees.

E. I. Goulding for the first defendant, the tenant for life. E

J. W. Mills for the second defendant, beneficially interested in remainder.

Cur. adv. vult.

Feb. 22. VAISEY, J., read the following judgment: The questions in the summons in this case arise under the will dated Jan. 13, 1941, of the sixth Lord Boston, who died on Sept. 16, 1941. By that will the testator appointed (i) his nephew, the second defendant, Mr. Irby, (ii) the late Mr. Arthur Borrer, and (iii) the plaintiff, Mr. Cecil George Inglis, to be the executors and trustees thereof, and devised and bequeathed to them his residuary real and personal estate on trusts for sale and conversion (with the usual power to postpone sale and conversion) and for investment. He directed his trustees to stand possessed of the resultant investments along with any part of his estate remaining unconverted, and the annual income thereof on trust during the life of the first defendant, the seventh Lord Boston, to hold the income on protective trusts for his benefit and, subject thereto, to stand possessed of the capital and income of the estate on further trusts which it is not necessary for me to describe except by saying that they are trusts for the benefit of persons who may include the defendant, Mr. Irby, and other persons unborn or presently unascertainable. F G H

The said will, with a codicil which does not affect the questions which I have to decide, was proved on Dec. 9, 1941. Mr. Borrer died on Feb. 2, 1953, and thereupon the defendant, Mr. Irby, and the plaintiff, Mr. Inglis, became the surviving executors and trustees of the will. Included in the residuary estate are certain freehold properties in Anglesey which have been retained in exercise of the powers to postpone sale conferred by the testator's will. They comprise agricultural property as well as properties in the town of Holyhead, their total value being about £46,000. The estate, apart from these properties in Anglesey, consists of investments of about £129,000 in value. The estate is charged with the payment of certain annuities to which it is not necessary to make any further allusion. I

The evidence shows that, during the period between the death of the testator and the spring of 1951, a considerable sum of money was spent on repairs to the

- A farm properties and the town properties, and, in so far as the proportion of the costs of such works was attributable to capital, it was from time to time certified by a surveyor in accordance with the provisions of the Settled Land Act, 1925, s. 84 (2) (i). Subsequently, after the decision in *Re Duke of Northumberland* (1) ([1950] 2 All E.R. 1181), the trustees took the advice of counsel on the question whether, in view of that decision, they could properly apply capital moneys of the estate for making payments for repairs which, but for the provisions of the Agricultural Holdings Act, 1948, could only have been chargeable against income. They assumed, under the advice of counsel, that the Administration of Estates Act, 1925, s. 39 (1) (iii), gave to the executors (the administration of the testator's estate not having then been completed) and subsequently to the trustees of his will all the powers conferred by the Law of Property Act, 1925, s. 28, i.e., all the powers of a tenant for life, and all the powers of the trustees of a settlement under the Settled Land Act, 1925. It is the fact of the combination of the two sets of powers in the hands of the same persons which gives rise to the difficulty in the present case. The trustees were advised that they could apply capital moneys in accordance with the decision in *Re Duke of Northumberland* (1), and could themselves give the necessary direction for such application, subject only to their obtaining certificates under the Settled Land Act, 1925, s. 84 (2) (i).

- On or about July 31, 1951, the executors decided to direct that, so far as could properly be done under the decision in *Re Duke of Northumberland* (1), capital moneys should be applied towards the costs of certain repairs, as distinguished from improvements, and any necessary readjustments made.
- E Accounts were prepared and approved showing the amount expended on repairs since Dec. 31, 1948, which, but for the decision in *Re Duke of Northumberland* (1), or, rather, the law as interpreted in that case, could only have been charged against income but have, in fact, been charged against capital in reliance on that decision.

- The trustees are now raising the question how far they are entitled, as persons
- F having the powers of a tenant for life under the Settled Land Act, 1925, to continue the course which they have hitherto adopted of paying for repairs out of capital, and whether they, as trustees for sale, having regard to the terms of s. 75 (2) of the said Act, have a discretion to apply capital moneys for the payment of repairs without regard to the interests of the persons entitled to the capital of the estate in remainder.

- G It seems to me, putting the matter for the moment in quite broad terms, that the problem may be stated somewhat as follows. Assuming that a tenant for life is empowered under the Act of 1948, on a principle which has been rightly described by HARMAN, J., as "revolutionary" (*Re Sutherland Settlement Trusts* (2) ([1953] 2 All E.R. 27) and *Re Wynn* (3) ([1955] 2 All E.R. 865)), to have recourse to capital for expenditure which would normally be a liability of
- H income, are trustees for sale, by virtue of their possession of the powers of a tenant for life, entitled to exercise those powers for the benefit of income and to the detriment of capital under the authority of *Re Duke of Northumberland* (1), or, on the other hand, is the possession of those powers by executors or trustees for sale negatived or counter-balanced by their concomitant possession of the power and duty of Settled Land Act trustees to protect capital in a more positive and
- I direct sense than such a power and such a duty is generally vested in a tenant for life?

It seems to me that the decision in *Re Duke of Northumberland* (1) does, at any rate to some extent, relieve the tenant for life as such from the obligation of protecting capital, and certainly it has been so read and construed since it was first reported. When, however, as in the present case, the powers of a tenant for life are entrusted to persons who are already subject to the obligation as trustees to hold a fair balance between capital and income, and particularly to

consider the claims of capital, it may be difficult to see how such persons can properly make use of the decision in *Re Duke of Northumberland* (1) for the benefit of income. A

Apart from the decision in *Re Duke of Northumberland* (1), every tenant for life is, in my judgment, at the same time entitled to consider his own interests and also bound to consider the interests of capital, and to hold the balance fairly between the two, e.g., by not allowing the cost of unimportant and impermanent reparations which in the ordinary course of management would fall on income to be defrayed out of capital. This principle, however, appears to me to have been seriously encroached on by the decision in *Re Duke of Northumberland* (1). It may be the fact that the legislature of 1948 was not solicitous to protect capital and deliberately authorised the tenant for life to have recourse to and deplete capital in a manner which has already been described as "revolutionary". But how can the trustees in the present case exercise those special "revolutionary" powers as a matter of discretion without paying the regard, which they are bound to pay in their capacity of trustees, to the interests of capital? That duty rests on the very firm foundations of equity and fair dealing. Taking the decision in *Re Duke of Northumberland* (1) in the sense in which it has been understood and acted on, can it be taken advantage of by quasi-tenants for life who are also trustees, and are not such persons disqualified from benefiting income qua tenants for life by the duties which they owe to the remaindermen qua settlement trustees? B C D

The powers of a tenant for life are fundamentally and essentially fiduciary. The Settled Land Act, 1925, s. 107 (1), replacing the Settled Land Act, 1882, s. 53, enacts that he E

"... shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

In a sense, however, his fiduciary position is in the ordinary case necessarily qualified by reason of he himself being one of the cestuis que trustent so that he can legitimately exercise his powers with some, but not, of course, an exclusive, regard for his own personal interests, wishes and tastes. He is always liable in an ordinary case to be controlled by the settlement trustees who can check him if he is threatening to exercise his powers capriciously or unfairly: see per COTTON, L.J., in *Re Whiteley* (4) (1886) (33 Ch.D. 347 at p. 350), *Re Hunt's Settled Estates* (5) ([1905] 2 Ch. 418), and *Re Smith* (6) ([1930] 1 Ch. 88). He acts, as it were, under the real if somewhat remote supervision of the settlement trustees, whose primary duty is to conserve the settled property for the remaindermen, but who are also concerned to secure fair dealing to the tenant for life: see generally UNDERHILL'S LAW OF TRUSTS AND TRUSTEES (10th Edn.) at pp. 331, 332. F G

When, however, as in the present case, the fiduciary tenant for life powers and duties and the equally fiduciary trustee powers and duties are vested in the same persons, there must, in my opinion, be a definite limit to the freedom of the exercise of the tenant for life powers by those persons. Under the decision in *Re Duke of Northumberland* (1) as hitherto understood (and I must not be taken to be disapproving in the present case of what I decided in that one) the settlement trustees could not in an ordinary case prevent the tenant for life from benefiting himself by paying for income repairs out of capital subject to their somewhat attenuated powers of stopping him from going too far. I incline to the view that the legislature of 1948 was not concerned to protect capital, and did intend to facilitate the application of capital on expenditure which would theretofore have been made out of income, i.e., it was giving a privilege to the tenant for life which he could exercise for his own benefit if he chose. Where, however, that privilege and the duty of controlling it are vested in the same H I

A persons, the position is surely different. In other words, the trustees as acting tenant for life are gravely hampered and embarrassed by their paramount duty as acting settlement trustees of protecting the capital. The decision in *Re Duke of Northumberland* (1) merely permits but does not oblige the tenant for life to direct income repairs to be met out of capital; the permission is one of which advantage is to be taken, if at all, by a tenant for life who is entitled, under the decision in *Re Duke of Northumberland* (1), to think of himself first. The Agricultural Holdings Act, 1948, has, on the basis of that decision, encroached, in cases to which it applies, on the fiduciary position of the tenant for life. That position seems to me to remain intact in such a case as the present. My conclusions in the present case follow those of HARMAN, J., in *Re Wynn* (3).

C The second question on the summons asks me to define the principles under which the trustees' discretion ought to be exercised by them. I hesitate to attempt to define or limit those principles. I cannot myself see that it would be wrong for trustees to take into consideration such matters as the comparative wealth or poverty of the parties entitled to the income and of the parties interested in the capital of the settled property, or (for example) any benefits which either of them may have conferred on the settled property. I do not think that it should be a matter of mere arithmetic with no reference to the personal elements in the situation, which indeed it may be very difficult for a trustee to disregard, even if he tried to do so.

I do not propose to attempt to differentiate between repairs and improvements as was done in *Morcom v. Campbell-Johnson* (7) ([1955] 3 All E.R. 264) or to define to what extent (if any) trustees situated, as in the present case, can properly take advantage of the decision in *Re Duke of Northumberland* (1). I prefer to answer the first and second questions in the summons together by declaring in general terms that the trustees of the testator's will, notwithstanding para. 23 of Sch. 3 to the Agricultural Holdings Act, 1948, have a duty to preserve the capital value of the testator's residuary estate in exercising the discretionary powers conferred on them by the joint effect of the Law of Property Act, 1925, s. 28, the Settled Land Act, 1925, s. 73 (1) (iv) and the Agricultural Holdings Act, 1948, s. 96 (1), and ought not to lay out capital moneys in any manner authorised by the joint effect of those sections without regard to such duty.

Declaration accordingly.

Solicitors: *Boodle, Hatfield & Co.* (for all parties).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

COMMISSIONER OF STAMP DUTIES *v.* NEW ZEALAND INSURANCE CO., LTD.

[PRIVY COUNCIL (Viscount Simonds, Lord Oaksey, Lord Radcliffe, Lord Keith of Avonholm and Lord Somervell of Harrow), November 29, 30, December 1, 1955, February 15, 1956.]

Privy Council—New Zealand—Estate duty—Allowance—Obligation of deceased to pay life annuity—"Contingent debt"—What amount allowable as a debt—New Zealand Death Duties Act, 1921 (1921, No. 21), s. 9 (2) (d).

In 1941 the deceased entered into a deed under which he and other persons undertook to pay to H. a monthly sum of £31 5s. during her lifetime, in return for the release to them by H. of a legacy and a share of a residuary estate. In 1946 the deceased died, being survived by H., and an allowance was claimed in computing the final balance of the deceased's estate for £1,052 9s., which represented the actuarial value, at the date of the deceased's death, of the share of H.'s annuity payable by the deceased. The Commissioner of Stamp Duties rejected this claim but allowed, under the New Zealand Death Duties Act, 1921, s. 9 (3)*, the deduction of £281 5s., being the sum of the deceased's share of the monthly payments which had actually become payable since the deceased's death.

Held: the whole debt, valued at £1,052 9s., should be allowed as a deduction because the deceased's share of the annuity (a) was a debt owing by the deceased at his death within s. 9 (1) of the Act of 1921 and (b) was not excepted by s. 9 (2) (d) of that Act from the class of debts allowable because it was payable of estimation.

Comr. of Stamp Duties (New South Wales) v. Permanent Trustee Co. of New South Wales, Ltd. (Hill's Case) (1933) (49 C.L.R. 293) distinguished.

Appeal dismissed.

[**Editorial Note.** The enactment in the Finance Act, 1894, of the United Kingdom Parliament, corresponding in purpose to s. 9 of the New Zealand Death Duties Act, 1921, s. 9, is s. 7 (1), for which see 9 HALSBURY'S STATUTES (2nd Edn.) 360. It is to be noted, however, that there are no words in that section corresponding to s. 9 (2) (d) of the New Zealand Act on which the decision turned and that, further, there is no definition of "debt" in the Finance Act, 1894, but the term was defined for the purposes of the New Zealand Act by s. 2 thereof (see p. 601, letter B, post). The distinction drawn by the Court of Appeal, in considering the meaning of "contingent debt", between a debt which might never become due and one where liability was certain but its amount was uncertain (see p. 600, letters D and E, post) is worthy of note for tax purposes generally although it is not the ground of the decision of the present case by the Judicial Committee.]

Case referred to:

- (1) *Comr. of Stamp Duties (New South Wales) v. Permanent Trustee Co. of New South Wales, Ltd. (Hill's Case), (1933), 49 C.L.R. 293.*

Appeal.

Appeal by special leave by the Commissioner of Stamp Duties of New Zealand from an order of the Court of Appeal of New Zealand, dated Dec. 18, 1953, reversing an order of the Supreme Court of New Zealand, dated Dec. 17, 1952, in favour of the appellant on a Case Stated under the New Zealand Death Duties Act, 1921, s. 62. The facts appear in the judgment of the Board, p. 599, letters F to I, post.

* The terms of s. 9 are printed at p. 599, letters C to F, post.

A *Neil Lawson, Q.C., J. Byrne and T. H. H. Sheet* (both of the New Zealand Bar) for the appellants.

Sir Wilfred Sim, Q.C. (of the New Zealand Bar), *J. A. Brightman* and *G. H. Gould* (of the New Zealand Bar) for the respondent.

B **LORD RADCLIFFE:** The question in this appeal is whether the appellant, the Commissioner of Stamp Duties of New Zealand, ought to make an allowance in respect of the obligation to pay a life annuity when computing the final balance of the estate of a deceased person for the purposes of estate duty under the Death Duties Act, 1921, of New Zealand. The issue depends almost entirely on the effect of s. 9 of that Act.

Section 9 runs as follows:

C “ Allowance to be made for debts.—(1) In computing the final balance of the estate of the deceased, allowance shall, save so far as otherwise provided by this Act, be made for all debts owing by the deceased at his death. (2) No such allowance shall be made—(a) For debts incurred by the deceased otherwise than for full consideration in money or money's worth wholly for his own use and benefit; or (b) For debts in respect whereof there is a right of reimbursement from any other estate or person, except to the extent to which reimbursement cannot be obtained; or (c) More than once for the same debt charged upon different portions of the estate; or (d) For contingent debts or any other debts the amount of which is, in the opinion of the commissioner, incapable of estimation. (3) If any debt for which by reason of the provisions of para. (d) of this section an allowance has not been made becomes at any time within three years after the death of the deceased actually payable or, in the opinion of the commissioner, capable of estimation, an allowance shall be made therefor, and a refund of any estate or other duty paid in excess under this Act shall be made to the person entitled thereto, but no action for the recovery of any such refund shall be commenced except within three years after the payment of the duty so paid in excess.”

G The material facts of the case are very simple. The deceased person was a Mr. Francis Joseph Rolleston, who died on Sept. 8, 1946. In 1941, some years before his death, he had been one of the parties to a deed, apparently a sort of family arrangement, under which he and other persons had undertaken to remit to a Miss Helen Mary Rolleston a monthly sum of £31 5s. New Zealand currency during her lifetime. In return, Miss Rolleston released to the grantors of this annuity a legacy and a share of residue to which she was entitled under the will of another member of the Rolleston family. It was common ground between the parties to the appeal that what Miss Rolleston received was fully adequate consideration for what she gave up under the deed, and that, accordingly, no gift duty was payable in respect of her disposition. Miss Rolleston was alive at the date of the death of the deceased. He was, at that date, liable for his share of the accruing monthly instalment of the annuity, which share amounted to the figure of £1 16s. 5d. This amount was admitted by the appellant as a deduction under s. 9 (1). The respondent claimed that a further deduction of I £1,052 9s. ought to be made, as representing the estimated amount of the sum owing in respect of the annuity at the date of the deceased's death. The Case Stated by the appellant, which is the origin of the present proceedings, does not contain any information as to how the figure of £1,052 9s. was arrived at, but it seems to have been assumed throughout that it was the figure of the actuarial value of the share of Miss Rolleston's annuity payable by the deceased at the same date. The appellant rejected this claim, but conceded that, under s. 9 (3), the sum of £281 5s. ought to be deducted, this amount being the sum of the deceased's

share of the monthly payments of £31 5s. which had become actually payable since the date of his death. A

The question thus raised has occasioned a difference of opinion in the courts of New Zealand. In the Supreme Court, NORTHCOFT, J., upheld the appellant's rejection of the deduction claimed. The basis of his decision was that the liability under the annuity was a contingent debt within the meaning of sub-s. (2) (d); and that, since the period of the annuitant's life was not capable of determination in advance, an estimate of the quantum of the contingent indebtedness or pecuniary liability could not be made. This treatment of the matter seems to assume that, as a matter of construction, the relative clause in sub-s. (2) (d) "the amount of which is, in the opinion of the commissioner, incapable of estimation" qualifies both of the preceding phrases "contingent debts" and "any other debts". It should be added that the learned judge found considerable support for the view that he had taken in the judgments of the High Court of Australia in *Comr. of Stamp Duties (New South Wales) v. Permanent Trustee Co. of New South Wales, Ltd. (Hill's Case)* (1) (1933) (49 C.L.R. 293), a case to which some reference will be made subsequently. B C

In the Court of Appeal, the decision of the Supreme Court was reversed, and it was held that the deduction of £1,052 9s. ought to be allowed. All the three judges in that court (FAIR, STANTON and HAY, JJ.) adopted the same line of reasoning. In their view, there was a material distinction between a liability which could be described as "a debt that may never become due," such as, for instance, a guarantee of a bank overdraft or an uncalled liability on shares, and a liability E

"where liability is certain but the ultimate amount that will be payable depends on a contingency."

Only the first class were contingent debts for the purpose of sub-s. (2) (d). A life annuity belonged to the second class. Further, they held that there could not be any doubt that the amount of the debt represented by the annuity was capable of estimation for the purposes of the same sub-section, and that the opinion recorded by the appellant to the opposite effect must have been founded on some misapprehension of the relevant law and could not be allowed to prevail. Thus the order of the court, dated Dec. 18, 1953, which is now appealed from, is to the effect that the allowance to which the respondent is entitled for the liability of the deceased under the annuity deed ought to be estimated on the proper actuarial basis in respect of the annuity. F G

In their Lordships' view, the essential question in this case is not the bare question: Is the liability for an annuity for life a contingent debt? Indeed, it is very difficult to answer such a question in isolation, since the nature of the answer will depend on the context to which the existence of the contingency is relevant. No doubt, any particular amount which is claimed to be due in respect of the liability at the date of death (except the small accrued sum due by apportionment) is only contingently due in the sense that it cannot be said with certainty that it, or any part of it, will have to be paid out of the estate. The sum that will have to be paid depends on the number of months that the annuitant survives. No doubt, too, the value of the annuity, estimated on actuarial principles, is not the same thing as the amount of the debt itself. On the other hand, it may be that there is a relevant distinction for this purpose between a liability for an annuity accruing *de die in diem* and only terminating with the death of the annuitant, and a liability which, while not the less incurred by the date of death, will not result in a pecuniary debt except in a future event, as yet uncertain. Their Lordships do not think it necessary to express an opinion I

A on this point, which is, admittedly, a difficult one, since, in their view, the allowance or rejection of a life annuity as a debt to be allowed against the final balance of an estate can be decided more satisfactorily by reviewing the wording of s. 9 as a whole.

B First, is the annuity “a debt owing by the deceased at his death”? Having regard to the interpretation of “debt”, in s. 2, as including “any pecuniary liability, charge, or incumbrance”, it is clear that it is; and, if so, it is to be allowed under s. 9 (1), “save so far as otherwise provided by this Act”. The main grounds of exclusion are set out in sub-s. (2) of the same section, and, of the four paragraphs, para. (d) stands apart from the others. It is expressed in a form which is itself productive of some ambiguity:

C “For contingent debts or any other debts the amount of which is, in the opinion of the commissioner, incapable of estimation.”

D If the relative clause qualifies both the preceding phrases, a liability which is admissible under sub-s. (1) is not disallowed, even if contingent, so long as it is not incapable of estimation; while, if the relative clause qualifies only the phrase “any other debts”, which immediately precedes it, any liability properly described as contingent is disallowed merely by that fact, even though it is readily capable of estimation.

E Their Lordships do not think that the latter gives a reasonable construction of an ambiguous sentence. There is nothing in its favour, except the grammatical argument that the word “debts” should not have been used twice if the relative clause was intended to cover contingent as well as other debts, and the point, in itself of little weight, that there was no need to refer to contingent debts at all if the sentence was intended to mean no more than that any debt which was incapable of estimation was to be disallowed. If it is said that a contingent debt was meant to be disallowed as such, and without qualification, because it was regarded by the legislature as an obvious example of a liability

F which could be safely assumed to be incapable of estimation, the argument turns round on itself, since then it becomes highly improbable that the phrase “contingent debt” was intended to cover a life annuity, the obligation under which is of all uncertainties the one most readily capable of estimation. And the explanation leaves unexplained how it could be fair or reasonable to provide

G that no debt that was not a contingent debt was to be disallowed, if capable of estimation, while a debt that was a contingent debt was not to be allowed, even if capable of estimation.

In the light of these considerations, their Lordships are of opinion that the meaning of sub-s. (2) (d) is that the only debts within the meaning of sub-s. (1) which are disallowed are those the amount of which is, in the commissioner’s

H opinion, incapable of estimation. On this basis, it does not matter whether the annuity is to be thought of as a contingent debt or not. The section does not say, but it is necessarily to be assumed, that, if there is a debt, the amount of which is capable of estimation, that amount is itself to be treated as the debt and allowed as such. Their Lordships are not unmindful that, in the Case Stated, the appellant recorded the opinion that “the liability of the deceased under the

I said deed as from his death is incapable of estimation”. But, having regard to the known practice of the valuation of life annuities on actuarial principles for many purposes, including bankruptcy, administration and insurance business, they are content to accept the view of the Court of Appeal on this point, that he must have been acting under some misapprehension of the applicable law when he committed himself to this view.

The reading of the section which has been adopted by their Lordships makes it unnecessary to consider *Comr. of Stamp Duties (New South Wales) v. Permanent*

Trustee Co. of New South Wales, Ltd. (Hill's Case) (1), to which NORTHCROFT, J., made detailed reference in his judgment in the Supreme Court. For, while it is true that the effect of that decision was to exclude a life annuity from allowance under the Death Duties Act of New South Wales*, the ground of the decision was that, under that Act, the basic condition of allowance of any debt was that it must be "actually due and owing" at the date of death (see s. 107 (1) of the Act). If a debt was not capable of being so described—and, whatever else can be said about the liability to pay a life annuity, it is hard to see how it can properly be described in those terms—the range of allowance was not impliedly extended by the presence of a sub-s. (2) (d) in the same terms as sub-s. (2) (d) of the New Zealand Act, from which circumstance it had been sought to draw the conclusion that any liability ought to be allowed against the dutiable estate if, though a contingent debt, it was capable of estimation. The High Court rejected this argument, holding that the prohibition contained in sub-s. (2) could not be construed as an implied enlargement of the phrase "actually due and owing", in sub-s. (1). It is plain that there is a material difference between the words "actually due and owing" in the New South Wales Act and the words "owing by the deceased" (as interpreted by s. 2) in the New Zealand Act. Further, there was no definition of "debt" in the New South Wales Act, as there is in s. 2 of the New Zealand Act. Accordingly, the decision of the High Court of Australia does not bear on the issue of the present case.

For these reasons, their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs of the appeal.

Appeal dismissed.

Solicitors: *Mackrell, Maton & Co.* (for the appellant); *Neish, Howell & Haldane* (for the respondent).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

* The New South Wales Stamp Duties Act, 1920-1931.

A

THOMPSON v. THOMPSON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), October 14, 1955, February 7, 21, 1956.]

B

Divorce—Presumption of death—Absence of other party for seven years—“Reason to believe” that other party has been living within that time—Whether inference is a reason—Whether reason must be due to something happening within the seven years—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 16 (2).

C

Statute—Construction—Construction to avoid absurdity or inconvenience or hardship—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 16 (2).

D

The Matrimonial Causes Act, 1950, s. 16 (2), provides that in any proceedings for divorce on the ground of presumption of death, “the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that he or she is dead until the contrary is proved”. In this provision the phrase “the petitioner has no reason to believe that the other party has been living within that time” is to be construed as equivalent to “nothing has happened within that time to give the petitioner reason to believe that the other party was then living” (see p. 608, letters G to I, post).

E

The parties were married in 1920. They separated in September, 1937. In December, 1937, the wife obtained an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, whereby she was no longer bound to cohabit with the husband and he was ordered to pay a weekly sum for her maintenance. The husband last saw her in 1942. The wife became a tramp. The last occasions on which she collected from the court her maintenance were in March, 1946, December, 1947 and on Feb. 2 and 17, 1948. On the date last mentioned she was in sound health and in no known danger, but no one was known to have seen her since then. Reasonable inquiries had been made to ascertain whether she was living thereafter. On a petition by the husband presented on Feb. 24, 1955, for a decree of presumption of the wife's death and of dissolution of the marriage,

F

G

Held: nothing had happened within the seven years immediately preceding the presentation of the petition to give the husband reason to believe that the wife was living during that time; accordingly he had established a prima facie case that the wife was dead, and, the contrary not having been proved, he was entitled to the decree which he sought.

H

[**Editorial Note.** In the present case the petitioner had made reasonable inquiries, outside the ambit of his own knowledge, to ascertain whether his wife was alive within the seven-year period. The question whether a petitioner could succeed without having made such inquiries was not in issue and a submission on that point was reserved (see p. 605, letter I, post).

I

As to evidence in proceedings for presumption of death and for dissolution of marriage, see 12 HALSBURY'S LAWS (3rd Edn.) 288, para. 566, notes (i) (k); and for cases, see 27 DIGEST (Repl.) 372, 3069, 3070.

For the Matrimonial Causes Act, 1950, s. 16 (1) (2), see 29 HALSBURY'S STATUTES (2nd Edn.) 403.]

Cases referred to:

(1) *Chard v. Chard* (otherwise *Northcott*), [1955] 3 All E.R. 721.

(2) *Prudential Assurance Co. v. Edmonds*, (1877), 2 App. Cas. 487; 22 Digest (Repl.) 164, 1497.

(3) *Parkinson v. Parkinson*, [1939] 3 All E.R. 108; [1939] P. 346; 161 L.T. 251; 27 Digest (Repl.) 372, 3069.

(4) *R. v. Cullen*, (1840), 9 C. & P. 681; 173 E.R. 1008; 15 Digest 742, 8008. A

(5) *R. v. Lund*, (1921), 16 Cr. App. Rep. 31; 15 Digest 742, 8018.

(6) *Ward v. Ward* (*otherwise Hanson*), (Feb. 9, 1956), *The Times*.

Petition.

The parties were married in April, 1920, and there were three children of the marriage, born in 1921, 1926 and 1930. The parties ceased to live together in September, 1937, and the husband assumed the care and control of the children. On Dec. 22, 1937, the Brentford justices found, on the wife's complaint, that the husband had wilfully neglected to provide reasonable maintenance for her, and made an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, whereby the wife was no longer bound to cohabit with the husband and the husband was ordered to pay her 7s. 6d. a week for her maintenance. On June 16, 1941, the Ealing justices, on the wife's complaint, ordered that the amount of maintenance be increased to 10s. a week and that the wife should have access to the children of the marriage. On Jan. 5, 1942, on the husband's complaint, the order for access was revoked. The husband last saw the wife on Jan. 31, 1942. At that date she was a tramp and had no fixed abode. The wife last collected her maintenance from the court on Feb. 17, 1948; since that date no one was known to have seen her. On Feb. 24, 1955, the husband presented a petition for divorce, under the Matrimonial Causes Act, 1950, s. 16 (1), on the ground that the wife should be presumed to have died on or since Feb. 17, 1948. If the wife had continued alive she would have been fifty-five years of age at the time of the presentation of the petition. The husband had made inquiries for the wife with the Church Army and the Salvation Army but had failed to find any trace of her. The suit was undefended and came before SACHS, J., on Oct. 14, 1955, when HIS LORDSHIP adjourned it for argument by the Queen's Proctor.

N. C. Lloyd-Davies for the husband.

Colin Duncan for the Queen's Proctor.

Cur. adv. vult. F

Feb. 21. SACHS, J., read the following judgment: The parties married in 1920, both then being aged twenty-one years. There were three children of the marriage born respectively in 1921, 1926 and 1930. The husband and wife last lived together in September, 1937, when the husband left the wife and assumed care of the children. From December, 1937, to 1946 there were a number of occasions when the parties contested before the justices issues whether the husband should pay the wife any and if so what maintenance, and who should have custody of and access to the children. From December, 1937, onwards the husband was under a liability, by virtue of court orders, to pay his wife maintenance, which in the first place was fixed at 7s. 6d. a week and later increased to 10s. Since the order in December, 1937, the wife has not been bound to cohabit with the husband and has in fact not done so. Indeed the husband has not seen her since 1942. According to the evidence, by 1942 the wife had in fact become a tramp of no fixed abode, carrying her belongings in a bag. She used, however, to collect her maintenance comparatively regularly from the Magistrates' Court at Ealing until Mar. 18, 1946. After that date she did not call again until police inquiries as to her whereabouts resulted in her coming to the court on Dec. 15, 1947, for the money the husband had meanwhile deposited for her week by week. She next came there for the same purpose on Feb. 2, 1948, and after that once more, on Feb. 17, 1948. Since then no one is known to have seen her and the money paid into the court office regularly by the husband has not been collected—though the sums available there now total £136, being the amount that had been reached by 1953 when the husband was advised to discontinue such payments. There are no relatives of the wife from whom news

A of her is available and extensive inquiries in recent years have neither led to the wife being traced nor have disclosed the existence of any relevant registration of death. The petition now before the court was put on the file on Feb. 24, 1955, that is seven years and seven days from the date when the wife was last seen.

B The case is thus of the type sometimes referred to as concerning the "mere disappearance" of a spouse, and the petition is brought by virtue of s. 16 of the Matrimonial Causes Act, 1950, which replaces verbatim s. 8 of the Matrimonial Causes Act, 1937. Sub-section (1) states that the court if satisfied that reasonable grounds exist for supposing that one party to a marriage is dead may make a decree of presumption of death and of dissolution of marriage. Sub-section (2), on which the husband has founded his prayer for relief, reads:

C "In any such proceedings the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that he or she is dead until the contrary is proved."

D In sub-s. (2) the legislature chose to use phraseology which had material distinctions from that adopted respectively in what is now known as the *Cestui Que Vie* Act, 1666*, and in s. 57 of the Offences against the Person Act, 1861†—the precise terms of both of which are set out in *Chard v. Chard* (otherwise *Northcott*) (1) ([1955] 3 All E.R. 721 at p. 725)—nor does sub-s. (2) follow exactly LORD BLACKBURN's definition of what, in relation to presuming death, is sometimes called the "seven-year rule" (see his speech in *Prudential Assurance Co. v. Edmonds* (2) (1877) (2 App. Cas. 487), which provided the best known authority on that rule when the Act of 1937 was passed).

E It thus falls to be interpreted according to the normal rules applicable to ascertaining the intention of Parliament in an Act when there is a history of past legislation dealing with similar subject-matter. On that footing sub-s. (2) is the most recent of quite a long line of provisions which lay down an appropriate and convenient rule as to the evidence on which a court may *prima facie* be enabled to presume death for a particular purpose—without it necessarily having to examine all those matters which might have to be investigated in the absence of statutory guidance. It may thus be assumed to be intended to provide its own clear-cut test as to when the death of one spouse can be presumed for the specific purpose of allowing the other to re-marry. Unfortunately even on that simple basis the sub-section is at more than one point far from easy to interpret: but the following matters at any rate, on the arguments addressed to me, appear to be clearly established as regards that phrase

G "the petitioner has no reason to believe that the other party has been living within that time",

H which for the purpose of the present case is the critical phrase.

I First, the test to be applied by the court relates to the position as it appears to a single specified person—the petitioning spouse. Secondly, the onus of proving that the position is one which brings him within the benefit of the sub-section lies on the petitioner (*Parkinson v. Parkinson* (3), [1939] 3 All E.R. 108 at p. 112). It is for him to state fully and frankly all the relevant facts known to him. In the present case he has taken that course and has also made appropriate inquiries outside the ambit of his personal knowledge. (Whether or not a petitioner can bring himself within sub-s. (2) without making such inquiries is a point that does not arise here, and in pursuance to counsel's specific request I record that the Queen's Proctor desired to reserve his submission on that point.) Thirdly, the test whether or not there is "reason to believe that the other party

* 20 HALSBURY'S STATUTES (2nd Edn.) 377.

† 5 HALSBURY'S STATUTES (2nd Edn.) 809.

has been living " must relate to the standards of belief of a reasonable man and not to those of the particular petitioner. The legislature could hardly have intended that on the same set of facts the right to relief might vary according to whether the petitioner happened to be a moron or a senior wrangler—with their differing approaches to what constitutes such " reason ". Fourthly, facts from which the inferences are no more than " pure speculation " do not constitute " reason to believe "—see this troublesome phrase discussed by BUCKNILL, J., in *Parkinson v. Parkinson* (3) ([1939] 3 All E.R. at p. 112). The line between " pure speculation " and " reason to believe " being difficult, it can suffice for the purpose of the present case to say that where on the relevant facts known to the petitioner it seems to a reasonable man that there is more than a fifty-fifty chance of the " other party " being alive, then the matter undoubtedly leaves the realm of pure speculation and the petitioner cannot be held to have proved that he " has no reason to believe " that the other party has been living within the period. Fifthly, it is clear that if at any point in the seven years preceding the petition—be it either in the first or last week of those years—there was " reason to believe " (within the meaning of the sub-section) that the other spouse was alive, the petitioner cannot avail himself of sub-s. (2). That appears to me to be the obvious interpretation of the phrase under consideration, and incidentally corresponds with the interpretation of the parallel words in s. 57 of the Offences against the Person Act, 1861* (cf. *R. v. Cullen* (4) (1840) (9 C. & P. 681), where PATTESON, J., dealt with the identical words in 9 Geo. 4 c. 31, s. 22†).

It is perhaps convenient at this point to note in parenthesis that, mutatis mutandis, the wording of s. 57 of the Offences against the Person Act, 1861*, corresponds with that of the sub-s. (2) under consideration, save that in s. 57 the words

" and shall not have been known by such person to be living within that time "

are to be compared with the phrase in sub-s. (2)

" and the petitioner has no reason to believe that the other party has been living within that time ".

The reason for the adoption in the latter Act of the words " has no reason to believe " in place of the words " shall not have been known " may be assumed to have been made in knowledge of the statement of SIR A. T. LAWRENCE, C.J., in a bigamy case, *R. v. Lund* (5) (1921) (16 Cr. App. Rep. 31 at p. 32):

" The statute relating to the excuse of seven years' absence is a beneficial one in favour of persons who enter upon a marriage like this. The prosecution must show knowledge. Inference is not knowledge."

The words " reason to believe " may thus well have been introduced into sub-s. (2) simply to make admissible a wider range of matters than is made admissible by the word " known ".

Starting from the footing of the five matters previously set out which are clear in relation to the critical phrase‡ there arises in an unusually acute form the final point relevant to the present case, and the one which caused me to seek the assistance of the Queen's Proctor—and here I would like to take the opportunity of expressing my indebtedness to counsel for all the help which he gave. The petition having been filed as shortly as seven days after the seven years had elapsed since the wife was last seen alive, the strong probabilities are that this

* See 5 HALSBURY'S STATUTES (2nd Edn.) 809.

† Offences against the Person Act, 1828.

‡ I.e., the quotation from s. 16 (2) of the Matrimonial Causes Act, 1950, set out at p. 605, letter G, ante.

- A woman, who seems to have had but little natural inclination to collect her maintenance, was alive during, at any rate, the first week of the seven years immediately preceding the petition. Indeed, any jury properly charged as to the ordinary law of inferences would, in my view, if allowed to consider all the relevant matters, certainly come to the conclusion that she was alive during that week (and maybe longer) and thus had been "living" at some time "within" the seven years. It is to be noted, however, that the facts which lead to that conclusion all stem from the wife having been alive seven days before the commencement of that week in the circumstances above set out and that the conclusion is in no way derived from any fact that occurred after the first day of the seven years. Accordingly, if in relation to a case of mere disappearance "reason to believe" includes inferences to be drawn from the mere fact that the wife was alive in sound health and in no known danger just before the seven years begins to run, the husband fails to bring himself within the beneficial part of sub-s. (2), that is to say that part which precedes the words "until the contrary is proved". If, on the other hand, "reason to believe" can only be produced by aid of evidence as to some matter supervening during those seven years, then the husband does bring himself within the beneficial part of that sub-section.
- D If the first of the above two interpretations is the correct one, it means that in practice sub-s. (2) is of no real use to a petitioner until seven years have elapsed from the date on which the other spouse can on the normal rules of evidence be presumed to be dead. For, so long at any rate as inferences drawn from all the facts known to the petitioner lead to a presumption of fact that that spouse is alive there is "reason to believe" that he or she is alive—and indeed such reason probably exists until those inferences would lead a properly charged jury to presume the death of that spouse. That in turn would mean that sub-s. (2), far from being of assistance to a petitioner in mere disappearance cases, would be of severe hindrance to him, because the seven years could not start to run until such date as death could be presumed under the normal common law rules. Such a result would produce inconvenience and hardship to a petitioner contrary to the apparent intentions of the legislature and would indeed reduce sub-s. (2) to an absurdity. In that state of affairs I take the relevant rule of interpretation to be well stated in MAXWELL ON INTERPRETATION OF STATUTES (10th Edn.) at p. 229:
- G "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence."
- H Accordingly, although the first of the two above interpretations of "reason to believe" originally attracted me both as a matter of grammar and of first impression, I think it should be rejected, unless some strong reason can be shown against adopting the second. The second interpretation involves construing the critical phrase in a way which tends to exclude from the calculation of "reason to believe" matters occurring before the seven years begin to run except in so far as those matters are related to others supervening during that period. Accordingly, it became desirable in the course of the argument to consider various sets of facts so as to examine what might be the result of such an exclusion, and in particular what harm that exclusion might cause. It is only necessary to refer to two instances. First, what would be the position where the known facts were that at the beginning of the seven years the other spouse was twenty-five years of age, robust in health and subject to no abnormal risks, but nothing had been heard of him for seven years—facts which would normally lead a court to presume that spouse to be alive after the seven years (compare *Chard*
- I

v. *Chard* (1), the cases cited therein, and *Parkinson v. Parkinson* (3), [1939] 3 All E.R. at pp. 111, 112). Secondly, what after seven years of newsless absence would be the position where an experienced explorer just before the beginning of the relevant period had announced he intended to spend the next ten years continuously studying the inhabitants of some remote territory with which communication is, even in 1956, impracticable—again a case where the court on common law rules would not presume death as soon as seven years had elapsed. B

As I understood his submission, it was submitted by counsel for the Queen's Proctor that in the first case there would be, and in the second case there would not be, "reason to believe" that the spouse was alive within the seven years. Whilst appreciating his desire not to exclude all pre-seven year matters from consideration in relation to "reason to believe" in cases where there is no positive evidence of anything having happened in that period, I felt unable to accept the invitation to tread some delicate path by which some pre-seven year matters could be excluded and others not. Such a path did not appear to me to be viable, and so the position as regards the explorer must be further considered on the footing that in relation to "reason to believe" his pre-seven year announcement is a matter which may be excluded from consideration. Whether or not Parliament, in relation to sub-s. (2), gave consideration to such highly exceptional cases as that of the explorer, it yet seems to me that in any event the court would not be forced into a decision contrary to the justice of a case. For instance, sub-s. (2) is subordinate to sub-s. (1) and under sub-s. (1) the court "may" make a decree—a permissive word which contrasts with the imperative "shall" in s. 4 of the same Act. The court thus has, as counsel for the Queen's Proctor pointed out, a judicial discretion which enables it to avoid deciding contrary to the justice of a case even where a petitioner brings himself within the benefit of sub-s. (2). That of itself provides protection for respondents in exceptional cases. So I need not discuss alternative ways in which they may be protected, e.g., the possibilities whether "absent" in sub-s. (2) may be construed as "unexplainedly absent". Suffice it to say that no overriding argument has been adduced before me against the adoption of the second interpretation. C D E F

It is obvious that in some cases that interpretation may result in death being presumed for the purposes of a divorce when it will not be presumed for other purposes. Such a result, however, is not merely a likely consequence when a statute sets up a presumption in terms which do not follow that adopted by the common law, it is a consequence which the preamble of the Act of 1937 shows may well have been deliberately intended, and it is a consequence which BUCKNILL, J., obviously accepted in *Parkinson v. Parkinson* (3) ([1939] 3 All E.R. at p. 110) in relation to the facts of that case. Thus, I adopt the second interpretation, which involves construing the critical phrase G

"the petitioner has no reason to believe that the other party has been living within that time"

as if the legislature had in substance said H

"if nothing has happened within that time to give the petitioner reason to believe that the other party was then living"

—to adopt the robust paraphrase alternatively put forward by counsel for the Queen's Proctor after I had tempted him from more tenuous ways. That gives to the words of sub-s. (2) precisely the same meaning throughout as to the parallel ones in s. 57 of the Act of 1861—simply substituting as regards matters arising during the seven years a wider class of material than that relevant to "knowledge" within the meaning given to that word in *R. v. Lund* (5). I

The effect is to produce a clean-cut and convenient rule. It frees a petitioner from the practical difficulties that attend litigation in which the decisive test (see *Ward v. Ward (otherwise Hanson)* (6)) whether or not death should be presumed

- A is the proper inference to draw from the totality of all the wide range of facts admissible where there is no statutory provision. Further the above interpretation results in sub-s. (2) being held to conform to a pattern adopted by the legislature over some three centuries when enacting convenient rules for presuming that death has occurred at some unspecified point of time within a period of seven years. On each occasion it has been laid down that a presumption of
- B death was to arise on a seven years' absence unless some positive happening since the beginning of those years provided evidence rebutting that presumption. Once the above interpretation of the critical phrase is adopted it follows that the husband in the present case has brought himself within the beneficial part of sub-s. (2). He has established a *prima facie* case that his wife is dead, and on the facts of the present case, the contrary not having been proved, he is entitled
- C to the decree which he seeks.

Decree nisi.

Solicitors: *B. L. Harris & Co.* (for the husband); *Queen's Proctor.*

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

D

E

NOTE.

COON v. DIAMOND TREAD CO. (1938), LTD. ([1950] 2 All E.R. 385).

- F In *Re Banque des Marchands de Moscou (Koupetschesky)* on Feb. 27, 1956, at the hearing of a summons to review taxation WYNN-PARRY, J., after citing the judgment of COZENS-HARDY, M.R., in *In the Estate of Ogilvie, Ogilvie v. Massey* ([1910] P. 243 at pp. 244, 245) and the judgment of BUCKLEY, L.J. (*ibid.*, at p. 245), concerning the rule that on questions of quantum the decision of the taxing master was, generally speaking, final, referred to his own judgment in *Coon v. Diamond Tread Co. (1938), Ltd.* ([1950] 2 All E.R. 385) as follows:
- G "In the later case of *Coon v. Diamond Tread Co. (1938), Ltd.*, where I had to deal with what, as it emerged, was a question of quantum, I said ([1950] 2 All E.R. at p. 389, letters B-C): 'Unless it be shown that the taxing master has erred on a question of principle, there is, on the authorities, no jurisdiction in this court to interfere with what he has done'. In view of the judgments in *In the Estate of Ogilvie*, particularly that of BUCKLEY, L.J., I think that that phrase
- H goes a little too far. What I meant to say, and to what I adhere, is that on a question which is shown in the end to be only a question of quantum, then the court should not interfere."

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

NOTE.**R. v. MANCHESTER JUSTICES, *Ex parte* GAYNOR.**

[QUEEN'S BENCH DIVISION (Hallett, Pearce and Pearson, JJ.), November 28, 1955.]

Street Traffic—Driving licence—Disqualification—Application to remove disqualification after disqualification removed in part—Jurisdiction of justices to hear application—Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 7 (3).

[For the Road Traffic Act, 1930, s. 7 (3), see 24 HALSBURY'S STATUTES (2nd Edn.) 580.]

Motion for Mandamus.

On Apr. 27, 1954, the applicant, Ray Gaynor, a motor dealer, was convicted by justices at Manchester of driving to the danger of the public contrary to the Road Traffic Act, 1930, s. 11, and was fined £20. The justices further ordered that he be disqualified for driving motor vehicles for a period of three years from the date of the conviction. On May 27, 1955, the applicant applied, under the Road Traffic Act, 1930, s. 7 (3),* for the removal of the disqualification and the justices reduced the period of disqualification from three to two years, ordering its removal to take effect on Apr. 27, 1956. On Aug. 31, 1955, the applicant sought to make application to the justices for the removal of the disqualification on the ground that, since May, 1955, irretrievable hardship was being caused to him by the continuance of the disqualification owing to the effect on his business of the hire-purchase and credit restrictions† resulting in his being unable to afford to pay a driver to drive him and his consequent inability to get about so as to be able to test cars for purchase. The justices refused to allow the application to be made, on the ground that they had no jurisdiction to hear it because the previous application on May 27, 1955, had been granted, and a further application could only be made if the previous application had been refused. The applicant now moved for an order of mandamus requiring the justices to exercise the jurisdiction conferred on them by the Road Traffic Act, 1930, s. 7 (3) and, in particular, to hear and consider the applicant's application for the removal of his disqualification for driving a motor vehicle ordered by them on Apr. 27, 1954, on the ground that they had no jurisdiction to refuse to consider the application made by the applicant on Aug. 31, 1955.

F. P. Neill for the applicant.

The justices did not appear and were not represented.

THE COURT granted the order of mandamus.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Pattinson, Harrison & Milne*, Macclesfield (for the applicant).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

* The Road Traffic Act, 1930, s. 7 (3), provides as follows: "A person who by virtue of a conviction or order under [Part I] of this Act is disqualified for holding or obtaining a licence, may, at any time after the expiration of six months from the date of the conviction or order, and from time to time apply to the court before which he was convicted or by which the order was made to remove the disqualification, and on any such application the court may, as it thinks proper . . . either by order remove the disqualification as from such date as may be specified in the order or refuse the application. Provided that, where an application under this sub-section is refused, a further application thereunder shall not be entertained if made within three months after the date of the refusal . . ."

† The Hire-Purchase and Credit Sale Agreements (Control) (Amendment) Order, 1955 (S.I. 1955 No. 1130) which came into operation on July 26, 1955.

A

NOTE.

SULLIVAN v. SULLIVAN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), February 9, 13, 1956.]

B *Justices—Husband and wife—Adultery—Reasonable belief by one spouse that the other has committed adultery—Notice of substance of case sufficient.*

There is an essential difference between making a charge of adultery and alleging that the conduct of one spouse has induced a reasonable belief that adultery has been committed.

C Where a charge of having committed adultery is made in matrimonial proceedings before justices full and proper particulars should be given. Where, however, in such proceedings one party proposes to rely on a reasonable belief that the other party has committed adultery, it is appropriate and sufficient to give notice of the substance of the former party's case, and it is not a matter of course that specific allegations of adultery should be made.

D *Duffield v. Duffield* ([1949] 1 All E.R. 1105) and *Jones v. Jones* ([1954] 3 All E.R. 476n.) approved.

[As to procedure on the making of an application to justices in a matrimonial matter, see 12 HALSBURY'S LAWS (3rd Edn.) 493, para. 1092.]

Cases referred to:

- E (1) *Duffield v. Duffield*, [1949] 1 All E.R. 1105; 113 J.P. 308; 2nd Digest Supp.
 (2) *Frampton v. Frampton*, [1951] W.N. 250; 95 Sol. Jo. 400; 2nd Digest Supp.
 (3) *Jones v. Jones*, [1954] 3 All E.R. 476n.; 118 J.P. 563; 3rd Digest Supp.

Appeal.

F The husband appealed against an order of the Bristol justices dated Nov. 29, 1955, whereby they held that the wife had proved her complaint of desertion and made an order in her favour under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949.

G. G. Macdonald for the husband.

W. M. Huntley for the wife.

G LORD MERRIMAN, P., in the course of his judgment said: The justices held that the wife had proved her complaint of desertion as from Sept. 23, 1955. As that was the date on which the wife herself left the matrimonial home, it was necessary for her to justify it and to show that, in effect, she had been expelled by the husband's conduct. This she sought to do by asserting that she left in the reasonable belief, induced by the husband's conduct, that he had committed adultery, and she relied on certain events which occurred between Thursday, Sept. 15, and the discovery by her on Sunday, Sept. 18, of the state of the husband's clothing. There was no formal complaint of adultery.
 H Her complaint was one of desertion on Sept. 23, 1955, but on Oct. 26 her solicitors wrote to the husband's solicitors asking them to accept the letter as notice that they intended on behalf of the wife to allege that the husband had committed adultery with a woman unknown on Friday, Sept. 16, 1955. By letter of Oct. 31 the date was corrected; the husband's solicitors were invited to note that it should have been alleged that adultery had been committed with a woman unknown on Saturday, Sept. 17, not Friday, Sept. 16; but it was still an allegation that adultery had been committed. Finally, on Nov. 25, it was corrected again; this time they said:

"In view of the nature of the evidence on which we must rely it would be improper to specify any particular date on which adultery was committed, and we therefore feel that we must give a fresh notice of allegation (sic) in substitution of the one dated Oct. 31 [the correction to Saturday, Sept. 17]

to read 'adultery with a woman unknown shortly before the discovery of the stains and blood on [the husband's] outer- and under-clothing on the morning of Sunday, Sept. 18'."

Taken over the whole period, that summarises the charge of adultery as having been committed between Thursday, Sept. 15, and the discovery of certain marks on Sunday, Sept. 18.

Short of an actual formal complaint, it would be difficult to imagine a plainer charge of adultery on a specified or at least an ascertainable date, albeit the charge was not with a specific woman but with a woman unknown. Moreover, in their reasons the justices say that it was admitted that written notice had been given to the husband of the wife's intention to allege that he had committed adultery. However, the justices were not satisfied that adultery had been proved, though they found that the wife had reasonable grounds at the time for believing that the husband had committed adultery, and that such belief was induced by his conduct. In one phase of the argument counsel for the wife submitted that there had been no determination adverse to the wife on the issue whether the husband had in fact committed adultery, because adultery was not the subject of her formal complaint, and that the notices to which I have just referred were given because of what was stated to be the universal practice to give notice of a charge of adultery whenever adultery was mentioned in any form whatever.

I do not in the least degree retract from the decision of this court in *Duffield v. Duffield* (1) ([1949] 1 All E.R. 1105), in which I said (*ibid.*, at p. 1106):

"I wish to emphasise, as has been emphasised repeatedly by this court, that it is of the utmost importance that, whenever a charge of adultery is made, in whatever context, under the summary jurisdiction procedure, full and proper particulars should be given."

I repeat that the words were "whenever a charge of adultery is made". The point is that a charge of adultery may be made in more than one context, for example (and these are not necessarily intended to be exhaustive): as a bar to the jurisdiction of the court under s. 6 of the Summary Jurisdiction (Married Women) Act, 1895, as a ground for revoking an order under s. 7 of the Act, as a defence to a charge of desertion, or as ground for substantive relief at the instance of either the husband or the wife. There is, however, an essential difference between making a charge of adultery and alleging that the conduct of one spouse or the other has induced a reasonable belief that adultery has been committed. In my opinion, a specific allegation of adultery should not be made merely as a matter of course unless it is intended to make the actual charge of adultery. In the present case it would have been appropriate and sufficient to give notice that the wife intended to rely in support of the charge of desertion on a reasonable belief that adultery had been committed at the time and in the circumstances specified; in other words, to state the substance of her case. I think that that is the true effect of the decisions of this court in *Frampton v. Frampton* (2) ([1951] W.N. 250), and *Jones v. Jones* (3) ([1954] 3 All E.R. 476n.). I am making these observations in deference to the statement of counsel for the wife that there is a practice which is supposed to necessitate the charge of adultery merely because the charge of reasonable belief in adultery is being put forward, whether by way of defence or otherwise, and it is desirable that the matter should be brought back to where it is left in *Jones v. Jones* (3): viz., that what is required is a correct statement of the substance of the wife's case, but that adultery should not be charged merely as a matter of course.

[HIS LORDSHIP then dealt with the substance of the appeal.]

Solicitors: *Vallance & Vallance*, agents for *Parry, Mackan & Hamilton*, Bristol (for the husband); *Pengelly & Co.*, agents for *J. W. Ward & Son*, Bristol (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

A CHIPCHASE v. BRITISH TITAN PRODUCTS CO., LTD.

[COURT OF APPEAL (Denning, Morris and Parker, L.J.J.), February 9, 10, 1956.]

B Building—Negligence—Safety regulations—Standard of care—Fall of painter from staging six feet above ground—Whether regulations material to claim at common law—*Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145), reg. 22 (c).*

C The plaintiff was a painter employed at the defendants' factory. He was working with a bucket of paint on a staging which he had himself erected, consisting of two pairs of steps and a nine-inch plank. The plank was six feet above the ground; had it been six feet six inches above the ground it would have been necessary, pursuant to reg. 22 (c) of the Building (Safety, Health and Welfare) Regulations, 1948, to have had staging of a width of not less than thirty-four inches. The plaintiff fell from the staging and was injured. He claimed against the defendants damages for negligence at common law, contending that, although the regulation did not apply, the requirements of the regulation were a guide to the standard of care which lay on the defendants at common law and showed that there ought to have been a plank wider than nine inches. On appeal from a dismissal of his claim,

D **Held:** it was right to approach the question of negligence at common law independently of the regulation, as it did not, on the facts, apply, and there was no reason for the court to interfere with the decision that the defendants had not been guilty of negligence.

E Appeal dismissed.

[For the Building (Safety, Health and Welfare) Regulations, 1948, reg. 22 (c), see 8 HALSBURY'S STATUTORY INSTRUMENTS 218.]

Case referred to:

F (1) *Franklin v. Gramophone Co., Ltd.*, [1948] 1 All E.R. 353; [1948] 1 K.B. 542; [1948] L.J.R. 870; 2nd Digest Supp.

Appeal.

G Appeal by the plaintiff against an order of Mr. Commissioner EDMUND DAVIES, Q.C., at Durham Assizes, dated Oct. 24, 1955. The plaintiff claimed damages for breach of statutory duty under reg. 22 (c) of the Building (Safety, Health and Welfare) Regulations, 1948, and for negligence at common law. At the trial it appeared that the regulation did not apply as the plaintiff had been working only six feet above the ground. The commissioner rejected the argument of counsel for the plaintiff that reg. 22 (c) afforded a guide in coming to a conclusion on the common law position, and expressed the view that the only way in which he could approach the case was to ask himself whether independently of any regulation, it had been established that the defendants had failed to take that degree of reasonable care for the safety of the plaintiff which was the standard prescribed by the common law.

H *N. F. Stogdon* for the plaintiff.

John Thompson, Q.C., and *D. Tolstoy* for the defendants.

I **DENNING, L.J.:** Counsel for the plaintiff says that if the plaintiff had been working six feet six inches above the ground, he would, as he had a paint bucket up there beside him, have had to have planks at least thirty-four inches wide. That is provided by reg. 22 (c) of the Building (Safety, Health and Welfare) Regulations, 1948. Counsel agrees that the present case is not within the regulations because the plaintiff was working only six feet above the ground; but he argues that, as it was so nearly within the regulation, the court ought to take the regulation into account and hold that there ought to have been a plank wider than nine inches. I do not think that that argument is correct. The

commissioner was clearly right in saying that the common law claim must be considered independently of the regulations. Undue complications would be brought into these cases if, whenever the courts were considering common law obligations, they had to consider all the statutory regulations which nearly apply but which do not in fact apply. A

As a matter of common sense, the question, therefore, is—Ought there to have been a wider staging? On all the evidence in the case the commissioner thought not, and I see no reason why this court should interfere with his decision. It is true that the foreman said that they used one plank only up to five feet ten inches, and if the height was over five feet ten inches there ought to be two planks. Although the foreman was called as a witness for the defendants, the commissioner was not bound to accept every word the witness said. The commissioner was entitled to take into account the fact that the plaintiff selected the ladders and the plank himself and without complaint worked on it. It seems to me that the commissioner was right in holding that the defendants had not been guilty of negligence, and I would dismiss the appeal. B C

MORRIS, L.J.: I agree. I do not think that the commissioner approached the matter erroneously. We were referred by counsel to *Franklin v. Gramophone Co., Ltd.* (1) ([1948] 1 All E.R. 353). That case showed that whether a factory owner is relieved of his common law duty by some regulation depends on the particular regulation in each case. That case also shows that the fact that the occupier of a factory has complied with all the requirements of regulations made under the Factory Acts, 1937 and 1948, which may be of limited scope, will not necessarily absolve him from liability for negligence at common law if he has not fulfilled his common law duty of care for the health of the workmen employed by him. **SOMERVELL, L.J.,** said ([1948] 1 All E.R. at p. 360): D E

“It is, of course, relevant to consider the regulations, and, in very many cases, it would be difficult, if not impossible, to maintain that an employer who had complied with regulations had been negligent at common law. In this case, however, it is the regulation itself, coupled with the evidence, which I find establishes negligence. The regulation, by saying that the appliances must be there if one or more people are employed mainly in or incidental to the process, is an indication that injury is to be apprehended by continuous proximity to an abrasive grinder such as this.” F

In the present case, if the regulation were an indication of anything in particular, it was an indication of that which everyone knows, namely, that if one falls one may hurt oneself, and if one falls from a great height one may hurt oneself more than if one falls from a lower height. The commissioner was not unmindful of that, and he said that he approached the case independently of any regulation. He put to himself the test whether the employer had failed to take that degree of reasonable care for the safety of his workmen which is required by the standards laid down at common law. I can see no error at all in that approach, and in all other respects as well I agree with the judgment delivered by the commissioner, which it seems to me was a wholly admirable judgment. G H

PARKER, L.J.: I agree.

Appeal dismissed.

Solicitors: *Tarry, Sherlock & King*, agents for *Maurice Sutherland*, Stockton-on-Tees (for the plaintiff); *Gascoin & Co.*, agents for *Cohen, Jackson & Scott* Stockton-on-Tees (for the defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A

BONNINGTON CASTINGS, LTD. v. WARDLAW.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Tucker, Lord Keith of Avonholm and Lord Somervell of Harrow), January 17, 18, 19, March 1, 1956.]

B

Factory—Statutory duty—Breach—Injury to workman—Onus of proof.
Statutory Duty—Breach—Onus of proof.

In an action for damages for negligence at common law, the onus of proving that the fault complained of caused, or materially contributed to, the injury complained of, as well as of proving the negligence or breach of duty, lies on the plaintiff. The same onus of proof, viz., of proving breach of duty and that the breach caused or materially contributed to the injury, applies in an action for damages for breach of statutory duty, unless the statute or statutory regulation in question expressly or impliedly provides otherwise. The onus of proof that the injury was caused by the breach of duty is not shifted from a plaintiff employee merely by the facts that there has been a breach of a safety enactment and that the employee has been injured in a way that could result from the breach (dictum of SCOTT, L.J., in *Vyner v. Waldenberg Bros., Ltd.*, [1945] 2 All E.R. at p. 549, letter C, disapproved). See p. 618, letters B to D, p. 621, letters C, E and F, post.

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The respondent, who had worked for eight years in the dressing shop of a foundry producing steel castings owned by the appellants, contracted pneumoconiosis through inhaling air which contained silica dust. The main source of this dust was from pneumatic hammers, one of which the respondent operated, but, throughout the material period, there was no known protection against dust produced by the operation of such a hammer. Part of the dust, however, which polluted the atmosphere which the respondent inhaled, came from operations conducted at swing grinders, as a result of the ducts of dust-extraction plant for these grinders not being kept free from obstruction as provided by reg. 1 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925*. The appellants admitted that they were in breach of this regulation, but maintained that, as there was no evidence to show the proportions of dust emanating from the various sources of dust in the dressing shop, the respondent could not show that the dust from the swing grinders contributed materially to the dust inhaled by him.

Held: the proportion of dust coming from the swing grinders and inhaled by the respondent had been shown on the evidence not to have been negligible and had contributed materially to his contracting pneumoconiosis; the appellants were, therefore, liable to him in damages for breach of statutory duty.

Appeal dismissed.

[As to the burden of proof of causation of injury in action for damages for negligence, see 23 HALSBURY'S LAWS (2nd Edn.) 668, para. 949, text and note (g); and for cases on the subject, see 36 DIGEST (Repl.) 140, 141, 735-746.]

I

As to the burden of proof of causation of injury by breach of statutory duty, see 23 HALSBURY'S LAWS (2nd Edn.) 669, para. 951.]

Cases referred to:

- (1) *Vyner v. Waldenberg Bros., Ltd.*, [1945] 2 All E.R. 547; [1946] K.B. 50; 115 L.J.K.B. 119; 173 L.T. 330; 110 J.P. 76; 2nd Digest Supp.
- (2) *Lee v. Nursery Furnishings, Ltd.*, [1945] 1 All E.R. 387; 172 L.T. 285; 2nd Digest Supp.

* See p. 617, letter E, post.

- (3) *Mist v. Toleman & Sons*, [1946] 1 All E.R. 139; 110 J.P. 149; 38 B.W.C.C. 150; 2nd Digest Supp. A
- (4) *Watts v. Enfield Rolling Mills (Aluminium), Ltd.*, [1952] 1 All E.R. 1013; 3rd Digest Supp.
- (5) *Wakelin v. London & South Western Ry. Co.*, (1886), 12 App. Cas. 41; 56 L.J.Q.B. 229; 55 L.T. 709; 51 J.P. 404; 36 Digest (Repl.) 130, 667.
- (6) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; 2nd Digest Supp. B
- (7) *Stimson v. Standard Telephones & Cables, Ltd.*, [1939] 4 All E.R. 225; 161 L.T. 387; sub nom. *Stimpson v. Standard Telephones & Cables, Ltd.*, [1940] 1 K.B. 342; 109 L.J.K.B. 315; 2nd Digest Supp.

Appeal.

Appeal by the defenders, Bonnington Castings, Ltd., against an interlocutor of the First Division of the Court of Session, dated Mar. 25, 1955, adhering to an interlocutor pronounced by the Lord Ordinary (LORD WHEATLEY), dated July 21, 1954, whereby he awarded the pursuer, John Harkness Wardlaw, a steel dresser employed by the defenders, £2,000 damages in respect of his having contracted pneumoconiosis while in the defenders' employment. The facts appear in the opinion of LORD REID. D

Ian H. Shearer, Q.C., and *R. H. McDonald* (both of the Scottish Bar) for the appellants.

The Dean of Faculty (C. W. Graham Guest, Q.C.) and *G. C. Einslie* (both of the Scottish Bar) for the respondent.

The House took time for consideration. E

Mar. 1. The following opinions were read.

VISCOUNT SIMONDS: My Lords, I have had the advantage of reading the opinion which my noble and learned friend, LORD REID, is about to deliver, and I agree with it in all respects. I shall, therefore, do no more than move that this appeal be dismissed with costs. F

LORD REID: My Lords, the respondent was employed by the appellants for eight years in the dressing shop of their foundry in Leith, and, while employed there, he contracted the disease of pneumoconiosis by inhaling air which contained minute particles of silica. He ceased work on May 12, 1950. The Lord Ordinary (LORD WHEATLEY) held the appellants liable for this, and awarded £2,000 damages. The First Division by a majority (LORD CARMONT and LORD RUSSELL, the Lord President (LORD CLYDE) dissenting) adhered to the interlocutor of the Lord Ordinary. G

The appellants produce steel castings. These are made by pouring molten metal into moulds which consist of sand with a very high silica content. When the casting has cooled, it is freed from sand so far as possible and then annealed. The annealed casting has a certain amount of the sand adhering to it, or burnt into it, and the surface of the casting is somewhat irregular. It is then necessary to remove these irregularities and smooth the surface of the casting, and, in the course of doing this, any adhering sand is also removed. This is done in the dressing shop by three types of machine. In two of these machines, floor grinders and swing grinders, the means employed are grinding wheels made of carborundum, and, in the third, a hammer or chisel is driven by compressed air, so that it delivers some 1,800 blows per minute. There are several of each type of machine in the dressing shop, and all of them produce dust, part of which is silica from the sand which they remove. The particles of this sand are originally sufficiently large not to be dangerous, because it is only exceedingly small particles of silica which can produce the disease—particles which are quite invisible except through a powerful microscope. But, either in the annealing process or by the working of these machines, or at both stages (the evidence on H I

- A this is inconclusive), a number of the original particles are broken up, and the dust produced by all of these machines contains a certain proportion of the dangerous minute particles of silica. Most of the dust from the grinders can be sucked into ducts or pipes, but, during the time when the respondent contracted his disease, there was no known means of preventing the dust from the pneumatic hammers from escaping into the air, and it is now admitted that no form of mask or respirator had then been invented which was effective to protect those exposed to the dust.

- B Throughout his eight years in the appellants' service, the respondent operated one of these pneumatic hammers, and he admits that he cannot complain in so far as his disease was caused by the dust from his own or any of the other pneumatic hammers. As there was no known means of collecting or neutralising this dust, and as it is not alleged that these machines ought not to have been used, there was no breach of duty on the part of the appellants in allowing this dust to escape into the air. The respondent makes no complaint with regard to the floor grinders, because the dust-extracting plant for them was apparently effective, so far as that was possible, and it seems that any noxious dust which escaped from these grinders was of negligible amount. But the respondent alleged, and it is admitted, that a considerable quantity of dust escaped into the air of the workshop from the swing grinders, because the dust-extraction plant for these grinders was not kept free from obstruction as it should have been. It frequently became choked and ineffective.

Regulation 1 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925*, provides:

- E "No racing, dry grinding, or glazing ordinarily causing the evolution of dust into the air of the room in such a manner as to be inhaled by any person employed shall be performed without the use of adequate appliances for the interception of the dust as near as possible to the point of origin thereof, and for its removal and disposal so that it shall not enter any occupied room . . ."
- F It is admitted for the appellants that they were in breach of this regulation, in that, for considerable periods, dust from the swing grinders escaped into the shop where the respondent was working, owing to the appliances for its interception and removal being choked and, therefore, inadequate. The question is whether this breach of the regulation caused the respondent's disease. If his disease resulted from his having inhaled part of the noxious dust from the swing grinders which should have been intercepted and removed, then the appellants are liable to him in damages; but, if it did not result from that, then they are not liable.

- G The Lord Ordinary and the majority of the First Division have dealt with this case on the footing that there was an onus on the defenders, the appellants, to prove that the dust from the swing grinders did not cause the respondent's disease. This view was based on a passage in the judgment of the Court of Appeal in *Vyner v. Waldenberg Bros., Ltd.* (1) ([1945] 2 All E.R. 547) per SCOTT, L.J., at p. 549:

- H "If there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of proof shifts on to the employer to show that the breach was not the cause. We think that that principle lies at the very basis of statutory rules of absolute duty."

I Mr. Vyner was working a circular saw when part of his thumb was cut off. The saw failed in several respects to comply with the Woodworking Machinery Regulations, 1922, and, in particular, the guard was not properly adjusted. The accident happened before the passing of the Law Reform (Contributory

* S.R. & O. 1925 No. 904; 8 HALSBURY'S STATUTORY INSTRUMENTS 124.

Negligence) Act, 1945, and the main defence was contributory negligence. The arguments of counsel are not reported, but it does not appear to have been suggested that the accident might have happened even if the guard had been properly adjusted. There was, however, a question whether the duty to see that the regulations were complied with had been delegated to Mr. Vyner. Of course the onus was on the defendants to prove delegation (if that was an answer) and to prove contributory negligence, and it may be that that is what the Court of Appeal had in mind. But the passage which I have cited appears to go beyond that and, in so far as it does so, I am of opinion that it is erroneous.

It would seem obvious in principle that a pursuer or plaintiff must prove not only negligence or breach of duty but also that such fault caused, or materially contributed to, his injury, and there is ample authority for that proposition both in Scotland and in England. I can find neither reason nor authority for the rule being different where there is breach of a statutory duty. The fact that Parliament imposes a duty for the protection of employees has been held to entitle an employee to sue if he is injured as a result of a breach of that duty, but it would be going a great deal further to hold that it can be inferred from the enactment of a duty that Parliament intended that any employee suffering injury can sue his employer merely because there was a breach of duty and it is shown to be possible that his injury may have been caused by it. In my judgment, the employee must, in all cases, prove his case by the ordinary standard of proof in civil actions; he must make it appear at least that, on a balance of probabilities, the breach of duty caused, or materially contributed to, his injury.

The only authority cited by the Court of Appeal in *Vyner v. Waldenberg Bros., Ltd.* (1) for their statement of the law is a passage from the judgment of LORD GODDARD in the Court of Appeal in *Lee v. Nursery Furnishings, Ltd.* (2) ([1945] 1 All E.R. 387 at p. 390):

"In the first place I think one may say this, that where you find there has been a breach of one of these safety regulations and where you find that the accident complained of is the very class of accident that the regulations are designed to prevent, a court should certainly not be astute to find that the breach of the regulation was not connected with the accident, was not the cause of the accident."

I agree. A court should not be astute to find against either party, but should apply the ordinary standards. I cannot see, in what LORD GODDARD said, any suggestion that the ordinary onus of proof is to be shifted. I would only add that, in at least two subsequent cases (*Mist v. Toleman & Sons* (3) ([1946] 1 All E.R. 139) and *Watts v. Enfield Rolling Mills (Aluminium), Ltd.* (4) ([1952] 1 All E.R. 1013)), the Court of Appeal, being powerless to overrule a previous decision of that court, were driven to find distinctions which did not appear to me to be satisfactory, and which I doubt whether they would have adopted if they had been convinced of the validity of the general rule.

The medical evidence was that pneumoconiosis is caused by a gradual accumulation in the lungs of minute particles of silica inhaled over a period of years. That means, I think, that the disease is caused by the whole of the noxious material inhaled and, if that material comes from two sources, it cannot be wholly attributed to material from one source or the other. I am in agreement with much of the Lord President's opinion in this case, but I cannot agree that the question is which was the more probable source of the respondent's disease, the dust from the pneumatic hammers or the dust from the swing grinders. It appears to me that the source of his disease was the dust from both sources, and the real question is whether the dust from the swing grinders materially contributed to the disease. What is a material contribution must be a question of degree. A contribution which comes within the exception *de minimis non curat lex* is not material, but I think that any contribution which does not fall within

A that exception must be material. I do not see how there can be something too large to come within the *de minimis* principle, but yet too small to be material.

As the Lord Ordinary did not deal with the case from this point of view, I must deal with the evidence afresh in the light of such of his findings of fact as are relevant in this connection. He said:

B “Prima facie it would appear that the main source of injurious silica dust which the pursuer inhaled came from the dressing processes in which he was engaged at the dressers’ bench over the years.”

With that I agree. Then he said:

“but to succeed in this argument the defenders have to establish that on the balance of probabilities it was the *only* source.”

C I have already stated my reasons for not agreeing with that. Then he considered certain evidence, and said:

“In the face of that evidence I cannot hold that the silica dust from the dressing process was the sole source of infection, having regard to the proximity of the pursuer’s place of work to the swing grinders, unless it is established that the system of ventilation in the shop was sufficient to carry away the noxious particles of silica dust and prevent them from being inhaled by the pursuer.”

D He held that the ventilation was defective and insufficient to do this. I do not think that the ventilation was insufficient to comply with the regulations, but I agree that it did not carry away dust so quickly as to prevent it from floating in the general atmosphere of the shop for some time; probably, no system of ventilation would have prevented that.

E I think that the position can be shortly stated in this way. It may be that, of the noxious dust in the general atmosphere of the shop, more came from the pneumatic hammers than from the swing grinders, but I think it is sufficiently proved that the dust from the grinders made a substantial contribution. The respondent, however, did not only inhale the general atmosphere of the shop; when he was working his hammer, his face was directly over it, and it must often have happened that dust from his hammer substantially increased the concentration of noxious dust in the air which he inhaled. It is, therefore, probable that much the greater proportion of the noxious dust which he inhaled over the whole period came from the hammers. But, on the other hand, some certainly came from the swing grinders, and I cannot avoid the conclusion that the proportion which came from the swing grinders was not negligible. He was inhaling the general atmosphere all the time, and there is no evidence to show that his hammer gave off noxious dust so frequently, or that the concentration of noxious dust above it when it was producing dust was so much greater than the concentration in the general atmosphere, that the special concentration of dust could be said to be substantially the sole cause of his disease.

H The Lord President was of opinion that there was “no evidence of any material contribution of noxious dust from the swing grinders”, and I must examine his reason for taking that view. He said:

I “when the evidence of noxious dust from the swing grinders is analysed it is not impressive. Much of the evidence in regard to these machines is related to dust generally, and this body of evidence has misled the Lord Ordinary into phrases such as ‘a fairly constant stream of silica dust in the atmosphere over a very extended period’. There is no such evidence in regard to silica dust. The evidence of fellow workmen of the pursuer relates to visible dust and is not helpful on the vital issue.”

In this, I think that he was mistaken.

It is, of course, true that the only direct evidence related to harmless dust, because it alone was visible. But if the larger visible particles hung in the

atmosphere for some time, then smaller, lighter and invisible particles emitted by the swing grinders must have hung there even longer. No doubt the amount of noxious dust was very much less than the amount of visible dust. But there is nothing to indicate that the castings dressed with the swing grinders had substantially less sand adhering to them than had the castings dressed with the pneumatic hammers, or that substantially less noxious dust was produced by the grinders than by the hammers. No doubt the total amount from both sources in the atmosphere was small at any one time, but the combined effect over a period of eight years was to cause the respondent's disease. The importance of the evidence of the fellow workman is that it shows that the visible dust and, therefore, also the invisible dust from the swing grinders was not immediately dispersed and, therefore, that the respondent was bound to inhale some of the invisible noxious dust from the swing grinders. On this matter, LORD CARMONT said:

"Even if the majority of the pursuer's inhalations took place near the source where the silica dust was produced, i.e. at his hammer, a minority of inhalations from the general atmosphere of the shop needlessly contaminated owing to the breakdown of the extracting hood, duct and fan at the swing grinders may well have contributed a quota of silica dust to the pursuer's lungs and so helped to produce the disease."

On his view of the onus of proof, LORD CARMONT did not require to go farther than that. In my opinion, it is proved not only that the swing grinders may well have contributed, but that they did, in fact, contribute, a quota of silica dust which was not negligible to the respondent's lungs and, therefore, did help to produce the disease. That is sufficient to establish liability against the appellants and I am, therefore, of opinion that this appeal should be dismissed.

LORD TUCKER: My Lords, it is, I think, clear from the opinion of the Lord Ordinary that he accepted in substance the evidence of the respondent's witnesses with regard to the extent of the defective condition of the dust-extraction appliances in the swing grinders, and that this defective condition had existed over a substantial period of time, if not throughout the whole length of the respondent's employment. On this basis, it follows that the quantity of silica dust discharged into the atmosphere of the shop from this source cannot be disregarded as negligible on the "de minimis" principle. In my opinion, the inference to be drawn from these facts is that the silica dust discharged from the swing grinders contributed to the harmful condition of the atmosphere, which, admittedly, resulted in the respondent's contracting pneumoconiosis, and was, therefore, a contributory cause of the disease.

This was the decision reached by the majority of the judges in the First Division, but, in so doing, both LORD CARMONT and LORD RUSSELL were to some extent influenced by certain decisions of the Court of Appeal in England with regard to the existence of an onus on defendants in cases of alleged breach of statutory duty. The cases actually referred to were *Mist v. Toleman & Sons* (3) ([1946] 1 All E.R. 139), and *Watts v. Enfield Rolling Mills (Aluminium), Ltd.* (4) ([1952] 1 All E.R. 1013), but the origin of this supposed onus is to be found in the judgment of the Court of Appeal delivered by SCOTT, L.J., in *Vyner v. Wallenberg Bros., Ltd.* (1) ([1945] 2 All E.R. 547), where he said (*ibid.*, at p. 549):

"If there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of proof shifts on to the employer to show that the breach was not the cause. We think that that principle lies at the very basis of statutory rules of absolute duty."

The judgment then went on to cite a passage from the judgment of LORD GODDARD in *Lee v. Nursery Furnishings, Ltd.* (2) ([1945] 1 All E.R. 387), in the course of which he used these words (*ibid.*, at p. 390):

- A "In the first place I think one may say this, that where you find there has been a breach of one of these safety regulations and where you find that the accident complained of is the very class of accident that the regulations are designed to prevent, a court should certainly not be astute to find that the breach of the regulation was not connected with the accident, was not the cause of the accident."
- B In the subsequent cases of *Mist v. Toleman & Sons* (3) and *Watts v. Enfield Rolling Mills (Aluminium), Ltd.* (4), attempts were made to explain, and to some extent to modify, the actual language of SCOTT, L.J., in *Vyner v. Waldenberg Bros., Ltd.* (1), but the existence of some onus was recognised.
- C My Lords, I think it is desirable that your Lordships should take this opportunity to state in plain terms that no such onus exists unless the statute or statutory regulation expressly or impliedly so provides, as in several instances it does. No distinction can be drawn between actions for common law negligence and actions for breach of statutory duty in this respect. In both, the plaintiff or pursuer must prove (a) breach of duty, and (b) that such breach caused the injury complained of (see *Wakelin v. London & South Western Ry. Co.* (5) (1886) (12 App. Cas. 41), and *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (6) ([1939] 3 All E.R. 722)). In each case, it will depend on the particular facts proved, and the proper inferences to be drawn therefrom, whether the respondent has sufficiently discharged the onus that lies on him. In the present case, I think he has, and on this ground, and without expressing any view on the subject of the alleged defective ventilation, I would dismiss the appeal.
- E LORD KEITH OF AVONHOLM: My Lords, this appeal falls, in my opinion, to be decided on a few material facts established by the evidence in the case. The onus is on the respondent to prove his case, and I see no reason to depart from this elementary principle by invoking certain rules of onus said to be based on a correspondence between the injury suffered and the evil guarded against by some statutory regulation. I think most, if not all, of the cases which
- F professed to lay down or to recognise some such rule could have been decided as they were on simple rules of evidence, and I agree that *Vyner v. Waldenberg Bros., Ltd.* (1) ([1945] 2 All E.R. 547), in so far as it professed to enunciate a principle of law inverting the onus of proof, cannot be supported. The correct principles governing the matter were laid down by this House in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (6) ([1939] 3 All E.R. 722), and by
- G SIR WILFRID GREENE, M.R., in *Stimson v. Standard Telephones & Cables, Ltd.* (7) ([1939] 4 All E.R. 225).
- I I refer to the facts as set out by my noble and learned friend, LORD REID. What to my mind determines this case is (i) that the respondent is suffering from pneumoconiosis which is a disease caused by the inhalation of minute particles of silica into the lungs; (ii) that it is admitted that the disease was contracted by the respondent in the course of his employment with the appellants; (iii) that he was employed by the appellants as a steel dresser in the appellants' dressing shop for a period of over eight years before the disease manifested itself; (iv) that, in the dressing shop, the respondent was exposed throughout this period to the action on his lungs of silica dust which pervaded the dressing shop; (v) that part of this silica dust was released into the atmosphere of the dressing shop from the operations conducted at the swing grinders; (vi) that a substantial part, if not much the greater part, of the silica dust from the swing grinders was released as the result of repeated negligence of the appellants in failing to keep clear of obstruction the flues or ducts designed to carry away the noxious dust from the swing grinders; (vii) that this negligence recurred at very short intervals throughout the whole of the time during which the respondent was employed by the appellants; (viii) that silica dust, when inhaled, is gradual and insidious in its effects, and requires to operate on the lungs for a considerable period of time before producing pneumoconiosis.

On these facts, I think the respondent has proved enough to associate his illness A
with the fault of the appellants, or at least to establish a prima facie presumption
to that effect. The case for the appellants depends on the fact that the re-
spondent, as a steel dresser, engaged over the whole period of eight years in
operating a pneumatic hammer on steel castings, was exposed much more imme-
diately, and in a much greater measure, to silica dust released from these castings.
I am prepared to agree, as did all the judges in the court below, that the main B
source of silica dust inhaled by the respondent came from this operation, a cause
for which it is agreed the appellants were in no way to blame. It was, accordingly,
maintained for the appellants that the respondent must show that the dust
released by their negligence from the swing grinders had contributed materially
to the dangerous dust inhaled by the respondent. As there was no evidence to
show the proportions of the dust emanating from the various sources in the C
dressing shop inhaled by the respondent, his case, it was said, must fail. The
respondent has, however, in my opinion, proved enough to support the inference
that the fault of the appellants has materially contributed to his illness. During
the whole period of his employment he has been exposed to a polluted atmosphere
for which the appellants are in part to blame. The disease is a disease of gradual
incidence. Small though the contribution of pollution may be for which the D
appellants are to blame, it was continuous over a long period. In cumulo it
must have been substantial, though it might remain small in proportion. It was
the atmosphere inhaled by the respondent that caused his illness, and it is im-
possible, in my opinion, to resolve the components of that atmosphere into
particles caused by the fault of the appellants and particles not caused by the
fault of the appellants, as if they were separate and independent factors in his E
illness. Prima facie the particles inhaled are acting cumulatively, and I think
the natural inference is that, had it not been for the cumulative effect, the re-
spondent would not have developed pneumoconiosis when he did, and might not
have developed it at all. The inference, of course, would have been different if
it could be shown that the respondent could not have inhaled any particles given
off from the swing grinding operations, or that the particles negligently released F
from the swing grinding operations were released at intervals so infrequent, or in
quantities so insignificant even if taken cumulatively, as to make it unreasonable
to regard them as a material contributing cause of the respondent's disease.
But that, in my opinion, the appellants are unable to show. On the whole
evidence, I consider that the respondent has discharged the onus that is on him
of showing that the appellants' fault was a material contributing cause of his G
illness. I would, accordingly, dismiss the appeal.

LORD SOMERVELL OF HARROW: My Lords, I agree.

Appeal dismissed.

Solicitors: *Lawrence Jones & Co.*, agents for *Macpherson & Mackay*, Edinburgh
(for the appellants); *W. H. Thompson*, agents for *Donald Shaw & Co.*, Edinburgh
(for the respondent).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

A UNITED MOTOR FINANCE CORPORATION, LTD. v.
TURNER AND ANOTHER.

[COURT OF APPEAL (Lord Evershed, M.R., Singleton and Parker, L.J.J.),
February 24, 1956.]

B *Hire-Purchase—Action for possession of goods—Claim against guarantor included—Hirer and guarantor named as defendants—Service on hirer not effected—Whether action to enforce right to recover goods from hirer commenced—Whether hirer made a party to the action—Hire-Purchase Act, 1938 (1 & 2 Geo. 6 c. 53), s. 12 (1) (2), extended by Hire-Purchase Act, 1954 (2 & 3 Eliz. 2 c. 51), s. 1—County Court Rules, 1936, Ord. 6, r. 1, r. 3.*

C By a hire-purchase agreement dated July 3, 1954, a motor cycle was let on hire by the plaintiffs to the first defendant. The second defendant guaranteed the plaintiffs against loss under the hiring. The hire-purchase price of the motor cycle was £138 2s. The hirer paid an initial rent of £48 12s. (being more than one-third of the hire-purchase price within s. 11* of the Hire-Purchase Act, 1938, so that recovery of possession could only be by action). No further payment having been made, the plaintiffs duly served notice terminating the hiring. Subsequently they caused a plaint to be issued in the county court against the defendants claiming possession of the motor cycle and payment of certain sums and, against the guarantor, for the total amount of £91 7s. 6d. No summons was ever served on the hirer who, at the time of the suit, was serving abroad as an airman. The defendants contended that if an action had been "commenced" within the meaning of s. 12 (1)* of the Hire-Purchase Act, 1938, "all parties to the agreement" had not "been made parties to the action" within s. 12 (2)* and that the proceedings were bad under that section. The plaintiffs sought to treat the action as abandoned against the hirer but to enforce the guarantee against the guarantor.

F **Held:** although the action had been "commenced" within s. 12 of the Hire-Purchase Act, 1938, by the emergence of the plaint, yet the plaintiffs could not recover therein against the guarantor because the action was an action for recovery of possession of the article hired, the claim against the guarantor was made in such an action and there had not been compliance with s. 12 (2) since the hirer had not been made effectively a party to the action.

G Per LORD EVERSLED, M.R.: probably an owner could start proceedings against a guarantor alone by an action in which the owner did not claim to enforce any right of recovery of possession (see p. 626, letter E, post).

Appeal dismissed.

[**Editorial Note.** Until the Hire-Purchase Act, 1954, came into operation on Aug. 30, 1954, the Hire-Purchase Act, 1938, did not apply to a hire-purchase agreement relating to a motor vehicle if the price exceeded £50, but thereafter the Act of 1938 applies to such an agreement if the hire-purchase price or total purchase price does not exceed £300; see s. 1 of the Hire-Purchase Act, 1954, 34 HALSBURY'S STATUTES (2nd Edn.) 758. Section 1 (2) of the Act of 1954 extended certain provisions of the Act of 1938 retroactively to the hire-purchase agreement in the present case by virtue of s. 20 (1) of the Act of 1938.

I For the Hire-Purchase Act, 1938, s. 11, s. 12, and s. 20, see 22 HALSBURY'S STATUTES (2nd Edn.) 1026, 1027, 1032.]

Appeal.

The plaintiffs appealed from an order made by His Honour JUDGE BRAUND at Buxton and New Mills County Court on Oct. 17, 1955, in an action concerning a hire-purchase agreement and a contract of guarantee relating thereto. The

* For the relevant terms of these enactments see p. 624, letter I, and p. 625, letters B and C, post.

learned judge held that the action was, on the face of it, an action to recover possession of goods under a hire-purchase agreement; that, by virtue of s. 1 of the Hire-Purchase Act, 1954, and s. 20 (1) (c) of the Hire-Purchase Act, 1938, the provisions of s. 12 of the Act of 1938 applied in respect of the action, which was commenced after Aug. 30, 1954; and that the plaintiffs had failed to comply with the requirement of s. 12 (2) of the Act of 1938, in that all the parties to the agreement were not made parties to the action; and, accordingly, he non-suited the plaintiffs. The facts are stated in the judgment of LORD EVERSHED, M.R.

D. J. C. Ackner for the plaintiffs.

R. G. Dow for the second defendant, the guarantor.

LORD EVERSHED, M.R.: The unusual question which is raised in this appeal turns on the effect of two sections, s. 11 and s. 12 (and more particularly the latter) of the Hire-Purchase Act, 1938. The present proceedings were commenced (I use that word deliberately, as will later appear) by the plaintiffs, the appellants, by plaint, followed by particulars of claim, in the county court, two persons being named as defendants to the proceedings, George Edward Turner (whom I will hereafter call "the hirer") and his father, John Edward Turner (whom I will hereafter call "the guarantor"). The subject-matter of the claim was a motor bicycle which had been the subject of a hire-purchase agreement, dated July 3, 1954, between the plaintiffs and the hirer. I need not, for the purposes of this judgment, read the terms of the agreement. It suffices to say that, according to the terms, more than one-third of the total hire-purchase price was paid at the time that the motor bicycle was handed to the hirer. At the same time, the guarantor executed a contract of guarantee in favour of the plaintiffs. It appears that, the one-third having been paid by either the hirer or the guarantor on behalf of the hirer, no further sums were ever paid to the plaintiffs. Accordingly, in April, 1955, they served a notice in accordance with the agreement, terminating the hire under the agreement. That gave to the plaintiffs certain rights, including the right to recover possession of the motor bicycle. By the particulars of claim the plaintiffs, after setting out matters of history, alleged that the right to recover possession of the motor bicycle had arisen, and sought the return of the article, or, alternatively, the payment of a certain sum of money, and they claimed also payment of the arrears of hire rentals alleged to be due under the agreement. They further claimed, as an independent claim, against the guarantor under his guarantee a sum of £91 7s. 6d., which, they said, represented his liability in the circumstances under the contract of guarantee.

According to the learned judge's judgment, the hirer was serving as an airman when these proceedings were commenced, and it is said that at present he is so serving on the continent of Europe. He has never been served with the summons, nor has he at any time submitted to the jurisdiction of the court in the action. The plaintiffs said that they are content to treat the case as abandoned for practical purposes against the hirer and not to proceed with their claim to recover possession of the motor bicycle. They seek to rely exclusively on their contract with the guarantor. The question (and the sole question which we have to decide) is whether, having regard to the two sections which I have mentioned, the plaintiffs are disabled from taking that course.

The Hire-Purchase Act, 1938, in its original unamended form, would not have applied to this transaction at all, but, by virtue of s. 1 of the Hire-Purchase Act, 1954, the terms of s. 11 and s. 12 of the Act of 1938 are, as counsel for the plaintiffs conceded, indubitably applicable to this case and this matter*. Section 11 (1) of the Act of 1938 provides:

"Where goods have been let under a hire-purchase agreement and one-third of the hire-purchase price has been paid . . . the owner shall not

* See note at p. 623, letter H, ante.

A enforce any right to recover possession of the goods from the hirer otherwise than by action."

In other words, it is not open to an owner in such a case to recover possession by seizure; he can do so only by action. I think that the plain object of Parliament was to put into the hands of the court a measure of control over the owner's right as against the hirer. Section 12 (1) of the Act of 1938 provides:

B "Where, in any case to which the last foregoing section applies, an owner commences an action to enforce a right to recover possession of goods from a hirer after one-third of the hire-purchase price has been paid . . . the action shall be commenced in the county court for the district [the appropriate district is defined] and after the action has been commenced the owner shall not take any step to enforce payment of any sum due under the hire-purchase agreement or under any contract of guarantee relating thereto, except by claiming the sum in the said action."

Section 12 (2) reads:

D "Subject to such exceptions as may be provided for by county court rules, all the parties to the agreement and any guarantor shall be made parties to the action."

Section 12 (4) provides:

E "On the hearing of the action the court may, without prejudice to any other power,—(a) make an order for the specific delivery of all the goods to the owner, or (b) make an order for the specific delivery of all the goods to the owner and postpone the operation of the order on condition that the hirer or any guarantor pays the unpaid balance of the hire-purchase price at such times and in such amounts as the court . . . thinks just, or (c) make an order for the specific delivery of a part of the goods to the owner and for the transfer to the hirer of the owner's title to the remainder of the goods."

F I have read those sub-sections because they seem to me, as they appeared to the learned county court judge, to emphasise the Parliamentary intention to be discerned in this section, namely, to give a considerable measure of control to the court where the question of the enforcement of hire-purchase contracts arises. The question which we have to determine turns on the language of s. 12 (2):

G "Subject to such exceptions as may be provided for by county court rules, all the parties to the agreement and any guarantor shall be made parties to the action."

H The first question which arose before the county court judge, and which has also been intimated here, is whether, within the language of s. 12 (1), the action to recover possession of goods from the hirer has been "commenced". The learned county court judge was of opinion that in this case the condition was satisfied. He pointed out that, according to the County Court Rules, 1936, and Ord. 6, r. 1 and r. 3, in particular, the commencement of an action or proceeding in the county court is by way of filing a *præcipe*, and, following the steps there laid down, "commencement" stops short of any service of the proceeding on any person named. I have no doubt in my own mind that the view of the county court judge in this respect was entirely correct. I think that, once the necessary steps had been taken which resulted in the emergence of a plaintiff bearing the letter and number "L 65", the action had been "commenced". Counsel for the plaintiffs did not, with any force at any rate, contest that conclusion. His main submission was that, for the purposes of s. 12 (2) of the Act of 1938, the commencement of the action also carried with it the making of the persons named in the *præcipe* "parties" to that action; from which he contended that, since the hirer was named as a defendant in the action, he was made a party to the action, so that s. 12 (2) was satisfied, and jurisdiction was conferred on the court to make an order against the guarantor for payment of the sum claimed or

such other sum as should be found to be due. The county court judge rejected that contention and in my judgment he rightly rejected it. It seems to me that, in the context in which s. 12 (2) is found, the formula "shall be made parties to the action" must be interpreted as meaning "shall be made effectively parties to the action": that is to say, so that the persons so named should be subject to the court's jurisdiction and so that the court could exercise such of the powers, for example, which I have already read from s. 12 (4). Were it otherwise, it would appear to me that the intended requirement of this section would be a brutum fulmen. Escape from it could always be achieved by the mere mechanical act of naming persons in the proceedings as parties and then taking no steps whatever to bring the proceedings to their attention. I agree with counsel for the plaintiffs that, when one speaks of "a party to an action", it may well be said in certain contexts that the phrase will include or mean a person who is merely named as a party. In the context of s. 12 (2), however, and having regard to the powers of the court under s. 12 (4), I think that making the persons specified parties to the action is something other than merely naming them; they must effectively be made parties by service, or by taking such steps by way of substituted service as will have the same effect.

Counsel for the plaintiffs suggested that, if the view which commended itself to the county court judge and which commends itself to me were right, one curious result would arise which could not, he thought, be contemplated. Let it be supposed, said counsel, that an action is started against a hirer and a guarantor, and then for some good reason is discontinued. According to counsel, it would then be impossible, according to the strict wording of the section, for the owner ever to obtain any remedy against the guarantor. It is not necessary for us to decide this question. Suffice it to say that I am not prepared, as at present advised, to accept that such a conclusion would follow from the view which the learned judge took. I think that counsel for the plaintiffs is probably right in saying (although this again must be treated as an obiter dictum on my part) that an owner could start proceedings against a guarantor alone by an action in which he did not claim to enforce any right of recovery of possession. In this case, however, the action which the plaintiffs brought was an action to enforce the right to recover possession, since, as the learned judge pointed out, that was the first of the claims actually made in the particulars. Such an action having been commenced, it therefore follows under s. 12 (1) of the Hire-Purchase Act, 1938, that the claim against the guarantor must be a claim made in the action, and also, as I think, by virtue of s. 12 (2), that all the parties to the transaction, including the guarantor, must be "made parties", that is, as I interpret it, "effectively made parties" to the proceedings. For those reasons I conclude that the county court judge rightly held that the plaintiffs could not recover in these proceedings, and I think that the appeal must be dismissed.

SINGLETON, L.J.: I agree.

PARKER, L.J.: I also agree.

Appeal dismissed.

Solicitors: *Duthie, Hart & Duthie* (for the plaintiffs); *Wilfred Taylor & Hindle*, Manchester (for the second defendant).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

A

Re BARBOUR'S LIFE ASSURANCE POLICIES.
WESTMINSTER BANK, LTD. v. INLAND REVENUE
COMMISSIONERS.

[COURT OF APPEAL (Lord Evershed, M.R., Birkett and Romer, L.JJ.), January 25, 26, February 21, 1956.]

B

Estate Duty—Passing—Property deemed to pass—Moneys received under policy of assurance—Settlement inter vivos of policies on life of settlor—Income to be accumulated for specified period—Life interest in trust fund—Proceeds of policies falling in on settlor's death—Whether life interest in possession if no income during life of settlor—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (d).

C

By a settlement dated Mar. 5, 1929, a settlor, who at all times was domiciled in Northern Ireland, assigned to a bank as trustees two fully paid "policies of assurance [on his life] and all moneys to become payable thereunder and the full benefit thereof" to the trustees "to hold the same on the trusts" therein declared, and the settlor also gave the sum of £12,000 to the trustees on the same trusts. The sums assured by the first policy were two four per cent. Victory Bonds and the policy provided that if either of the bonds was drawn during the currency of the policy a certain sum in cash should be paid to the assured or his assigns forthwith. The second policy was a single premium policy assuring payment of a sum of money on the death of the settlor. Clause 2 of the settlement provided that the trustees should "out of the proceeds of the said policies" pay all duties leviable on the death of the settlor and should invest the residue of these moneys and should forthwith invest the £12,000 "which moneys and the property for the time being representing the same and the accumulations of the income thereof hereinafter directed to be made are hereinafter called 'the trust fund'".

D

In the events which happened the trustees were directed to pay the income of the trust fund (after a period of accumulation which ended in 1942) to J.B. for life, and the income was then paid to him. The settlement contained no power to surrender the policies. During the life of the settlor one of the Victory Bonds was drawn, and £750 was paid in respect of it to the trustees in accordance with the policy and was invested and the income was paid to J.B. The settlor died in 1951, J.B. surviving him. At the settlor's death

E

both assurance policies were locally situate in England, and accordingly were property in respect of which a claim to English estate duty might arise. On a summons to determine whether, on the settlor's death, estate duty became payable under s. 2 (1) (d) of the Finance Act, 1894*, in respect of the proceeds of the policies (excluding the £750) to the extent of the then value of J.B.'s life interest therein,

F

Held (ROMER, L.J., dissenting): duty was payable under s. 2 (1) (d) because the "interest" (within the meaning of the words "other interest" in that paragraph) was the policies and the contractual rights which they comprised, including the right on the settlor's death to receive the policy moneys, and thus there then accrued to J.B. for the first time a "beneficial interest" (within s. 2 (1) (d)), viz., the right to the present enjoyment of the income of the proceeds of the policies.

G

D'Avigdor-Goldsmid v. Inland Revenue Comrs. ([1953] 1 All E.R. 403) distinguished.

H

Decision of HARMAN, J. ([1955] 3 All E.R. 41) reversed.

I

[As to estate duty on policy moneys and interests arising on death, see 13 HALSBURY'S LAWS (2nd Edn.) 241, 242, paras. 232, 233; and for cases on the subject, see 21 DIGEST 15, 16, 73-80.]

* The terms of s. 2 (1) (d) are printed at p. 629, letter G, post.

Cases referred to:

- (1) *D'Avigdor-Goldsmid v. Inland Revenue Comrs.*, [1953] 1 All E.R. 403; [1953] A.C. 347; 3rd Digest Supp. A
- (2) *A.-G. v. Robinson*, [1901] 2 I.R. 67; 21 Digest 15*q*.
- (3) *A.-G. v. Dobree*, [1900] 1 Q.B. 442; 69 L.J.Q.B. 223; 81 L.T. 607; 64 J.P. 24; 21 Digest 17, 97.
- (4) *Inland Revenue Comrs. v. Scott's Trustees*, 1918 S.C. 720; 55 S.L.R. 654; [1918] S.L.T. 97; 21 Digest 15, 73*i*. B
- (5) *Tennant v. Lord Advocate*, [1939] 1 All E.R. 672; [1939] A.C. 207; 108 L.J.P.C. 65; 160 L.T. 441; Digest Supp.
- (6) *Westminster Bank, Ltd. v. A.-G.*, [1939] 2 All E.R. 72; [1939] Ch. 610; 108 L.J.Ch. 294; 160 L.T. 432; Digest Supp.
- (7) *Lord Advocate v. Hamilton's Trustees*, 1942 S.C. 426; 2nd Digest Supp. C
- (8) *Adamson v. A.-G.*, [1933] A.C. 257; 102 L.J.K.B. 129; sub nom. *A.-G. v. Adamson*, 148 L.T. 365; Digest Supp.
- (9) *A.-G. v. Murray*, [1904] 1 K.B. 165; 73 L.J.K.B. 66; 89 L.T. 710; 68 J.P. 89; 21 Digest 16, 79.

Appeal.

This was an appeal by the Crown from a decision of HARMAN, J., given on July 14, 1955, and reported [1955] 3 All E.R. 41. On an adjourned summons taken out by Westminster Bank, Ltd., as trustees of a settlement comprising, among other property, two policies of assurance on the life of the settlor, Sir John Milne Barbour, HARMAN, J., held that, on the construction of the settlement, the life interest of the tenant for life was a true life interest in possession prior to the death of the settlor, and, accordingly, on the death of the settlor estate duty did not become payable under the Finance Act, 1894, s. 2 (1) (d), in respect of that life interest. D

J. Pennycuik, Q.C., and *E. B. Stamp* for the Crown.
Geoffrey Cross, Q.C., and *J. A. Wolfe* for the trustees.

Cur. adv. vult. E

Feb. 21. The following judgments were read. F

LORD EVERSHED, M.R.: The question raised in this appeal is whether estate duty is chargeable under the Finance Act, 1894, s. 2 (1) (d), in respect of the interest under a voluntary settlement, of a person entitled for his life, on the death of the settlor, to the income of the proceeds of certain fully-paid policies of life assurance on the settlor's life. G

The settlement is dated Mar. 5, 1929, and by its terms the settlor, Sir John Milne Barbour, having paid to the respondents, Westminster Bank, Ltd., as trustees, the sum of £12,000 cash, assigned to the same trustees four policies of life assurance on his own life. The settlor was at all material times domiciled in Northern Ireland; and we are, in the present case, concerned with two only of such policies, which were at the settlor's death, in October, 1951, locally situate in England. Both these last-mentioned policies were made with the Scottish Amicable Life Assurance Society. In one case the insurers promised, in consideration of a single premium already paid at the date of the settlement, to pay to the executors, administrators and assignees of the settlor the sum of £7,000 with profits on the settlor's death. In the other case, in consideration of annual premiums payable during a period which had expired at the date of the settlement, the insurers covenanted on the settlor's death to pay or transfer to his executors, administrators and assignees two specified four per cent. Victory Bonds of £5,000 each; and the policy further provided that in the event of either of the bonds being drawn for redemption during the currency of the policy (as happened, in fact, in the case of one of them) the assured or his assigns should (in effect) be then paid fifteen per cent. of the amount of the bond and H

A that the balance of eighty-five per cent. thereof should be paid on the settlor's death to his executors, administrators and assignees.

The terms of the settlement are, in my judgment, of considerable importance and must, therefore, be stated at some length. Clause 1 operated to transfer to the bank

B "all those four several policies of assurance . . . and all moneys to become payable thereunder and the full benefit thereof to hold the same unto the bank upon the trusts and subject to the powers and provisions herein-after declared and contained concerning the same."

C By cl. 2 it was provided that the bank should "out of the proceeds of the said" policies pay all death duties leviable at the death of the settlor in respect thereof and all costs and expenses in connection with the receipt of the proceeds of the policies, and should invest "the residue of the said moneys" and also forthwith invest the sum of £12,000

"(which moneys and the property for the time being representing the same and the accumulations of the income thereof hereinafter directed to be made are hereinafter called 'the trust fund')"

D in the manner therein specified. Clause 3 provided for accumulation of the entire income of "the trust fund" until June 30, 1942. By cl. 4 the bank were directed, from and after June 30, 1942, to pay the income of "the trust fund" and all accumulations thereof

E "(the said policies and the proceeds thereof, however, not to be treated as income-bearing until the amounts payable in respect thereof shall have been received and invested)"

to the settlor's son John during his life; and after his death the bank were to hold the capital of "the trust fund" and its accumulations for the sons of the settlor's said son, John, as therein mentioned.

F In fact the settlor's son, John, predeceased him. He died without issue in 1937, i.e., during the period of accumulation. Accordingly by the effect of the subsequent clauses of the settlement the name of the settlor's nephew, Mr. James Barbour, is to be substituted for that of his son for all the purposes of the beneficial interests conferred by the settlement; in other words, the settlor's nephew, James, became the first life tenant under the settlement, and he was entitled by virtue of, and according to, its terms to the income of "the trust fund" and its accumulations.

G The familiar terms of s. 2 (1) (d) of the Finance Act, 1894, provide that:

"Property passing on the death of the deceased shall be deemed to include . . . Any annuity or other interest purchased or provided by the deceased . . . to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

H It was, and is, the contention of the Crown that the requirements of the sub-section are here satisfied because (i) the two policies to which I have referred constitute "property" provided by the settlor, and (ii) on the death of the settlor there arose or accrued for the first time to Mr. James Barbour a beneficial interest in that property, namely, a present right to the enjoyment of the income of the proceeds of those policies which were then received or of the investments representing the same, Mr. Barbour's interest in the "property" prior to the settlor's death having been (subject to the one qualification hereafter mentioned) a mere interest in expectancy in the income of the proceeds dependent on his survivorship of the settlor, and not giving to him in the meantime any interest in possession in the policies themselves. The qualification which I have mentioned is related to the fact that, as I have earlier stated, one of the Victory Bonds had been drawn for redemption in 1937, so that the bank then received in respect of it the sum of £750. The bank then became bound to invest that sum, and, after

the expiry of the period of accumulation in 1942, bound to pay the income of A that sum and of its accumulations immediately to Mr. James Barbour. It follows, and the Crown have not contended to the contrary, that in the event no beneficial interest in such sum arose or accrued to Mr. James Barbour on the settlor's death. His interest in the sum was the same immediately thereafter as it had been before. It is to be observed, however, that there was by the terms of the settlement no power in the bank to surrender the policies or otherwise to deal B with them during the settlor's life nor any power to put the life tenant into possession of the policies so as to allow him to surrender or otherwise deal with them.

The question which now arises was expressly reserved by the House of Lords in the recent case of *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (1) ([1953] 1 All E.R. 403), and particularly by LORD MORTON OF HENRYTON in his speech C in that case (*ibid.*, at p. 411). Briefly, the facts in that case were that, as a result of a settlement, a resettlement and a joint appointment, the policy there referred to, together with settled freehold premises, became during the settlor's life (and more than five years before his death) the absolute beneficial property of the appellant, the settlor's son. The premiums under the policy continued in fact to be payable after the appointment took effect and were paid by the son; but D nothing for present purposes turns on those circumstances. In this court the view had been taken, following a decision of PALLES, C.B., in *A.-G. v. Robinson* (2) ([1901] 2 I. R. 67), that estate duty was properly leviable under s. 2 (1) (d) of the Finance Act, 1894, on the footing that a beneficial interest accrued or arose for the first time to the appellant on the settlor's death, being the beneficial interest which then was realised for him by the maturity of the policy and the E payment to him of the policy moneys. The House of Lords reversed the decision of this court and expressly disapproved the reasoning of PALLES, C.B., in the Irish case. The conclusion of the House of Lords can conveniently be summarised by one citation from the speech of VISCOUNT SIMON ([1953] 1 All E.R. at p. 406):

"A life policy is a piece of property which confers on the owner of it the right, if certain conditions continue to be satisfied, to claim and be paid F the policy moneys on the death of the person whose life is assured. These rights, therefore, belonged to the appellant from 1934 and were the beneficial interest in the policy which belonged to him from that moment. When the death occurred, he held these rights, and the quality of these rights was not changed by the death, which was merely the occasion when the rights were realised. There was, therefore, no new or additional beneficial interest G in the policy which arose on the death of the appellant's father. For six years past, he had had absolute and unfettered ownership of the policy. As VAISEY, J., pointed out ([1951] 1 All E.R. at p. 248), he 'could have sold it, mortgaged it, given it away, destroyed it, settled it, or (being a policy on his father's life) he could have surrendered it at the moment when his father was in extremis, at the point of death'. If he had done any of these H things, the Crown could not have claimed to aggregate the policy moneys with the rest of the estate for the purposes of duty. It follows that no estate duty is payable on the [proceeds of the policy], for no beneficial interest in the policy accrued or arose on the death of the deceased."

It will be necessary for me to examine closely the other speeches in the House I in order to see how far the reasoning of them extends, in particular, whether, as the respondents here claim, it extends so as to cover the facts now before this court. For the case of the respondents was, and is, in substance this, that *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (1) inevitably carries with it a conclusion favourable to the respondents. It is said on their behalf (and the argument appealed to HARMAN, J.), that the effect of the decision in the House of Lords is that the first and any succeeding life tenant under the terms of the settlement during the settlor's life was entitled in possession, albeit for a limited

A interest, to the policies, that is to the contractual rights or the "bundles of rights" constituted thereby, and that this is none the less so, although until the proceeds of the policy or some proceeds of the policy were received by the bank such life tenant had no actual enjoyment of any present benefit. Reference was made before HARMAN, J., and in this court to a number of cases also cited in *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (1) in the House of Lords. There is, I think, little doubt (and counsel for the trustees was disposed so to concede) that before the decision in *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (1), the answer to the present question would, on the authority of the earlier cases, have been in favour of the Crown. But it was also before us agreed by counsel that *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (1), had called for a reassessment of the older law. In truth, in my judgment, the earlier cases to which I have referred no longer form for us a clear guide: the question is now one of principle to be determined in accordance with the proper construction of the well-known sub-section of the Finance Act, 1894, but in the light of the citations in *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (1).

Thus, in *A.-G. v. Dobree* (3) ([1900] 1 Q.B. 442), the question raised being substantially the same as that now before us, the decision of the Divisional Court was in favour of the Attorney-General. LORD MORTON OF HENRYTON, though expressly reserving the question now raised and determined in *A.-G. v. Dobree* (3), nevertheless pointed out that the decision in the latter case must be taken to have been erroneous in so far as it decided that duty was leviable, not on the value of the life interest which took practical effect on the death of the assured, but on the whole value of the policy; and also in so far as DARLING, J., and E CHANNELL, J., found that the "other interest" provided by the deceased was not the policy but the sum paid in respect thereof on the settlor's death. In others of these cases, e.g., *Inland Revenue Comrs. v. Scott's Trustees* (4) (1918 S.C. 720), *Tennant v. Lord Advocate* (5) ([1939] 1 All E.R. 672), and *Westminster Bank, Ltd. v. A.-G.* (6) ([1939] 2 All E.R. 72), the point now in question was not, or was not primarily, at issue, and was either conceded or regarded as covered F by previous decisions; and, as LORD MORTON OF HENRYTON pointed out in *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (1) ([1953] 1 All E. R. at p. 414), these cases again can no longer be regarded as authorities in so far as they proceeded on the view that the interest provided by the settlor was the policy moneys and not the policy itself. In the Scottish case of *Lord Advocate v. Hamilton's Trustees* (7) (1942 S. C. 426), a settlor had settled life policies on his own life in favour of his sons and his daughter, the interest of the daughter G (unlike the interests of the sons) being limited for her life only. The Inner House rejected a claim for duty; but, so far as the report seems to show, on the single ground that the sons' interests were absolutely vested immediately at the date of the settlement, and no notice appears to have been taken (as pointed out by HARMAN, J.) of the different circumstances affecting the settlor's daughter. These H earlier cases being, therefore, in my judgment, no longer authoritative or of real assistance for the purposes of the present appeal, I ask myself, in order to discover whether (to use LORD SIMON'S word) the "quality" of Mr. James Barbour's rights was at all changed by his uncle's death, what those rights were under the settlement during the settlor's life.

I According to the terms of the settlement itself the beneficial interest of Mr. James Barbour is limited to the income during his life of the "trust fund" and the investments representing the same, the trust fund being by virtue of the definition in cl. 2 limited, as respects the policies, to the proceeds thereof and the property representing the same including the accumulation of income. Counsel for the trustees referred us to the parenthesis in cl. 4 providing that "the said policies" and their proceeds were not to be treated as income-bearing until the sums payable in respect thereof had been received and invested. For present purposes I do not think that this provision is of significance. But it is

clear, as I have earlier said, that the bank were given no power to surrender or otherwise realise the policies, still less to put a tenant for life in possession of them in the sense of transferring the legal title in them to him so as to enable him to deal therewith himself. A

There was some discussion before us of the question what would happen if the assurance society were wound up and a sum of money paid to the bank in satisfaction of their contractual rights under the policies. In my judgment, it is sufficient to say that, in such an event or on any other variation of the strict contract contained in the policies, after the expiration of the period of accumulation directed by the settlement, the right of a tenant for life to receive immediately the income of the invested sums paid to the bank would appear to depend on the question whether such sums could properly be described as "proceeds of the policies". If they could be so described, then no doubt, as in the event which happened of one or more of the Victory Bonds being drawn for redemption during the settlor's life, the right of the tenant for life to enjoyment of income would be pro tanto accelerated. Subject, then, to the tenant for life's right to immediate receipt of the income of any proceeds of the policies received in the lifetime of the settlor, his rights as regards the policies during that period were, in my view, limited to a right, if necessary by application to the court, to require the bank to preserve and maintain the policies according to their terms, and no more. On the settlor's death he then had the right of requiring the bank to enforce the terms of the policies and collect and invest the proceeds, and thereafter (assuming that the accumulation period had expired) the further right to require the bank to pay to him the income of the resulting investments. B C D

In my judgment, and treating the matter for the moment as *res integra*, the "quality" (again to use LORD SIMON's expression) of the tenant for life's rights quoad the policies did undergo a change, and a change of substance, on the settlor's death. Put otherwise, I think that on the happening of that event the tenant for life acquired new or additional rights which he did not before possess. Expressed in the terms of s. 2 (1) (d) of the Act the property (or "other interest") provided by the settlor was the policies and the whole of the contractual rights comprised in the policies; those rights included the right on the happening of a future event to receive the policy moneys; and on that event there arose or accrued to the tenant for life, if he survived, for the first time a beneficial interest, namely the right to the present enjoyment thereafter of the income. E F

I therefore, for my part, agree with the analysis of counsel for the Crown—and I am, of course, still treating the matter as ungoverned by authority—that (subject only to the event of one of the Victory Bonds being drawn for redemption as regards the specified part of the redemption moneys received by the bank, in which event his interest expectant on his being alive at the settlor's death would be pro tanto accelerated) the interest of the life tenant during the settlor's life was an interest in expectancy only and thereafter, if he survived the settlor, was an interest in possession. I would add that if this analysis is correct it appears not to be in doubt that s. 2 (1) (d) is applicable, since the tenant for life's interest in the policy moneys is a beneficial interest in the policy itself (see *Tennant v. Lord Advocate* (5)); and also that (having regard to s. 28 of the Finance Act, 1934) the duty is leviable on the whole value of Mr. James Barbour's life interest at his uncle's death. G H

Having regard to the terms of the settlement which we have to construe, the case is, to my mind, essentially different from the case of a person presently entitled to the income of a block of shares or other fund which for one reason or another happens not at the time to be producing income—though I would add that any such comparison may be misleading unless the exact terms of the latter's rights are known and stated. On the other hand, if the respondents' contention is correct then it must follow—and counsel for the trustees expressly so conceded—that if Mr. James Barbour had died in the settlor's lifetime after June 30, 1942, I

A the policy itself would have passed on his death under s. 1 of the Act of 1894—a result which seems to me, I confess, contrary to the common sense and reality of the matter.

B It remains to consider whether the view which, if I am free to adopt it, commends itself to me is negatived by the speeches of the noble Lords in *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (1), which it is, of course, my duty loyally to follow. In my judgment, the decision of the House was based on and limited to the proposition that, in the circumstances of the case before it, the appellant was at all material times both before and after the settlor's death absolute beneficial owner of the relevant policy together with all the rights and incidents attached thereto. So much clearly appears, as I think, from the extract which I have already made from the leading speech of LORD SIMON. So, also, does it appear from the report of the arguments. Thus, Mr. Tucker, Q.C., put his case for the appellant thus:

"The case of an annuity is different because a person in order to become entitled to it must survive whereas in the case of a lump sum to which he is absolutely entitled he need not survive, since if he dies it goes to his estate."

D So, also, Mr. Pascoe Hayward, Q.C., said:

"... in s. 2 (1) (d) the draftsman had in mind the type of case exemplified in *Adamson v. A.-G.* (8) ([1933] A.C. 257) where there is a settlement or trust instrument under which the benefit can arise;"

and after referring to the formula in s. 28 of the Finance Act, 1934, "any interest in expectancy" he proceeded:

E "This is the first time in the reported cases that it has been sought to exact tax under s. 2 (1) (d) when there was no trust instrument, in force at the death, under which the beneficial interest arose."

F LORD PORTER referred at the beginning of his speech to the dissenting opinion of LORD RUSSELL OF KILLOWEN in *Tennant v. Lord Advocate* (5) and to the proposition there referred to by the noble Lord, which had been accepted by PALLES, C.B., that the "property" deemed to pass by virtue of s. 2 (1) (d) "was the policy moneys, not the rights existent in the contract of insurance". LORD PORTER continued ([1953] 1 All E.R. at p. 407):

G "If it is accurate to say that the interest which is aimed at in s. 2 (1) (d) is the policy money when received and not the contract of insurance represented by the policy, there does spring up for the first time on the death of the assured an interest which then and then only arises or accrues, and the Crown's contention is right. But, in my opinion, LORD RUSSELL's doubts are fully justified, and I cannot accept the view that some fresh interest accrues or arises in the beneficial holder of a policy on the death of the deceased life."

H The last sentence which I have quoted appears to be one of wide import. But, in my judgment, by his use of the expression "the beneficial holder of a policy" the noble Lord was intending to confine himself to the case of one who, like the appellant before him, had become before the settlor's death absolute beneficial owner of the policy and all the rights incident thereto. LORD PORTER continued in the very next sentence:

I "From the date of the assignment to him in 1934, the appellant was the absolute owner of the policy and, subject to payment of the premium, entitled to receive the sum insured . . . when the stipulated time of payment . . . had been reached."

Again (*ibid.*, at p. 408), distinguishing *Adamson v. A.-G.* (8) from the case before him, he said:

"The case differs from the present one in which the rights of the appellant have not changed. He is, and has been since 1934, full and absolute owner of the policy."

LORD MORTON OF HENRYTON, as I have already said, while criticising in some respects *A.-G. v. Dobree* (3), expressly left open the validity of the conclusion reached in that case and, therefore, the question raised in this. The ratio of his view on the case before him may be found at p. 411 of the report. A

"The question to be decided is whether a beneficial interest in the policy accrued or arose on Sir Osmond's death. To that question there can, in my view, be only one answer. The whole beneficial interest in the policy passed to the appellant absolutely in 1934. No interests in expectancy were created, and the beneficial interest of the appellant in the policy immediately after his father's death was exactly the same as his beneficial interest in the policy immediately before his father's death." B

LORD REID, after observing that the words "beneficial interest" were not synonymous with "financial benefit" and that for the Crown to succeed it must be shown that there accrued or arose on the relevant death "some right or property of a different kind from that previously enjoyed by the beneficiary", proceeded to point out (*ibid.*, at p. 416): C

"In the present case, the appellant was absolute and unfettered owner of the policy before Sir Osmond's death, and he remained absolute and unfettered owner after the death." D

Then, after a refutation of the proposition that the property provided was not the policy but the money paid under it, he said (*ibid.*):

"It was then argued that, if what was provided was the policy, a new beneficial interest in respect of it arose at the death, because then for the first time there arose a right to sue for the sum due under the policy: before the death the appellant only had a contingent future right, but after the death he had a new and different right—a right to get the money. This argument is not based on any peculiarity of a contract of insurance, and if it is right it seems to me necessarily to lead to the conclusion that, whenever a creditor is owed money payable at a future date, his right after the date of payment has come is a new right different from the right which he had before that date. That seems to me to be a novel doctrine, and to neglect the fact that the rights of contracting parties flow from the contract: a new right would require a new contract. From the beginning the creditor's right was to be paid on a certain day, and the coming of that day does not create a new right, it merely enables him to enforce his old right, and I do not see why it should make any difference if the date of payment is determined, not by the calendar, but by the occurrence of an event, such as death, whose date cannot be predicted. Nor do I see why it should make any difference that the creditor has had to perform his part of the contract between the date when it was made and the date of payment. I must, therefore, also reject this argument." E F G

In my judgment the passage which I have quoted at length does not and was not intended to carry with it the conclusion that one who, by the terms of a settlement is entitled at the death of a person living, if he survives that event, to the income of the invested proceeds of a policy of insurance on such person's life, is in the meantime also entitled to be treated or sensibly described as a life tenant of the contract of insurance. In my judgment, LORD REID rejected the argument posed because the appellant was and had been at all relevant times the absolute beneficial owner of the policy in question and because survivorship of the life assured was irrelevant to his rights of ownership. H

LORD ASQUITH OF BISHOPSTONE expressed his concurrence with the preceding opinions in brief but characteristically vivid language; and there was considerable reference before us to his final sentence (*ibid.*, at p. 417): I

"If I buy an apple tree and it subsequently bears fruit, I was beneficially interested in the fruit from the start."

- A But it does not follow, in my judgment, that one who expects, if he so long survives, to enjoy the fruit or some of the fruit which a tree may hereafter bear has necessarily thereby an identity of interest in both the tree and its fruit. There was indeed, to my mind, force in counsel for the Crown's comment that we are not in the present case concerned with any of those questions of capital and income to which the metaphor of a tree and its fruit is more generally applied. I, therefore, find in the speeches in *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (1) nothing which binds me to answer the question posed in this appeal in favour of the respondents. Being, as I think, free to decide the question according to principle and the true construction of the sub-section, I have come to a conclusion, with all respect to the different view taken by HARMAN, J., and also by ROMER, L.J., in favour of the Crown and think that the appeal should be allowed. I should add that counsel for the trustees expressly reserved before us, as not being open to him in this court in light of the decision of *A.-G. v. Murray* (9) ([1904] 1 K.B. 165) the argument that a policy of insurance is in any event outside the scope of the formula in s. 2 (1) (d) "any annuity or other interest."

- D BIRKETT, L.J.: The judgment of LORD EVERSHED, M.R., leaves little to be said on the questions which arise on this appeal. The main question which arises is whether estate duty is payable under s. 2 (1) (d) of the Finance Act, 1894 on the death of the settlor in respect of the beneficial interest under the voluntary settlement on the proceeds of two policies of assurance on the settlor's life. The settlor was Sir John Milne Barbour, and in March, 1929, he assigned to the Westminster Bank, Ltd., as trustees, certain property including the two policies of assurance in question. One policy was dated July 16, 1919, and was fully paid in 1928. The other policy was dated Sept. 12, 1928, and was a single premium policy. The relevant clauses have already been read and need not be repeated. Sir John Milne Barbour died in October, 1951, and the trustees received the sum of £19,753 2s. in satisfaction of the two policies in question. By reason of the death of the settlor's son in 1937 and by the provisions of cl. 8 of the deed, it is the settlor's nephew, Mr. James Barbour, who takes the life interest in this sum, and it is on the life interest of Mr. James Barbour that the Crown claims the duty in this appeal. The learned judge made the order in this case that having regard to the provisions of the settlement and in the events that have happened, estate duty did not become payable under s. 2 (1) (d) of the Finance Act, 1894 in respect of the life interest of Mr. James Barbour in the policy moneys, and from that decision the Crown appeals.

- G The settlor was domiciled in Northern Ireland, but it was conceded that as the policies in question were situated in England at the death of the settlor, and if estate duty was in fact payable on the death of the settlor in respect of the two policies, the duty would be payable in England. The early correspondence between the solicitors for the Westminster Bank and the Estate Duty Office in Belfast made it plain that the Crown's advisers were contending that *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (1) did not relieve the bank from payment of estate duty under the section, as the bank contended.

- H Before HARMAN, J., and in this court, *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (1), and the many cases which were cited in the House of Lords were fully discussed, but in view of the judgment of the Master of the Rolls I can content myself by stating my own view as briefly as possible. In my view, the facts in the present appeal take the case quite outside the decision in the House of Lords. In order that a claim may arise under s. 2 (1) (d) of the Finance Act, 1894, it must be shown that there is some item of property such as an annuity or other like interest which has been provided by the deceased, and that a beneficial interest in the piece of property has arisen on the death of the deceased. In *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (1) the deceased had provided the piece of property, in the form of a policy of assurance, but on the death of the deceased no beneficial interest arose by survivorship or otherwise, because

the policy was absolutely and indefeasibly vested in the son of the deceased prior to the deceased's death. In the words of LORD MORTON OF HENRYTON ([1953] 1 All E.R. at p. 411):

"The whole beneficial interest in the policy passed to the appellant absolutely in 1934. No interests in expectancy were created, and the beneficial interest of the appellant in the policy immediately after his father's death was exactly the same as his beneficial interest in the policy immediately before his father's death."

In the present case, however, Sir John Milne Barbour by the trust deed of 1929 assigned the fully paid up policies on his life to the trustees on trust to invest the proceeds as set out in the trust deed. The beneficial interest of Mr. James Barbour in the present case (as a possessory interest) was in the proceeds of the policy, and not in the policy itself. So long as the settlor was alive that interest was an interest in expectancy. If he had died before the deceased, his interest would have failed completely, and his estate would not have been enriched in any way from the proceeds of the policies when in fact they became payable on the death of the deceased. Neither he nor anybody else had a beneficial interest in possession in the proceeds of the policies because of the nature of the policies themselves; but on the death of the settlor the beneficial interest did fall into possession, and the change was made from the beneficial interest in expectancy by the express terms of the settlement.

Some attempt was made to show that the beneficial interest was in the policy from the beginning, and that the death of the deceased made no alteration; and, there being no fresh beneficial interest created on the death, no liability to estate duty arose. In my view this argument cannot be sustained, and it is clear that it is raised to bring the facts of this case within the decision in *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (1). In my view, the interest in the present case was the benefit of an obligation to pay a sum of money in a specified event, that is on the death of the deceased settlor. When the death occurs that sum of money becomes the proceeds referred to in cl. 2 of the settlement. The beneficial interest that arose to Mr. James Barbour was in the proceeds, and not in the policy itself. The learned judge in the court below came to his conclusion after the most careful consideration of many cases and he set out his reasons quite fully in his judgment. With great respect to the learned judge, in my opinion the point at issue seems to me to be whether some beneficial interest in the proceeds of the policies arose on the death of the settlor for the first time. It is not a question whether the beneficial interest became more valuable on the death, but whether the beneficial interest arose itself for the first time. In my opinion, it did, and the interest in expectancy had become the interest in possession, and accordingly the provisions of s. 2 (1) (d) apply. I would allow the appeal.

ROMER, L.J.: It is with regret and diffidence, as I need scarcely say, that I differ from the views which the Master of the Rolls and BIRKETT, L.J., have expressed in the judgments which have been read; but for myself I have arrived at the conclusion that the decision of HARMAN, J., was right.

For the reasons which my Lords have stated I fully agree that the circumstances of the present case differ very considerably from those which were before the House of Lords in *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (1) and to which the speeches of their Lordships were directed. Nevertheless, two points at least which are relevant to the present appeal do arise from the decision of the House. These points (both of which appear clearly from the speech of LORD MORTON OF HENRYTON ([1953] 1 All E.R. at p. 411)) are (i) that the "other interests" which were provided by Sir John Milne Barbour were the two policies of assurance which are in issue in the case, and (ii) that the question for decision is whether a beneficial interest in these policies accrued or arose on Sir John's death.

A If the true view of the matter be that Mr. James Barbour had a beneficial interest in the policies and that such interest was the same in quality before the death of Sir John as it was afterwards, then it cannot be said that a different or additional interest accrued or arose when he died which attracted the operation of s. 2 (1) (d) of the Act.

What, then, were the beneficial interests or rights in relation to the policies which were vested in Mr. James Barbour (a) before and (b) after the death of the settlor? Before the death he had the right to compel the trustees, as the legal assigns of the policies, to exercise such contractual rights against the assurance companies as the policies conferred on the holders thereof and to restrain them from improperly disposing of or surrendering the policies in such a way as to constitute a breach of the trusts declared by the settlement. This right to enforce a due performance of the trusts was not peculiar to Mr. James Barbour, for it was common to all persons to whom beneficial interests in the policy moneys were given by the settlement; nor was the right conferred by the terms of the settlement, for it is a right of a kind which is extended to all cestuis que trust by our law. In addition to this right Mr. James Barbour was entitled (subject to the direction for accumulation) to receive the income of any "proceeds" of the policies which might have been paid to the trustees during the settlor's lifetime and invested by them so as to form part of the trust fund; and this was a right which was conferred on him by the grant itself and not merely by the court as incidental to his position as a beneficiary under a trust. After the death of the settlor Mr. James Barbour's right to enforce performance of the trust still continued and would have enabled him (and all the other beneficiaries under the settlement) to compel the trustees (in the improbable event of compulsion being required) to call in the policy moneys and to invest the proceeds in authorised securities. He also possessed under the terms of the settlement the right to receive during his life the income of those moneys when invested. A comparison of Mr. James Barbour's position before and after the settlor's death shows that his right to compel the trustees to enforce their contractual rights under the policies, and to perform in other respects the duties imposed on them by the settlement, was the same before the death as afterwards. As, however, in my judgment, this right should be regarded, not as a beneficial interest in the policies which the settlor provided, but as a right which the law attached to that beneficial interest, the question whether it underwent a change on the death of the settlor is in fact immaterial. The vital question is whether Mr. James Barbour acquired a beneficial interest in the policies on his uncle's death which he had not possessed before.

The contention of the Crown is, first, that his life interest in the policy moneys, when invested, constituted a beneficial interest in the policies which the settlor had provided; and, secondly, that this interest was a mere interest in expectancy during the settlor's lifetime and did not become an interest in possession until the policy moneys became payable by reason of the settlor's death. The first of these submissions is, I think, well founded (*Tennant v. Lord Advocate* (5)). The second submission, which was rejected by the learned judge, raises, as I think, a very considerable difficulty. It is true that under each of the policies with which this appeal is concerned the event or contingency on which the sum assured was to become payable was expressed to be the death of the settlor; and it is equally true that neither Mr. James Barbour nor (within the terms of the settlement) the trustees could accelerate payment, in advance of the prescribed event, of the policy moneys. The trust fund under the settlement, however, was not to be constituted solely of the moneys, when invested, to be received by the trustees on the death of the settlor; for the subject-matter of the trust was expressed by cl. 1 of the settlement to be the policies of assurance "and all moneys to become payable thereunder and the full benefit thereof", all of which were later referred to as "the proceeds" of the policies. Had Mr. James

Barbour's life interest been confined to an interest in the moneys which the trustees should receive under the policies when the settlor died it is, I think, clear that his interest would have been merely expectant and contingent so long as the settlor was alive. The inclusion, however, in the trust fund of "all moneys to become payable" under the policies would plainly bring within the trusts of the settlement all such moneys as became payable while the life assured was still in being. As it happened £750 did in fact become payable under one of the policies during Sir John Barbour's lifetime and the income of that sum, when invested, was paid to Mr. James Barbour and nobody has suggested that it was wrongfully so paid. A
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The question arises then: By virtue of what beneficial interest did Mr. James Barbour become entitled to receive this income? The answer to this must surely be, by virtue of the beneficial interest in the policy to which he was entitled under the settlement. The next question is: By virtue of what beneficial interest did Mr. James Barbour become entitled to receive the income of the moneys which were paid to the trustees under the policies on the death of the settlor? The answer would again appear to be, by virtue of the beneficial interest in the policies to which he was entitled under the settlement. Does then the beneficial interest which entitled him to receive the income of the last-mentioned moneys differ in quality from the interest which entitled him to receive the income of the £750 and would have entitled him to receive the income of any other "proceeds" of the policies that might have been paid to the trustees during the settlor's lifetime? I confess that I cannot see in what respect it does differ. The £750 and the moneys received on the settlor's death were equally moneys which became payable under the policies (or "proceeds" of the said policies) and Mr. James Barbour's right to receive the income of both funds derived under precisely the same title, namely, the life interest which he took under the settlement. In these circumstances I do not for myself see how, in the words of LORD REID in *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (1) ([1953] 1 All E.R. at p. 415), it can truly be said that C
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"... some right or property of a different kind from that previously enjoyed by" F

Mr. James Barbour accrued or arose on the death of the settlor. For these reasons accordingly I would dismiss the appeal; but as my brethren take a different view the appeal will be allowed.

LORD EVERSHERD, M.R.: The order will be a declaration that, on the true construction of the settlement and the relevant Acts and in the events which have happened, estate duty became payable under s. 2 (1) (d) of the Finance Act, 1894, on the death of Sir John Milne Barbour in respect of the life interest of Mr. James Barbour in the policies or in the property or moneys thereby secured. G

Appeal allowed. Leave to appeal to the House of Lords granted. H

Solicitors: *Solicitor of Inland Revenue; Parker, Garrett & Co.* (for the trustees).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A

A. V. POUND & CO., LTD. v. M. W. HARDY & CO.,
INCORPORATED.

B

[HOUSE OF LORDS (Viscount Kilmuir, L.C., Viscount Simonds, Lord Morton of Henryton, Lord Reid and Lord Somervell of Harrow), January 11, 12, 16, March 1, 1956.]

Sale of Goods—Licence necessary for exports—Whether buyers' or sellers' duty to obtain — English contract — Export licences granted only to Portuguese suppliers.

C

By a contract made in London in April, 1951, the sellers, an English company, agreed to sell to the buyers, an American company, for United States dollars, a quantity of Portuguese turpentine f.a.s. buyers' tank steamer at Lisbon during the second half of May, 1951, payment by confirmed irrevocable credit in sellers' name in Lisbon. At the time when the contract was made, the sellers knew that the buyers required the goods for shipment to Eastern Germany. The sellers then entered into a contract to purchase the goods from suppliers in Portugal. Under Portuguese law, at all material times, the export of turpentine was prohibited except under licence, export licences were granted only to Portuguese suppliers, and goods could not be delivered f.a.s. at Lisbon until they had been cleared through the Portuguese Custom House where the licence had to be produced. There was no mention of an export licence in the contract between the buyers and sellers, and, at the date of the contract, the buyers, apparently, did not know that a licence was necessary; but the contract between the sellers and their Portuguese suppliers, whose identity the sellers withheld from the buyers, was subject to the licence being granted. On May 4, 1951, the buyers wrote to the sellers giving them the name of the tanker which they had chartered and enclosing a copy of the charterparty which showed that the goods were to be carried to Rostock, and, subsequently, the buyers opened a letter of credit in the sellers' name in Lisbon. On May 22 the suppliers applied to the Portuguese authorities for a licence to export the turpentine to Rostock but the application was refused, and, in consequence, the goods could not be delivered f.a.s. the buyers' tanker at Lisbon since they could not be cleared through the customs. The sellers requested the buyers to give shipping instructions for a port other than Rostock but the buyers refused to do so. It was common ground that the proper law of the contract was English. The sellers claimed damages.

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Held: the sellers could only succeed if they established a breach of contract by the buyers and this they failed to do because (i) in the circumstances no obligation on the buyers to obtain an export licence should be implied, and (ii) (per VISCOUNT SIMONDS, LORD MORTON OF HENRYTON and LORD SOMERVELL OF HARROW) when the contract could not be carried through in the manner contemplated by both parties thereto there was no obligation on the buyers to nominate a port of destination for which an export licence could be obtained.

H. O. Brandt & Co. v. H. N. Morris & Co., Ltd. ([1917] 2 K.B. 784) distinguished.

Semble: no general rule is established for f.o.b. or f.a.s. contracts for the sale of goods, in relation to which a prohibition on export exists, that an obligation on the buyers to obtain an export licence for the goods, or to supply a ship into or alongside which the goods can lawfully be placed, is to be implied in default of express stipulation between the parties, but each

case depends on the contract and surrounding circumstances in that case (see p. 644, letter C, p. 645, letter A, p. 648, letter D, and p. 650, letter E, post).

Dictum of SCRUTTON, L.J., in *H. O. Brandt & Co. v. H. N. Morris & Co. Ltd.* ([1917] 2 K.B. at p. 798) criticised.

Decision of the COURT OF APPEAL, sub nom. *M. W. Hardy & Co., Incorporated v. A. W. Pound & Co., Ltd.* ([1955] 1 All E.R. 666) affirmed.

[As to f.a.s. contracts, see 29 HALSBURY'S LAWS (2nd Edn.) 228, para. 308.

As to the party on whom the duty to obtain a licence falls, see 8 HALSBURY'S LAWS (3rd Edn.) 182, para. 315; and for cases on the subject, see 12 DIGEST (Repl.) 451, 3395-3398; 39 DIGEST, 3rd Supp., 895a, 2562b.]

Cases referred to:

(1) *Brandt (H. O.) & Co. v. Morris (H. N.) & Co., Ltd.*, [1917] 2 K.B. 784; 87 L.J.K.B. 101; 117 L.T. 196; 39 Digest 666, 2555.

(2) *Re Anglo-Russian Merchant Traders & Batt (John) & Co. (London)*, [1917] 2 K.B. 679; 86 L.J.K.B. 1360; 116 L.T. 805; 12 Digest (Repl.) 451, 3395.

(3) *McMaster & Co. v. Cox, McEuen & Co.*, 1921 S.C. (H.L.) 24; 58 Sc.L.R. 70; 39 Digest 656, 2489.

(4) *Anderson v. Commercial Union Assurance Co.*, (1885), 55 L.J.Q.B. 146; 12 Digest (Repl.) 461, 3435.

(5) *Waugh v. Morris*, (1873), L.R. 8 Q.B. 202; 42 L.J.Q.B. 57; 28 L.T. 265; 12 Digest (Repl.) 264, 2041.

(6) *The Teutonia*, (1872), L.R. 4 P.C. 171; 41 L.J.Adm. 57; 26 L.T. 48; 12 Digest (Repl.) 459, 3428.

Appeal.

Appeal by the sellers, A. V. Pound & Co., Ltd., from an order of the Court of Appeal, dated Feb. 25, 1955, and reported [1955] 1 All E.R. 666, sub nom. *M. W. Hardy & Co., Incorporated v. A. W. Pound & Co., Ltd.*, reversing an order of McNAIR, J., dated Nov. 12, 1954, whereby he gave judgment for the sellers on a Special Case Stated by the Board of Appeal of the London Oil and Tallow Trades Association (Incorporated) on appeal by the buyers from an award of arbitrators. The questions of law for the opinion of the court set out in the Special Case were:

(i) Did the refusal by the Portuguese authorities of a licence for the export of the contract goods to Eastern Germany operate to discharge the contract between the sellers and the buyers? (ii) Did the refusal by the Portuguese authorities of a licence for the export of the contract goods to Eastern Germany (a) excuse the sellers from making delivery (b) excuse the buyers from taking delivery? (iii) Did the sellers' failure to obtain a licence for the export of the goods to Rostock constitute a breach of contract by the sellers? (iv) Was there a duty to obtain an export licence from Portugal in respect of the contract goods (a) on the sellers or (b) on the buyers? (v) Were the obligations of the parties as to obtaining export licences governed by English or Portuguese law? (vi) Was either and which party liable to the other in respect of the failure to make or take delivery of the contract goods? (vii) Did the buyers' failure to order the goods to be placed alongside a vessel by which the goods might lawfully be exported from Portugal constitute a breach of contract by the buyers? (viii) Did the buyers' letter of May 29, 1951*, constitute a wrongful repudiation of the contract by the buyers? (ix) Should the sellers (if the buyers be held liable to them) have mitigated their damages by treating the original contract with their suppliers as discharged owing to the refusal of the Portuguese authorities of an export licence relating to the goods the subject-matter of such original contract?

* See p. 646, letter F, post.

A The Board of Appeal held, subject to the opinion of the court, that the refusal by the Portuguese authorities of a licence for the export of the contract goods to Eastern Germany operated to discharge the contract between the sellers and the buyers, and they reversed the award of the arbitrators in favour of the sellers. The facts appear in the opinion of VISCOUNT KILMUIR, L.C.

B *T. G. Roche, Q.C.*, and *A. J. Bateson* for the sellers.
Leonard Caplan, Q.C., and *Neil Lawson, Q.C.*, for the buyers.

The House took time for consideration.

Mar. 1. The following opinions were read.

C VISCOUNT KILMUIR, L.C.: My Lords, this case has passed from arbitrators to the Board of Appeal of the London Oil and Tallow Trades Association, thence to McNAIR, J., and then in turn to the Court of Appeal (LORD GODDARD, C.J., SINGLETON and ROMER, L.JJ.). The results were that the arbitrators and McNAIR, J., held that the contract in the case was not frustrated and that the appellants (the sellers) were entitled to damages. The appeal committee and the Court of Appeal held that the contract was frustrated, that the respondents (the buyers) were not in breach, and that the appellants were, therefore, not entitled to damages. The appellants now appeal to this House.

D By an oral contract made on Apr. 19, 1951, the terms of which were confirmed in a sale note dated Apr. 20, 1951, between the appellants, as sellers, and the respondents, as buyers, the sellers agreed to sell and the buyers agreed to buy three hundred metric tons of Portuguese gum spirits of turpentine at a price in United States dollars equivalent to 11,000 escudos per thousand kilos net f.a.s. buyers' tank steamer at Lisbon during the second half of May, 1951, payment by confirmed irrevocable credit in sellers' name in Lisbon. The contract was made in London in English and provided for arbitration in London. On Apr. 20, 1951, the sellers wrote to the buyers:

F "We refer to our recent telephone conversations on the subject of Portuguese turpentine, and now have pleasure in sending you herewith our contract [the sale note referred to above] covering the sale of three hundred tons, for second half of May shipment, at Esc. 11,000—per thousand kilos, net f.a.s. tanker at Lisbon. As we understand that the destination will be Eastern Germany, payment will be required in free dollars, and subject to our sellers' approval, we suggest that this should be done at the rate of exchange ruling on the day the credit is opened."

G By the law of Portugal, in force at all material times, including at the date of the contract: (i) It was unlawful to export turpentine from Portugal without an export licence stating the destination of the goods and issued by the Junta Nacional dos Resinosos on behalf of the Portuguese government. (ii) A licence for the export of gum spirits of turpentine from Portugal could only be obtained by a supplier registered by the Portuguese authorities with the Junta for that purpose. (iii) Gum spirits of turpentine for export could not be delivered alongside ship at Lisbon unless they had been cleared through the Portuguese Custom House where the necessary export licence was required to be produced.

I Neither the buyers nor the sellers were suppliers registered under Portuguese law for these purposes, and neither of them could have applied for a Portuguese export licence for the contract goods. There was no express term of the contract as to which, if either, party was under the duty of obtaining, or taking steps to obtain, an export licence for the export of the goods from Portugal, and there was no express provision in the contract as to the liability of either party should an export licence not be obtained.

On Apr. 19, 1951, the buyers chartered the tanker Elizabeth B to proceed to Lisbon and ship the goods to Rostock in Eastern Germany on payment by the buyers of the sum of £2,875. Having entered into the contract with the buyers, the sellers, on Apr. 23, 1951, contracted to buy from a Portuguese company known as Uniao Resineira Portuguesa (hereinafter called "the suppliers") who agreed to sell to the sellers 300,000 kilos of Portuguese gum spirits of turpentine at the price of 10,800 escudos per thousand kilos net weight, less two per cent., delivery f.a.s. the tanker steamer Lisbon for shipment during the second half of May, 1951. This contract contained the following express term "subject to usual agreement of the Junta Nacional dos Resinosos being granted". It also contained a term for payment of the price in U.S. dollars. The suppliers were registered with the Junta in accordance with the provisions of Portuguese law and were entitled to apply to the Junta for an export licence relating to the goods. The sellers did not at that time, or until about May 8, 1951, inform the suppliers that the destination of the goods was Eastern Germany. On the instructions of the sellers, the identity of the suppliers was not communicated to the buyers.

On May 4, 1951, the buyers, by letter, advised the sellers that they had chartered the Elizabeth B for the purposes of the contract, sending therewith to the sellers a copy of the charterparty which they had entered into with the owners of the Elizabeth B. The charterparty showed that the Elizabeth B was chartered for a voyage from Lisbon direct to Rostock. The Elizabeth B arrived at Lisbon on May 27, 1951, and was ready to load on May 29, 1951. On May 14, 1951, the contract goods were at Lisbon awaiting to be passed through the Portuguese customs. On May 22, 1951, the buyers opened a letter of credit in favour of the sellers, which provided that it should be drawn on against delivery of, inter alia, bills of lading covering shipment from Lisbon to Rostock. The terms of the letter of credit were accepted by the sellers.

On May 22, 1951, the suppliers applied to the Junta for an export licence for the goods to enable them to be exported to Rostock, in Eastern Germany. On May 24, 1951, the Junta refused the suppliers' application for the export licence. The effect in Portuguese law of such refusal was to frustrate the contract which had been made between the sellers and the suppliers. On May 29 the sellers wrote to the buyers referring to previous telephone conversations and saying that, in their view, the refusal of a licence for Rostock did not invalidate the contract. They stated that the turpentine was available for delivery and asked for new instructions. The buyers replied by a letter of the same date refusing to give other instructions and saying that the sellers' inability to ship the goods to Eastern Germany was a breach of contract for which the sellers were liable to them in damages. On the same day, the buyers cancelled their charter of the Elizabeth B. In order to mitigate the damages, the sellers then instructed the suppliers to apply for a licence to export the goods to London, and this was granted the same day. The sellers also chartered the Elizabeth B and sent the goods to London. It was emphasised on behalf of the sellers that there was no finding that the sellers knew of the Portuguese licensing system at the time when they made the contract.

The first broad issue between the parties is whether it was the duty of the buyers to provide a vessel alongside which the sellers could lawfully place the turpentine, or whether, on the licence for the destination desired by the buyers being refused, the buyers were excused from the performance of the contract. It was common ground before this House, and it had been so accepted by McNAIR, J., and the Court of Appeal, that the proper law of the contract was English. Counsel for the sellers submitted that the impact of Portuguese law was restricted to modes of performance, in accordance with the limitations which well-known decisions on that subject have indicated.

- A The sellers' main contention, in accordance with the judgment of McNAIR, J., on which they relied, was that the principles applicable were those laid down by the Court of Appeal in *H. O. Brandt & Co. v. H. N. Morris & Co., Ltd.* (1) ([1917] 2 K.B. 784). In that case, the goods had been sold f.o.b. Manchester by English merchants to English merchants seeking to export from England. Subsequent to the contract, an order rendering a licence necessary was made in the United Kingdom under United Kingdom statutory powers. In these circumstances, the court held that it was for the buyers to supply any necessary licence which is required to enable the goods to be placed on the ship. In my opinion, it is necessary to remember, in comparing *Brandt v. Morris* (1) with any other case in this field, (i) that the parties had not contracted with reference to an existing licensing system; (ii) that a United Kingdom licensing system overtook their contract;
- C (iii) that either party could have applied to the British authorities; (iv) that the buyers alone knew the facts which it was necessary to state when a licence was applied for. The sellers, however, argued that the effect of this decision, and especially of the judgment of SCRUTTON, L.J., was that, in the case of any f.o.b. contract it was the duty of the buyers to provide a ship alongside which the goods could legally be placed, and, therefore, their duty to procure any licence
- D required.

In my opinion, the decision in *Brandt v. Morris* (1) is authority only for the proposition that, where a British buyer has bought goods for export from Britain, and a British prohibition on export except with a licence supervenes, then there is a duty on such a buyer to apply for a licence, because not only is he entitled to apply to the relevant British authority but he alone knows the full facts regarding the destination of the goods. It is not without importance to note that SCRUTTON, L.J., introduces the part of his judgment which deals with this point by saying ([1917] 2 K.B. at p. 798):

F "This is a contract to sell sixty tons of aniline oil f.o.b. Manchester. At the date of the contract there was no prohibition against the export of aniline oil. In *Re Anglo-Russian Merchant Traders & John Batt & Co.* (London) (2) ([1917] 2 K.B. 679) the contract was a c. and f. contract, and at the date thereof there was an existing prohibition against export except under a licence. A question arose as to whose duty it was to obtain a licence. BAILHACHE, J., held that the person who had contracted to sell undertook to obtain the licence or to pay damages. This court held that, as there was a finding of fact that the seller had done all in his power to get a licence, at any rate his obligation was not higher than that, and that therefore he was not liable. In this case it becomes necessary to go further and to decide whether in this f.o.b. contract the obligation to obtain a licence, in case there should after the making of the contract be a prohibition against export, lies upon the sellers or the buyers. In my opinion it lies upon the buyers."

H In my view, significance must be attached to the words "in this f.o.b. contract". Further, it must be observed that the lord justice draws attention not only to the fact that one was a c. and f. contract while the other was f.o.b., but also to the fact that in one case the prohibition was existing and that in the other it supervened. It is in the second case that the words following become applicable, namely:

I "The buyers must provide an effective ship, that is to say, a ship which can legally carry the goods."

Also, in the case of a supervenient prohibition, once it has become the duty of the buyers to obtain the licence and so legalise the ship, it is immaterial that there is a duty on the sellers to perform the act subsidiary to export, namely, to bring the goods through customs on to the quay. Moreover, it is, in my view, essential for us, thirty-nine years later, to read that judgment as SCRUTTON, L.J.,

was delivering it, in contradistinction to his decision in *Re Anglo-Russian Merchant Traders & John Batt & Co. (London)* (2). I draw attention to the words in which the lord justice there posed the problem ([1917] 2 K.B. at p. 688):

“The sellers could only export aluminium under a licence. They contracted to export it. There are two alternatives suggested. Have they contracted to get a licence or pay damages though it may be illegal to export? Or have they contracted to use reasonable diligence to get a licence, and, having been unable to obtain one, are they relieved from any liability because a contract which is illegal cannot be enforced?”

SCRUTTON, L.J., reaches the conclusion that the second of these alternatives is the term that must be implied in the contract.

Against that background, I cannot extract from *Brandt v. Morris* (1) a general rule that, on every f.o.b. or f.a.s. contract, the buyer must supply a ship into which, or alongside which, the goods can legally be placed where there exists a prohibition on export except with a licence. My view is supported by an examination of *McMaster & Co. v. Cox, McEuen & Co.* (3) (1921 S.C. (H.L.) 24), on which the sellers also relied. In that case, a firm of jute manufacturers in Dundee accepted order-notes for jute goods dated Nov. 1 and 2, 1917, from a firm of merchants also in Dundee. The notes stipulated for delivery f.o.b. Dundee. There supervened the Jute (Export) Order, of Nov. 23, 1917, which prohibited the manufacture and delivery of jute goods without a permit. Thereupon the sellers wrote to the buyers asking for a guarantee that the goods on order were not to be exported, or, if they were for export, for a government permit authorising their manufacture and delivery. The buyers intimated that the goods in question were for export. Thereupon they applied for, and were refused, a permit for the manufacture of the goods, whereupon they cancelled the contract. In an action for damages by the sellers against the buyers for breach of contract, your Lordships' House held that the buyers were liable in damages. In his opinion LORD BIRKENHEAD, L.C., said (*ibid.*, at p. 26):

“I find that it [the agreement] is one in which a vendor has undertaken to supply a certain article to a purchaser. He is not concerned to ask, and he does not ask, in what market the purchaser proposes to dispose of that which he buys, and I have already pointed out that every attempt to show that the vendor was affected with any knowledge that the purchaser intended to dispose of these goods in a foreign market has failed.”

VISCOUNT FINLAY said (*ibid.*, at p. 27):

“Something was said about the words ‘f.o.b.’ They, of course, would be equally applicable to any transit by sea whether coastwise or to foreign ports; but it appears to me quite impossible to find in the documents or in the surrounding circumstances any sufficient foundation for making it a term of the contract that liberty of export should exist at the time it was to be performed.”

LORD DUNEDIN took as the basis of his concurrence that the right of the buyers to dispose of the goods was a right due to the fact that, after delivery, they became owners of the goods. LORD ATKINSON agreed with him. Counsel for the sellers, however, placed great reliance on the reasoning of LORD SHAW OF DUNFERMLINE (*ibid.*, at pp. 29 and 30), and especially on the terms in which he rejected the view of the majority of the Second Division, that the buyer

“seems to have had a certain recourse at law under which he could, while holding the seller bound under the concluded contract, yet assert his own, the buyer's, freedom therefrom.”

A In my opinion, the applicability of that reasoning to a simple contract of sale which was overtaken by such a departmental order does not make it applicable to the facts of this case. The opinions in your Lordships' House do not, in my view, support a general rule for f.o.b. contracts. The outcome must depend on the contract, and the surrounding circumstances in each case.

B The sellers can only succeed in this action if they can establish that there was a breach of contract by the buyers. In my opinion, they have failed to do so. The essential facts seem to me to be (i) that the sellers knew that the buyers wished to export to Eastern Germany, and (ii) that only the suppliers (whose identity the sellers deliberately withheld from the buyers) could apply for the necessary licence. In these circumstances, it was for the sellers to do their best to obtain a licence for Eastern Germany through the suppliers and, if they
C found that they could not, further performance of the contract was excused. The sellers also contended that, by their letter of May 29, 1951, the buyers repudiated the contract before time for its performance had expired. In view of the position adopted by the sellers in the events which had occurred, I do not think that there is any substance in this point.

In my opinion, this appeal fails and should be dismissed with costs.

D **VISCOUNT SIMONDS:** My Lords, I agree that this appeal should be dismissed. I do not dissent from the view expressed by the Court of Appeal that this case is distinguishable from *H. O. Brandt & Co. v. H. N. Morris & Co., Ltd.* (1) ([1917] 2 K.B. 784). If it were not so, the Court of Appeal must have decided this case otherwise. But your Lordships are not similarly constrained,
E and I will give my own reasons why the sellers' claim is not supportable in law.

The sellers are merchants carrying on their business in London; the buyers are a company incorporated in the United States of America, but having a branch in London with which the contract to be presently mentioned was made. By a contract made orally on Apr. 19, 1951, and confirmed in writing on the following day, the sellers sold to the buyers three hundred metric tons of Portuguese gum spirits of turpentine at a price in United States dollars equivalent to 11,000 Portuguese escudos per thousand kilos free alongside the buyers' tank steamer at
F Lisbon. Delivery was to be made during the second half of May, and payment was to be by confirmed transferable irrevocable credit in the name of the sellers in Lisbon. The buyers required the goods for shipment to Rostock. The sellers knew at the time of the contract that they were destined for Eastern
G Germany, and within a very short time thereafter that the destination was Rostock.

By the law of Portugal, which was in force at all material times, it was unlawful to export turpentine from Portugal without an export licence stating the destination of the goods, which was issued by the Junta Nacional dos Resinosos on behalf of the Portuguese government; a licence for such export could only
H be obtained by a supplier registered by the Portuguese authorities with the Junta for that purpose; neither of the parties was so registered. The turpentine which was to be exported could not be delivered alongside ship at Lisbon unless it had been cleared through the Portuguese Custom House where the necessary export licence had to be produced. Thus the contract could not be performed unless the necessary licence was obtained. I am content to assume that the
I parties did not know the relevant Portuguese law at the date of the contract, though in regard to the sellers at least I do not find it an easy assumption. It is, in any case, immaterial.

The parties forthwith proceeded to take such steps as were necessary to carry out the contract. The buyers had already, on Apr. 19, chartered the tanker *Elizabeth B* to proceed to Lisbon and ship the goods to Rostock on payment by them of £2,875. The sellers, on Apr. 23, contracted to buy from a Portuguese company, whom I will call "the suppliers", 300,000 kilos of turpentine at a price of 10,800 escudos per thousand kilos net weight, less two per cent.,

the delivery to be f.a.s. the tanker steamer Lisbon for shipment during the second half of May, 1951. The contract contained the significant term "subject to usual agreement of the Junta Nacional dos Resinosos being granted." The suppliers were registered with the Junta and, accordingly, were persons who could apply for an export licence and to whom it might be granted. A

On May 4 the buyers advised the sellers of the charter, and sent them a copy of the charterparty, which showed that the Elizabeth B was chartered for a voyage from Lisbon direct to Rostock, and that the lay days should not commence before May 20, 1951, and, on May 7, they gave advanced notice of readiness to load at Lisbon on May 24-25. The tanker, in fact, arrived on May 27, and was ready to load on May 29. On May 22 they opened a letter of credit in favour of the sellers in accordance with the contract in terms which were accepted by the latter. B

I must now return to the sellers. For reasons, which were no doubt commercially adequate, they did not for some little time tell the suppliers what was the destination of the goods, and they did not tell the buyers who were the suppliers but, on the contrary, gave instructions that their identity should not be disclosed. On May 14 the suppliers had so far performed the contract that the goods were at Lisbon waiting to be passed through the customs, a passage that could not be granted until an export licence had been obtained. On May 22 the suppliers, who alone could do so, applied to the Junta for a licence to export the goods to Rostock, and on May 24 the application was refused. This refusal put an end to the contract between the sellers and the suppliers which had been expressed to be conditional on a licence being granted. On or about May 25 a new contract was made between the same parties for the sale and purchase of the same amount of turpentine on the same terms as the previous contract, except that there was no provision for payment in U.S. dollars. C D E

It is not clear on what day the sellers told the buyers that the licence had been refused, but it must have been, at latest, on May 29, for on that day they wrote a letter to them in which, after referring to recent telephone conversations, they said: F

"In our opinion the refusal of the Portuguese authorities to grant an export licence for Rostock does not invalidate the contract which calls for delivery 'f.a.s. buyer's tank steamer in Lisbon'. The turpentine is available for immediate delivery and we must ask you to let us have today new instructions for shipment of the goods." G

This challenging letter brought a response on the same day from the buyers, in which they said that in no circumstances were they prepared to give shipping instructions for any other port than Rostock. The goods, they said, were bought for that port and confirmed by the sellers for shipment to Eastern Germany; and their inability to ship the goods to Eastern Germany constituted a breach of contract, for which the buyers would hold them responsible for any damage suffered by them. They added, amongst other things, that they would hold the sellers liable for any damage sustained by them through cancelling the charter of the steamer Elizabeth B. They, in fact, cancelled that charter on the same day, paying to the owners the sum of £780 as compensation. The final act of the sellers was, on or about the same day, to obtain through the suppliers a licence to export the turpentine, the subject of the new contract of May 25, from Portugal to the United Kingdom, to charter the Elizabeth B for the purpose of shipment, and to load the turpentine on board. All this was done in time for the ship to sail from Lisbon at 4.15 p.m. on May 31. H I

Now the stage was set for the arbitration for which also the contract had provided. Each party alleged that the other had failed to perform its obligations under the contract, and claimed damages accordingly. Fortunately, your Lordships will not be troubled to examine the allegations by the buyers that the

A sellers committed a breach of their obligations, except so far as it is relevant to determine what those obligations were for the purpose of ascertaining those of the buyers. It is the obligations of the buyers alone with which this appeal is primarily concerned and, as to these, it is sufficient for the moment to say that the arbitrators and McNAIR, J., held that the sellers were entitled to damages, whereas the appeal committee (a conventional tribunal of appeal from the
B arbitrators) and the Court of Appeal held that they were not.

My Lords, the argument has been far-ranging and, in particular, there has been much discussion whether the doctrine of frustration can be invoked by the buyers to excuse the non-performance by them of their obligations. In my opinion, it is unnecessary to traverse this field; the case can be determined by a brief consideration of the buyers' obligations. I have stated the relevant terms
C of the contract, and two things are at once obvious, first, that it did not provide for an export licence being obtained by anyone and was not made conditional (as was the contract with the suppliers) on such a licence being obtained, and, secondly, that it contained no reservation in favour of the sellers in regard to the "buyer's tank steamer at Lisbon". What, then, was the buyers' obligation? Was it for them to obtain an export licence—to Rostock, if they wanted to ship
D the goods to Rostock, but, if that proved impossible, then to some other place, whether they wanted to ship the goods there or not? Was it for them to provide an "effective ship" (to use a phrase which is taken from *Brandt v. Morris* (1)), meaning thereby a ship having a destination for which an export licence could be granted, a destination, maybe, which was at no time in their contemplation and was commercially useless? I think that I state accurately the substance
E of the sellers' plea, and there is no doubt that, if this was the buyers' obligation, they did not perform it.

My Lords, it is very clear that this obligation is not imposed on the buyers by an express term of the contract. Is a term, then, to be implied by which it is imposed? I can see no ground for saying that it should be. On the contrary, every circumstance in the case suggests that, if the "officious bystander" had
F said at the making of the contract, "Of course, gentlemen, you intend the buyers to get the export licence", it must at once have been repudiated by the buyers and, probably, by the sellers also, who, by their conduct, showed where they thought that duty lay, and were anxious, too, to prevent the buyers making contact with the suppliers through whom alone a licence could be obtained. It is, in my opinion, plain that, according to the ordinary principles of construction,
G no obligation is to be implied. As I said some time ago, your Lordships are primarily concerned with the obligations of the buyers not with those of the sellers. It is, therefore, unnecessary to determine what is the legal consequence of the sellers undertaking to deliver goods f.a.s. the buyers' ship, but failing to do so because they could not get the necessary licence. But the fact that, *prima facie*, they have unreservedly undertaken to deliver the goods f.a.s. makes it
H the more difficult to imply an obligation on the part of the buyers.

I must refer now to another aspect of the argument for the sellers. It will be remembered that, on May 29, an export licence for Rostock having been refused on May 24, the sellers wrote to the buyers saying (*inter alia*) that the turpentine was available for immediate delivery, and asking for new instructions for shipment. This was a misleading statement, for the turpentine was not available
I for delivery in the sense of the contract; for no export licence, which was a condition of delivery f.a.s., had yet been obtained. But it was the answer of the buyers refusing to give shipping instructions for any other port than Rostock on which the sellers rely. This, they say, was a wrongful repudiation of the contract, for, in any view, two days remained for its performance. I do not think that there is any validity in this plea. The buyers had nominated the port of destination and had provided a vessel to carry the goods there and had further provided a letter of credit negotiable against documents in accordance with the

contract. All this was without objection from the sellers. It appears to me that, when, through no default of the buyers, the contract could not be carried out in the manner contemplated by both parties, it was not competent for the sellers to require the buyers to name some other port of destination, for which an export licence might, or might not, be obtained, and to which, in any case, they had no wish to consign the goods. A refusal by the buyers to do so was not, in my opinion, a wrongful repudiation of the contract. Carried to its logical conclusion, the argument of the sellers meant that, under this contract, the buyers were bound to consign the goods to some place for which an export licence could be obtained and, if there was only one such place, then to that place, however remote and undesirable it might be. A

In my opinion, therefore, on the true construction of this contract and in the light of its surrounding circumstances, the buyers were not in default, and this appeal should be dismissed. I cannot, however, conclude without making some observations on *Brandt v. Morris* (1). I do not dissent from the view entertained by the Court of Appeal that that case is in material respects distinguishable from the present case. But I think that it is proper to note that, just as in this case it is not primarily the sellers' obligation which has to be determined, so, in *Brandt v. Morris* (1), it was not primarily the buyer's obligation, and to that extent—perhaps a limited extent—the observations of SCRUTTON, L.J., on the latter's obligation may be regarded as obiter. If they are to be read as laying down a general proposition of law that, in every f.o.b. contract, and a fortiori, I suppose, in every f.a.s. contract, the duty of obtaining any necessary export licence primarily falls on the buyer in the absence of any relevant provision in the contract, then, with the greatest respect to a very learned judge, I cannot assent to such a proposition. It appears to me to beg the question to state that it is the duty of the buyer to provide an "effective ship", meaning thereby a ship which can lawfully carry the contract goods to a named destination. It is equally the duty of the seller to deliver f.o.b. or f.a.s. "effective goods", meaning thereby goods which can lawfully be carried to that destination. It may well seem strange, that, in a world in which restrictions on export are a commonplace, the elementary precaution is not taken of providing that any necessary licence should be got by one or the other of the parties. In the absence of such a provision, I am not prepared to accept the view that the obligation in all circumstances lies on the buyer. I would not, however, question that, assuming the obligation to be with the seller, the buyer must co-operate by telling him the destination of the contract goods and otherwise as may be reasonable. But these are matters which do not arise for consideration on the present appeal, which, as I have said, should be dismissed with costs. B C D E F G

LORD MORTON OF HENRYTON: My Lords, I agree with the two speeches which have just been delivered, and also with the speech which is about to be delivered by my noble and learned friend, LORD SOMERVELL OF HARROW, and I do not desire to add anything. H

LORD REID: My Lords, I concur.

LORD SOMERVELL OF HARROW: My Lords, the facts have already been stated so I will begin at the time the parties went to arbitration. The buyers contended that the sellers had committed a breach of contract, in that they were unable to deliver the goods f.a.s. Alternatively, that the contract had been discharged by impossibility or frustration. The sellers contended that the duty to obtain a licence was on the buyers and that the failure to obtain a licence constituted a breach. Alternatively, that when a licence for Rostock was refused, the buyers were under a contractual obligation to arrange for some other destination for which a licence was, or might have been, obtained. Their failure to do so was a breach. The arbitrators found that the buyers were in breach, and awarded the sellers damages. The buyers appealed to the Board of I

A Appeal, and application was made for a Special Case. Subject to the questions of law, the board decided that the refusal by the Portuguese authorities of a licence operated to discharge the contract. Alternative awards were made on the assumption that there had been a breach by either buyers or sellers.

The Special Case came before McNAIR, J., the sellers submitting that the buyers were in breach. McNAIR, J., basing himself on a decision of the Court of Appeal, *H. O. Brandt & Co. v. H. N. Morris & Co., Ltd.* (1) ([1917] 2 K.B. 784), held that the duty of obtaining an export licence, or at any rate the risk of failure to obtain the export licence, lay on the buyers. He found that the contract was not frustrated, and upheld the alternative award in favour of the sellers. The buyers appealed, and submitted that the award of the Board of Appeal should be restored. They did not seek to uphold the alternative award for damages against the sellers. The buyers succeeded. The court held that the buyers were not in breach, and distinguished *Brandt v. Morris* (1). The sellers appeal to this House. Before the Court of Appeal, as before your Lordships, the sellers must fail unless they establish a breach of contract by the buyers.

It seems to me impossible to maintain that, in the circumstances of the present case, it was the duty of the buyers to apply for a licence. They were precluded from doing so, as has been stated. If it is suggested that they had a duty to cause the Portuguese suppliers to apply, they could not do this unless they were informed of their name and requested to approach them. They were never so requested, and the sellers took steps to prevent the suppliers' name becoming known to them. It may be said that the question remains whether, under the contract, the buyers undertook that a licence would be granted, although it was not for them to apply. There are no words in the contract from which, as a matter of construction, such an obligation could be inferred. To suggest that such an obligation should be implied seems to me, on very familiar principles, impossible.

McNAIR, J., relied on the decision in *Brandt v. Morris* (1), by which, of course, he was bound. In *Brandt v. Morris* (1) the sale was f.o.b. Manchester. The prohibition of export except under licence was subsequent to the contract. Buyers and sellers both carried on business in Manchester. Either could apply for a licence. The facts which it was necessary to state when a licence had to be applied for were known to the buyers and not to the sellers (per VISCOUNT READING, C.J., [1917] 2 K.B. at p. 795). The buyers were suing the sellers for non-delivery. There were other issues, but the observations relevant to this point arose from a finding by the trial judge that the sellers who, over a certain period, had, it was said, taken on themselves the obligation of obtaining a licence, did not make sufficient applications for one and were, therefore, liable in damages. The Court of Appeal held that it was *prima facie* for the buyers and not the sellers to apply, and that the sellers had not taken the obligation on themselves. The buyers could not, therefore, get damages for any lack of diligence by the sellers. There was no counterclaim, and the court did not decide that the buyers would have been liable in damages if, having applied, a licence had been refused. The decision does not, therefore, assist the sellers.

The sellers seek comfort from certain observations of SCRUTTON, L.J. These observations must be read in the context of the facts. In dealing with this issue, SCRUTTON, L.J., said (*ibid.*, at p. 798):

I "In this case it becomes necessary to go further and to decide whether in this f.o.b. contract the obligation to obtain a licence, in case there should after the making of the contract be a prohibition against export, lies upon the sellers or the buyers. In my opinion it lies upon the buyers. The buyers must provide an effective ship, that is to say, a ship which can legally carry the goods. When the buyers have done that the sellers have to put the goods on board the ship. If that is so, the obtaining of a licence to export is the buyers' concern. It is their concern to have the ship sent

out of the country after the goods have been put on board, and the fact that under s. 8 of the Customs and Inland Revenue Act, 1879, as amended by s. 1 of the Customs (Exportation Prohibition) Act, 1914, a prohibition against export includes a prohibition against bringing the goods on to any quay or other place to be shipped for exportation does not cast the duty of obtaining the licence on the sellers. Bringing the goods on to the quay is merely subsidiary to the export which is the gist of the licence. In my view, therefore, in a contract of this kind it is for the buyer to get the licence. It is further said that, if the duty *prima facie* was on the buyers to get the licence, in this case the correspondence shows that the sellers took upon themselves the burden of getting it. Having carefully considered the correspondence I have come to the conclusion that there is nothing in it from which I can say that legally any such burden is placed on the sellers."

The observations, if general, must be confined to cases where both parties are within the jurisdiction of the licensing authority. I do not say the conclusion is necessarily different if they are not, but different considerations arise. Even so, I think this is an area in which it is impossible to lay down general rules. There might be a licence system based not on destination but on the proportion of a manufacturer's product to be sent out of the country. In such a case, the facts necessary to be stated would be known to the producer and not to the buyer. It would seem obvious that, in such a case, it would be for the seller to apply. There may well be cases in which each party must be ready and willing to co-operate. If, in the present case, the sellers had written to the buyers, told them of the licensing scheme, told them the suppliers' name and asked them to give the name of the destination and the ship to the suppliers, there might well have been an obligation on the buyers to do these things. The sellers invited your Lordships to lay down some general rule. There can be no general rule.

In *McMaster & Co. v. Cox, McEuen & Co.* (3) (1921 S.C. (H.L.) 24), the sale was of jute f.o.b. Dundee, and the prohibition of export subject to licence was subsequent to the contract. The buyers wished to export the goods, applied for a licence and were refused. They purported to cancel the contract, and were held by this House liable in damages for refusing to accept the goods. The buyers argued unsuccessfully that the terms of the contract or the surrounding circumstances indicated that the goods were bought for export. They failed. Jute might be sold f.o.b. Dundee if the jute was intended for coastwise traffic, and this was, presumably, a normal way of transporting jute to other parts of the country. The contract was, therefore, treated as one to sell goods in Scotland. Whether the buyer was precluded from disposing of them in a particular way did not, on that view, bring the contract to an end. That decision has no application to the point which I have been considering. Here, the sellers could only buy from the suppliers for export and knew at the time of the contract that the goods were to go to Eastern Germany.

I turn to the alternative claim that the buyers were under a contractual duty, when a licence for Rostock was refused, to nominate another port. The principle on which the sellers seek to rely in this submission was clearly stated by BOWEN, L.J., in *Anderson v. Commercial Union Assurance Co.* (4) (1885) (55 L.J.Q.B. 146 at p. 150):

"It is clear law that if one of two things which had been contracted for subsequently becomes impossible, it becomes a question of construction whether, according to the true intention of the document, the obligor is bound to perform the alternative or is discharged altogether."

The sellers sought to derive the principle from *Waugh v. Morris* (5) (1873) (L.R. 8 Q.B. 202), and *The Teutonia* (6) (1872) (L.R. 4 P.C. 171). It is unnecessary to consider the complicated facts of those cases, and whether the buyers were

A right in submitting that they do not illustrate the principle, as I accept the principle as laid down in the passage cited.

It is clear that, under the contract in the present case, the buyers are not restricted as to destination. It is submitted, therefore, that this should be treated as an obligation to nominate port A or port B, and so on. If one port becomes impossible by the law of the place of performance, then another must be nominated or there is a breach of contract. There is little authority on the application of this principle. It seems clear to me that it cannot possibly be invoked as against the buyers on May 29. The sellers had known of Eastern Germany as the proposed destination from the date of the contract. They had known of Rostock from May 4. On May 27 the ship chartered for Rostock had reached Lisbon ready to load, and only two days of the contractual period for shipment remained. Assuming the principle might apply at an earlier stage when, for example, a buyer had incurred no expense or obligations in the mode of performance which becomes impossible, it cannot apply in the present case.

As I stated earlier, the sellers can only succeed in this appeal by establishing a breach of contract by the buyers. The two grounds on which they sought to do so fail, and the appeal fails. It is, therefore, unnecessary to decide what would be the position if, in a contract in these or similar terms, the impossibility of getting goods f.a.s. for a particular destination had been discovered at a much earlier stage. It is also unnecessary to decide other points which were referred to in argument. Had the sellers undertaken an absolute obligation to get a licence for any destination? Was their obligation only to take reasonable steps? Apart from the general objection to dealing with points which it is unnecessary to decide, there is, I think, a special difficulty arising from the absence of certain findings. In what one may call prohibition licence cases, the knowledge or ignorance of either or both parties may well be a relevant consideration. The prohibition here arises under foreign law, and there are no express findings though, no doubt, inferences might be drawn if necessary.

For the reasons which I have given, I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Thomas Cooper & Co.* (for the sellers); *Crawley & de Reya* (for the buyers).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

THOMPSON-SCHWAB AND ANOTHER v. COSTAKI AND ANOTHER.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Parker, L.J.J.), February 20, 21, 1956.]

Nuisance—Prostitution—User of adjoining premises for prostitution.

Injunction—Interlocutory—Nuisance—Use of adjoining premises for prostitution—Form of order.

Each of the plaintiffs occupied a dwelling-house as his residence together with his family in a good class residential street in London. In the same street a house (adjoining that of the first plaintiff and near to that of the second plaintiff) was used by the defendants for the purposes of prostitution, their practice being to solicit men in nearby streets and to bring the men to the house. The plaintiffs brought an action to restrain the defendants from using the house for the purposes of prostitution, and they obtained an interlocutory injunction restraining the defendants "until after judgment in this action or until further order whether themselves or by their servants or agents or any of them or otherwise howsoever from using or causing or permitting to be used [the house] for the purposes of prostitution". The defendants appealed.

Held: the plaintiffs had shown a sufficient *prima facie* case for an interlocutory injunction in that the activities of the defendants constituted a sensible interference with the comfortable and convenient enjoyment of the plaintiffs' residences, having regard to the usages of civilised society and to the character of the neighbourhood.

Dictum of LORD WRIGHT in *Sedleigh-Denfield v. O'Callaghan* ([1940] 3 All E.R. at p. 364) applied.

Observations on the usual form of an interlocutory injunction.

Appeal dismissed.

[As to nuisance causing injury to the comfort of a neighbouring owner, see 24 HALSBURY'S LAWS (2nd Edn.) 50, 54, paras. 87, 91; and for cases on the subject, see 36 DIGEST (Repl.) 300-302, 436-473.]

Cases referred to:

- (1) *Sedleigh-Denfield v. O'Callaghan*, [1940] 3 All E.R. 349; [1940] A.C. 880; 164 L.T. 72; sub nom. *Sedleigh-Denfield v. St. Joseph's Society for Foreign Missions*, 109 L.J.K.B. 893; 36 Digest (Repl.) 316, 629.
- (2) *Lyons (J.) & Sons v. Wilkins*, [1899] 1 Ch. 255; 68 L.J.Ch. 146; 79 L.T. 709; 63 J.P. 339; 36 Digest (Repl.) 271, 238.

Appeal.

Appeal by the defendants from an order of WYNN-PARRY, J., made on Dec. 13, 1955, restraining the defendants until after judgment in the action or further order from using or causing or permitting to be used the premises at No. 12, Chesterfield Street, W.1, in the City of Westminster for the purposes of prostitution.

I. J. Lindner, Q.C., and *B. B. Stenham* for the defendants.

Charles Russell, Q.C., and *Maurice Berkeley* for the plaintiffs.

LORD EVERSLED, M.R.: The question raised by this appeal is a matter of some public interest, and, I do not doubt, some public importance too. The two plaintiffs are in occupation of houses which are their residences respectively in Chesterfield Street in the West End of London. Their complaint arises out of the fact that in the autumn of 1955 another of the houses in Chesterfield Street began to be used (and up to the date of the writ continued to be used) for the purposes of prostitution, a phrase which I shall have somewhat to explain and expand presently. I can take as sufficient for my judgment the circumstances as they affect the first plaintiff, Mr. Thompson-Schwab, whose house No. 13

A Chesterfield Street is actually next door to the house about which the complaints are made, viz., No. 12.

The first plaintiff states in his affidavit that he lives there with his family, which includes one young son, and that he employs there for the purposes of his domestic affairs three young girls. He says that until the events of which he complains, Chesterfield Street, though it is not far distant from other streets which have a more unsavoury reputation, has remained a good class residential street not affected by the activities of common prostitutes; and he says, therefore, that the activities of which he complains, and which concern the use of No. 12 Chesterfield Street, seriously depreciate the value of his own house as a residence (as is proved, indeed, in evidence), and seriously interfere with him in the comfortable and convenient enjoyment of his house as a residence. His own evidence and that of his co-plaintiff is supported by the evidence of three inquiry agents who made observations at various dates in October and November, 1955. The substance of their evidence is that the two defendants, during the period which I have mentioned, were making use of No. 12 Chesterfield Street as a resort while carrying on their practices as prostitutes, i.e., they were leaving those premises, walking for the purpose of solicitation towards Curzon Street, returning with men whom they had solicited, and then in turn the men left and the women again after them. The kind of activity needs, I think, no further exposition to anyone who is at all acquainted with the ways of the world.

D The evidence on the defendants' side I shall have to mention later, but in all the circumstances WYNN-PARRY, J., on a motion for an interlocutory injunction, granted relief to the plaintiffs in this form. He ordered:

E "that the defendants be restrained until after judgment in this action or until further order whether themselves or by their servants or agents or any of them or otherwise howsoever from using or causing or permitting to be used the premises at No. 12 Chesterfield Street, W.1, in the City of Westminster for the purposes of prostitution",

F and he ordered the defendants forthwith to pay the costs of the motion. It is against that order that the defendants have appealed, and their counsel put the first plank in their case boldly thus: that the law of nuisance, as it has been developed from the ancient assize, has never comprehended activities of this kind, which, though possibly shocking to the susceptibilities of ordinary people, does not in any material, that is physical, way interfere with the land of the plaintiffs or their use of it. That such is their case is perhaps made plainer by the circumstance that the defence which they have, as we were told, put in makes it clear that according to their submission they are free (that is, free in the sense of not infringing the civil rights of any other person) to use these premises for the purposes of prostitution in any way they like. That certainly seems a bold plea; but counsel for the defendants pointed out with truth that no case has come before the courts in which this kind of activity has been held to constitute a common law nuisance.

H I have said that the present appeal relates to an interlocutory order. I do not think that it is necessary that I should attempt any exposition of the wrong known to us as nuisance. For the purposes of this motion I am content to take as correct (as did WYNN-PARRY, J.) the passage which I find in CLERK & LINDSELL ON TORTS (11th Edn.), at p. 561, para. 970:

I "A private nuisance may be and usually is caused by a person doing on his own land something which he is lawfully entitled to do. His conduct only becomes a nuisance when the consequences of his acts are not confined to his own land but extend to the land of his neighbour by . . . (3) unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land."

The forms which activities constituting actionable nuisance may take are

exceedingly varied, and there is the highest authority for saying that they are not capable of precise or close definition. If the principle is rightly stated in the passage which I have read, then it must depend on the facts of each particular case whether the conditions, which I have stated as required to constitute a nuisance, are satisfied; and in considering whether they are satisfied or not the court must apply to the matter the usages of civilised society as they may be at the relevant date. A

In *Sedleigh-Denfield v. O'Callaghan* (1) ([1940] 3 All E.R. 349) LORD WRIGHT said (*ibid.*, at p. 364): B

"It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or, more correctly, in a particular society. The forms which nuisance may take are protean." C

It is true that so far as the evidence in this case goes there is nothing about the activities of the two defendants which is shown to be unlawful in the sense of being illegal or criminal; but it does not follow at all that their activities should therefore be regarded as free from the risk or possibility that they cause a nuisance, in the proper sense of that term, to a neighbour merely because they do not impinge on the senses—for example, the nose or the ear—as would the emanation of smells or fumes or noises. The test which I adopt for the purposes of this appeal is that which I have stated, viz., whether what is being done interferes with the plaintiff in the comfortable and convenient enjoyment of his land, regard being had, to borrow LORD WRIGHT's language, to the usages in this matter of civilised society, and regard being also had to the character, as proved, of the neighbourhood. D E

The case made for the plaintiffs shows to my mind at least a sufficient *prima facie* case to this effect, that the activities being conducted at No. 12 Chesterfield Street are not only open, but they are notorious and such as force themselves on the sense of sight at least of the residents in No. 13. The perambulations of the prostitutes and of their customers is something which is obvious, which is blatant, and which as I think the first plaintiff has shown *prima facie* to constitute not a mere hurt of his sensibilities as a fastidious man, but so as to constitute a sensible interference with the comfortable and convenient enjoyment of his residence where live with him his wife, his son and his servants. It appears to me, therefore, that for the purposes with which we are concerned, viz., the protection of the plaintiffs' rights pending a trial, there was ample justification for the judge, using his discretion, to grant an injunction. The exact extent and character of the alleged nuisance will be judged when oral evidence is given, and it will then no doubt be possible to form a closer view of the interference and inconvenience than appears from the written word in an affidavit. F G

Having said so much, I must turn now to see what is said on the other side, because I must pass also to the secondary matter which counsel for the defendants argued, viz., the form of the relief granted. The first defendant has put in no evidence whatever, and it is plain from the manner in which her case has been conducted, let alone her defence, that she in no sense refutes the allegations made about her. It is said that her proved use of the premises for the purposes of prostitution amounts to a very few isolated instances. I do not agree. The incidents are no doubt few in number, but I do not think they are isolated. She does not state, nor do we know, what interest (if any) either defendant has in the premises No. 12 Chesterfield Street. It would, of course, be a relevant circumstance (though I am not pursuing this matter) if they had some proprietary interest in the premises. The second defendant, Caroline Sullivan, on the other hand, states in an affidavit, which again in no way refutes the much more detailed allegations about her activities, that shortly before the issue of the writ (but plainly, I observe, when she knew that proceedings were imminent) she ceased to resort to No. 12 Chesterfield Street for the purposes of prostitution, and H I

A she says in that affidavit that it was not her intention to resort there again. An undertaking was offered at some stage in the court below on her part, but it has not been renewed here; and having regard to the admitted facts about her activities right up to a day or two before the issue of the writ, I can see no good reason why the relief which the learned judge thought it right to grant should not also be granted against her.

B It is obvious, having regard to the proximity of other streets with what I have called a less savoury reputation, that if this kind of use of houses is allowed to creep into Chesterfield Street, the whole character of the street might very soon and very seriously change for the worse. That is a circumstance which it is proper to bear in mind in considering whether, pending the trial, an injunction should be granted to protect the plaintiffs in their use of their own residences.

C The question remains, however, whether it is right that the form of the injunction should be of the absolute and unqualified character which I have read? The phrase "for the purposes of prostitution" is one that might be open to more than one possible meaning. It might be said to include, or it might be argued that it did not include, the case where a woman lived in a house in the position of a kept woman, not indulging in promiscuous activities, but living there in sin

D with one man. Such an activity might well not constitute a nuisance. I am indeed clear in my own mind that the extreme views which might be urged on either side could not be sustained. Even if the words "for the purposes of prostitution" have their widest possible significance, it could not be sustained that every use of a house for such purposes must constitute a nuisance. I am equally clear, however, that it is no more possible to assert that no use of premises

E for the purposes of prostitution could cause a nuisance. It may be said, perhaps, that in regard to such activity as prostitution, it would be *contra bonos mores* for the court to involve itself in any inquiry of its extent or exact character. On the other hand it has not been the practice of the Chancery Division, in granting interlocutory relief, to grant it in the extreme, absolute and unqualified form which we have here; and on the whole, therefore, it is better that the usual practice should be maintained, and that the form of injunction should be qualified in the more usual fashion by adding at the end

"in the manner complained of by the plaintiffs in this action or otherwise so as to cause a nuisance to the plaintiffs or either of them."

G I make that suggested qualification so as to be in accord with normal practice; but I also make it clear that for the purposes of this motion the difference is one of form rather than substance, for the words that I have used will make it quite plain that the continuation by either of these women of the activities which are described in the evidence would constitute a breach of the injunction. The question of the proper form of any injunction granted at the trial can then be further considered in light of the fact finally proved.

H There remains also the question of costs. It is again, in my experience, unusual to provide (as this order provides) that the defendants should pay forthwith on taxation the costs of the motion. I am not saying that such an order is not within the discretion of the judge in appropriate cases. I need not, however, pursue that aspect of it because counsel for the plaintiff is quite content (and again I dare say the point is quite academic) that the order should again be varied to conform with more usual practice, and that the order as to costs should

I read:
"That the defendants do pay to the plaintiffs their costs of the said motion in any event",

and then there will not have to be the wasteful, and I dare say futile, procedure of a separate taxation. Save for those two variations, which are really matters of form and not of substance, I think that in this case no good ground is shown why we should interfere with the steps which the learned judge thought

it right to take to protect the proper interests of the plaintiffs, and I would accordingly dismiss the appeal. A

ROMER, L.J.: I agree and have only a very few words to add. The principal submissions on which the defendants rely are, first, that no amount of user of premises for the purposes of prostitution can in itself constitute a private nuisance actionable at the instance of the occupiers of neighbouring houses. As to that I am quite satisfied that the proposition so presented is a great deal too wide; and for the reasons which **LORD EVERSHERD, M.R.**, has given I think that the contrary could really now hardly be suggested. It is, however, a question of fact in each particular case whether a nuisance has or has not been established. B

The second point on which the defendants rely is that nothing can constitute a private nuisance at law unless it affects the reasonable enjoyment of other premises in a physical way. This is only an interlocutory application, and at the trial no doubt that point will be taken again and may be argued at greater length, but my present impression is that it is unsound. It appears to be an unwarrantable gloss on the law on the subject as formulated in the text-books, and, what is perhaps more important, it appears to be inconsistent with the judgments of this court in *J. Lyons & Sons v. Wilkins* (2) ([1899] 1 Ch. 255) which was the picketing case. Consequently I am not prepared to accept either of the principal submissions on which the defendants are founding their case on this appeal. C D

The question then whether the plaintiffs have made out a case for the interference of this court by injunction is, as I have indicated, one of fact; and although the affidavit evidence which the plaintiffs have put in is not of a very elaborate description (and will no doubt receive further attention and be given in more detail at the trial) there is I think ample to lead to the conclusion that what these defendants have been doing in this house constitutes an actionable interference with the plaintiffs in the reasonable and ordinary enjoyment of their houses. As **LORD EVERSHERD, M.R.**, said, one of them at all events—indeed I think both of them—have young sons living there and their wives, and one of them has three young servants. One can well imagine the effect of what is going on in the house almost next door in one case and exactly next door in the other is likely to have on the minds of those young people. One can imagine also the feelings of visitors who come to the houses, or are invited to the houses, and all sorts of other considerations inevitably arise from the user to which the defendants have openly been putting the house to which they have resorted. I have no doubt that **WYNN-PARRY, J.**, was quite right in giving the relief for which the plaintiffs asked, although I agree with **LORD EVERSHERD, M.R.**, that the actual form of the order went too far, and should be modified in the manner which he has suggested. Subject to that, I would dismiss the appeal. E F G

PARKER, L.J.: I entirely agree with what my Lords have said, and I do not think there is anything which I can usefully add.

Appeal dismissed. Leave to appeal to the House of Lords refused. H

Solicitors: *Beach & Beach* (for the defendants); *Reynolds, Gorst & Porter* (for the plaintiffs).

[Reported by **F. GUTTMAN, Esq.**, Barrister-at-Law.]

A

MARCUK v. MARCUK.

[COURT OF APPEAL (Singleton, Hodson and Romer, L.JJ.), February 2, 3, 6, March 5, 1956.]

B

Justices—Husband and wife—Maintenance order—Discharge—Adultery—Condonation—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 7, as amended by Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 & 16 Geo. 5 c. 51), s. 2 (1).

C

On Sept. 8, 1954, a justices' order for maintenance was made against the husband on the wife's application under the Summary Jurisdiction (Married Women) Act, 1895. In June, 1955, on the application of the husband, the justices discharged the order on the ground of the wife's adultery on May 8, 1955. The order of June, 1955, was discharged by the Divisional Court on the ground that the husband had on May 8, 1955, condoned the wife's adultery. The husband having appealed, the wife's adultery and condonation of it by the husband were admitted by both parties. On the question whether the provision in s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, that "if any married woman upon whose application an order shall have been made . . . shall commit an act of adultery, such order shall upon proof thereof be discharged" applied where the act of adultery was condoned, and therefore was an act on which the husband would not be entitled to rely in other proceedings as constituting a matrimonial offence,

D

E

Held (HODSON, L.J., dissenting): on the true construction of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, the husband was entitled, adultery by the wife being admitted, to have the maintenance order made against him under the Act discharged, even though the adultery had been condoned.

Dicta of LORD MERRIMAN, P., and KARMINSKI, J., in *Abson v. Abson* ([1952] 1 All E.R. at pp. 371, letter H, and 373, letter A) applied.

F

Decision of the DIVISIONAL COURT ([1955] 3 All E.R. 758) reversed.

G

[**Editorial Note.** Where, in consequence of the interpretation of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, adopted in the present case, a justices' maintenance order is discharged by reason of the wife's adultery notwithstanding that her adultery has been condoned, it will still be open to her to apply afresh for an order for maintenance (see p. 661, letter F, and p. 669, letter I, post).

As to discharge of orders made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on the ground of adultery by the wife, see 12 HALSBURY'S LAWS (3rd Edn.) 490, para. 1089, note (h); and for cases on the subject, see 27 DIGEST (Repl.) 724, 6922-6924, and 3rd Digest Supp.

H

For the Summary Jurisdiction (Married Women) Act, 1895, s. 6, s. 7, see 11 HALSBURY'S STATUTES (2nd Edn.) 852.]

Cases referred to:

I

- (1) *Ruther v. Ruther*, [1903] 2 K.B. 270; 72 L.J.K.B. 826; 67 J.P. 359; 27 Digest (Repl.) 724, 6922.
- (2) *Abson v. Abson*, [1952] 1 All E.R. 370; [1952] P. 55; 116 J.P. 92; 3rd Digest Supp.
- (3) *Leavis v. Leavis*, [1921] P. 299; 90 L.J.P. 302; 125 L.T. 28; 27 Digest (Repl.) 675, 6438.
- (4) *Read v. Read*, [1952] P. 119; 3rd Digest Supp.
- (5) *Colquhoun v. Brooks*, (1888), 21 Q.B.D. 52; 57 L.J.Q.B. 439; 59 L.T. 661; 52 J.P. 645; *on appeal* (1889), 14 App. Cas. 493; 17 Digest (Repl.) 305, 1121.
- (6) *Wilson v. Glossop*, (1888), 20 Q.B.D. 354; 57 L.J.Q.B. 161; 58 L.T. 707; 52 J.P. 246; 27 Digest (Repl.) 193, 1527.

- (7) *Turton v. Turton*, (1830), 3 Hag. Ecc. 338; 162 E.R. 1178; 27 Digest (Repl.) 312, 2609. A
- (8) *Keats v. Keats & Montezuma*, (1859), 1 Sw. & Tr. 334; 28 L.J.P. & M. 57; 32 L.T.O.S. 321; 164 E.R. 754; 27 Digest (Repl.) 395, 3260.
- (9) *Cooper v. Lloyd*, (1859), 6 C.B.N.S. 519; 33 L.T.O.S. 149; 141 E.R. 559; 27 Digest (Repl.) 194, 1530.
- (10) *Beeby v. Beeby*, (1799), 1 Hag. Ecc. 789; 162 E.R. 755; 27 Digest (Repl.) B 399, 3280.
- (11) *Dent v. Dent*, (1865), 4 Sw. & Tr. 105; 34 L.J.P.M. & A. 118; 13 L.T. 252; 164 E.R. 1455; 27 Digest (Repl.) 399, 3283.
- (12) *Statham v. Statham*, [1929] P. 131; 98 L.J.P. 113; 140 L.T. 292; 27 Digest (Repl.) 294, 2394.
- (13) *Curtis v. Curtis*, (1859), 4 Sw. & Tr. 234; 27 Digest (Repl.) 543, 4908. C
- (14) *R. v. Watford (Inhabitants)*, (1846), 9 Q.B. 626; 16 L.J.M.C. 1; 8 L.T.O.S. 136; 11 J.P. 39; 115 E.R. 1413; 37 Digest 247, 414.
- (15) *Young & Co. v. Royal Leamington Spa Corpn.*, (1883), 8 App. Cas. 517; 52 L.J.Q.B. 713; 49 L.T. 1; 47 J.P. 660; 13 Digest 384, 1126.
- (16) *Wankie Colliery Co. v. Inland Revenue Comrs.*, [1921] 3 K.B. 344; 90 L.J.K.B. 1051; 125 L.T. 595; *on appeal*, [1922] 2 A.C. 51; 42 Digest D 630, 327.

Appeal.

The husband appealed from an order of the Divisional Court of the Probate, Divorce and Admiralty Division, dated Nov. 16, 1955, and reported [1955] 3 All E.R. 758, whereby the court allowed the wife's appeal from an order of the Paignton justices revoking an order for the maintenance of herself and the infant child of the marriage.

The facts appear in the judgment of SINGLETON, L.J.

P. Goodenday for the husband.

King Anningson for the wife.

Cur. adv. vult.

Mar. 5. The following judgments were read.

SINGLETON, L.J.: Wasyl Marczuk and Constance Marczuk were married on Jan. 25, 1950. They parted in 1954 and on Sept. 8, 1954, the justices for the petty sessional division of Paignton made an order in favour of the wife under the Summary Jurisdiction (Married Women) Act, 1895, by which the husband was ordered to pay £3 a week for her maintenance and £1 a week for the maintenance of the child of the marriage. On May 12, 1955, he was £42 in arrears and a summons was issued on her complaint that he had disobeyed the order. On May 28 the husband laid information that his wife had committed adultery on May 8 and on divers dates thereafter, and submitting that the order of Sept. 8, 1954, should be revoked or varied. On June 29, 1955, the justices discharged the order of Sept. 8, 1954 (except as to the £42 arrears) on the ground of adultery by the wife on May 8, 1955. On July 16, 1955, notice of appeal to the Divisional Court of the Probate, Divorce and Admiralty Division was given by the wife. The grounds of appeal were solely directed to the question whether adultery had been proved. On Nov. 16, 1955, the appeal, which was heard by LORD MERRIMAN, P., and BARNARD, J., was allowed, for reasons to which I shall refer in a moment, and the order of revocation was set aside. Leave to appeal was given. On Dec. 21, 1955, notice of appeal to this court was given.

The evidence of adultery by the wife was not strong, as is shown in the judgment of the Divisional Court. The court thought, however, that there was sufficient evidence on which the justices could find as they did. The evidence on which they acted was that of the husband, who said that on the same night on which he alleged that adultery had taken place he had gone to bed with his

A wife, on which a question as to condonation arose. The position appears from a passage of the judgment of the Divisional Court ([1955] 3 All E.R. at p. 763):

“A more important point, perhaps, is that the significance of the fact that sexual intercourse between husband and wife took place on May 8 appears to have escaped the attention of the justices, not only as to condonation but also in relation to the credibility of the husband about the earlier events of that evening. Nevertheless, we have come to the conclusion that there was ample evidence before the justices, if they accepted it, as they did, to justify a finding of adultery on May 8. Even if the justices misdirected themselves about the onus of proof, and have not fully appreciated the evidence in the respects we have just mentioned, we do not think that we ought to interfere with their finding.

“The real difficulty begins on the assumption that the finding of adultery cannot be disturbed. Two questions arise: (i) Has the husband condoned the adultery of which he complains, and (ii) if so, what, if any, effect has such condonation on the operation of that part of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, under which this application is made? It is right that we should say at once that the question of condonation does not appear to have been raised before the justices, and arose in this court in the most casual way. When we heard at the outset that the wife was appealing against a finding that she had committed adultery since the making of the order, we naturally inquired whether divorce proceedings had already been taken or were contemplated, for, if so, we should in the ordinary course have adjourned the appeal to enable that issue to be tried by a judge with the advantage of seeing and hearing the witnesses, instead of by this court on a paper record of the evidence. We were told that there were no such proceedings, and counsel for the wife added the comment that it was unlikely that there would be, because the husband had condoned the alleged adultery. Naturally he was anxious not to weaken the wife's case that the finding of adultery was entirely unjustified by contending that the adultery had been condoned. This, of course, did not absolve this court from considering this issue. Accordingly, without prejudice to the main contention, and at the request of the court, we had the benefit, after an adjournment, of a very helpful argument from counsel on both sides on the issue of condonation and its bearing on the right of the husband to rely on the act of adultery on which his application was based.

“As to question (i), it was admitted that the evidence of the husband about the evening of May 8, read in the light of his evidence of earlier visits, means that the husband and the wife had sexual intercourse, and that she left directly afterwards. Nor is it disputed that when this occurred the husband knew all that there was to be known about the alleged act of adultery. According to the evidence already referred to, she had admitted guilty affection for the man in question, and had said that she intended to go to him if the husband did not fulfil his obligations under the order. The evidence of opportunity to indulge that affection on the evening of May 8 was provided by the husband himself, and was accepted by the court. There was, it is true, some evidence of a continuation of the association thereafter, but without any evidence from which a later act of adultery could be inferred. That being so, there is, in our opinion, no substance in the argument that as the husband's complaint of the wife's adultery alleges that it occurred on May 8 ‘and thereafter’, that is to say, up to the date of the summons, the justices may have found adultery between May 8 and the date of the summons, which, being unknown to the husband, could not have been the subject of condonation.”

No question was raised before this court on the finding that the wife had committed adultery on May 8. The evidence of the husband was accepted on

that issue. The wife had denied that she had had sexual intercourse with her husband after they parted in 1954. The Divisional Court accepted the evidence of the husband that there had been sexual intercourse between them, and, in particular, that there was on the night of May 8. On that basis it was open to the court to find that there was condonation by the husband. The Divisional Court found that there was condonation, and it appears to me that on the evidence given by the husband this court ought to accept that finding, although the question was not before, or considered by, the justices. A B

It is the second question raised in the judgment which gives rise to difficulty. In order to consider it, it is necessary to refer to the Act of 1895. It is an Act

“to amend the law relating to the summary jurisdiction of magistrates in reference to married women.”

Section 4 provides that a married woman may in any of the circumstances therein set out apply to a court of summary jurisdiction for an order under the Act. Section 5 sets out the powers of the court as to the making of an order and in regard to its provisions. Section 6 reads: C

“No orders shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery: Provided that the husband has not condoned, or connived at, or by his wilful neglect or misconduct conduced to such act of adultery.” D

Section 7 contains provisions for the alteration, variation or discharge of any such order. It ends:

“If any married woman upon whose application an order shall have been made under this Act . . . shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged.” E

Counsel on behalf of the husband submitted that an act of adultery by the wife had been proved and that on proof thereof the order of Sept. 8, 1954, must be discharged. He drew attention to the difference between the provisions of s. 6 and s. 7 and asked us to hold that no question of condonation arises under s. 7. Counsel for the wife submitted that the concluding words of s. 7 should be read as “or shall commit an act of adultery *on which the husband is entitled to rely*, such order shall upon proof thereof be discharged”. He argued that the husband was not entitled to rely on the act of adultery of the wife as he had condoned it. It was accepted by the Divisional Court that in view of the decision in *Ruther v. Ruther* (1) ([1903] 2 K.B. 270), it was not legitimate to import the words of the proviso to s. 6 into s. 7 of the Act of 1895 but the court held that the words of s. 7 must be qualified as meaning an act of adultery on which the husband is entitled to rely and that he cannot rely on an act of adultery which he has condoned. On this ground they held that the husband was not entitled to rely on adultery of the wife on May 8 which he had condoned, and the appeal of the wife was allowed. With all respect, that seems to me to be introducing into the section words which are not there, and I cannot think that it is right to do so. The result would be as though the proviso to s. 6 had to be read into s. 7, or as though the words suggested by counsel for the wife had to be read into s. 7. The foundation for the judgment of the Divisional Court appears to be that by the ecclesiastical law and by the statute law relating to matrimonial causes a husband cannot rely on adultery which he has condoned. F G H I

It appears to me that that which we have to consider in the present case is the wording of the statute and in particular the wording of s. 7 as contrasted with s. 6. Adultery which had been condoned does not prevent a married woman obtaining an order under the Act but it may well be that it was the policy of the legislature to encourage chastity on the part of one who had obtained an order and to say that the order should be discharged on proof of adultery—whether the adultery had been condoned or not. There is nothing to prevent a woman

- A obtaining another order if her adultery has been condoned, and if she can prove her case. I do not see that this leads to absurdity or to undue hardship. The Act of 1895 was an amending Act. It took the place of, and revoked, s. 4 of the Matrimonial Causes Act, 1878, and the whole of the Married Women (Maintenance in case of Desertion) Act, 1886. Section 4 of the Act of 1878 gave power to a court or magistrate, if a husband was convicted of an aggravated assault
- B on his wife, to order that the wife should be no longer bound to cohabit with her husband, and to order payment of a weekly sum to her; subject to a proviso that no order for the payment of money by the husband should be made in favour of a wife who should be proved to have committed adultery, unless such adultery had been condoned, and that any order for payment of money *might* be discharged by the court or magistrate by whom such order was made on
- C proof that the wife had since the making thereof been guilty of adultery. The Act of 1886 enabled two justices to make an order in favour of a wife whose husband had wilfully refused or neglected to maintain her or had deserted her, with a proviso in s. 1 (2)

“that no order for payment of any such sum by the husband shall be made in favour of a wife who shall be proved to have committed adultery, unless such adultery has been condoned, and that any order for payment of any such sum *may* be discharged . . . upon proof that the wife has since the making thereof been guilty of adultery.”

- D
- E The word “may” which appeared in the proviso to s. 4 of the Act of 1878 and in the proviso to s. 1 (2) of the Act of 1886 becomes “shall” in s. 7 of the Act of 1895. It is notice in the strongest terms to a woman who obtains an order in her favour that she must behave herself. If she commits an act of adultery the “order shall upon proof thereof be discharged”. The question is whether she has committed an act of adultery, not whether she has done something which in other proceedings would be held to be a matrimonial offence. It is of first importance to notice that condonation is not mentioned in s. 7 while it is in s. 6.
- F The same principle appears from the two earlier Acts.

- G In my opinion the word “adultery” in s. 7 of the Act of 1895 should be read in its ordinary meaning: there is no reason to introduce anything into the section: the introduction of the words suggested would mean shutting one’s eyes to the difference between s. 6 and s. 7. This does not mean that a wife is deprived of any protection. She may apply for another order, and, if she can establish a case, her adultery which has been condoned will not be a bar. The effect of s. 7 is that her right to hold an order goes on proof of adultery. I see no answer to this on the wording of s. 7 (as contrasted with s. 6) unless it can be said that there is something in the nature of an estoppel arising against the husband, and nothing of that kind has been suggested. Again, s. 7 was amended by s. 2 (1) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925,
- H by the addition of the words

“Provided that the court may, if the court think fit—(a) refuse to discharge the order if, in the opinion of the court, such act of adultery as aforesaid was condoned to by the failure of the husband to make such payments as in the opinion of the court he was able to make under the order . . .”

- I No doubt the amendment was to remedy the position shown by the decision in *Ruther v. Ruther* (1). In that particular case (I take the facts from the headnote) ([1903] 2 K.B. 270):

“Where an order for a weekly payment by a husband to his wife is made under the Summary Jurisdiction (Married Women) Act, 1895, and the wife subsequently commits adultery, the husband is entitled under s. 7 of the Act, on proof thereof before a court of summary jurisdiction, to have the order discharged in spite of a finding by the court that he has been guilty of

conduct conducing to the adultery; and he is not liable to make any further payments to his wife, although the order may not have been in terms discharged by the adjudication as to the wife's adultery. The decision of a court of summary jurisdiction upon an information or complaint by a married woman alleging that payments due to her from her husband under an order made under the Act of 1895 are in arrear, is not a matter in respect of which an appeal lies under s. 11 of that Act to the Probate, Divorce, and Admiralty Division; but the court has power to state a case . . . "

which was done in that particular case. LORD ALVERSTONE, C.J., said (*ibid.*, at p. 274):

"With regard to the substantial question raised by the case, it appears that in 1898 an order was made under s. 4 of the Act of 1895 for the payment by the appellant to the respondent of a weekly sum of 10s. In 1901 the appellant had got in arrears with his payments, and a sum of £55 was owing by him. He ascertained that the respondent had committed an act of adultery, and he applied to the justices that the order might be discharged in accordance with s. 7 of the Act. The justices found that the adultery was proved, and in my opinion it thereupon became their duty under s. 7 to discharge the order. What they did was to make an indorsement upon the order in the terms set out in the case. I do not know what was intended to be the effect of that indorsement. It may be that the reason of it was that the justices desired to make it clear that the wife's remedy was to be kept alive as to arrears of payments which had accrued due before that date. But however that may be, I am of opinion that after the adultery had been proved on Dec. 4, 1901, the order ought to have been discharged, and from that date it ceased to be an effective order."

WILLS, J., said (*ibid.*, at p. 276):

"As to the main question, it is clear that there is no power to order committal for non-payment of the weekly sum after adultery on the part of the wife has been proved. I do not mean to say that the respondent was not entitled to recover arrears in respect of the period between the date when the adultery was committed and the date when the order ought to have been discharged . . . "

CHANNELL, J., said (*ibid.*):

"I agree. The only point of substance which has been raised on behalf of the respondent is whether conduct by a husband which has conduced to his wife's adultery has the effect of preventing the husband from obtaining the discharge of an order in the same way as such conduct before an order prevents the husband from relying on the adultery as a reason why an order should not be made. In my opinion it is impossible to adopt Mr. Rowsell's construction of s. 7. The proviso in s. 6 cannot be read into s. 7. That being so, the appellant's liability to continue the payments ceased after the adultery had been proved. The other questions in the case are simply matters of form."

It appears to me that there would have been no reason for the amendment if the argument put forward on behalf of the wife is right; and there was no amendment to cover "condonation". Furthermore, on the view of the Divisional Court the proviso to s. 6 in regard to adultery condoned would seem to be unnecessary.

The case of *Abson v. Abson* (2) ([1952] 1 All E.R. 370) does not appear to have been brought to the notice of the Divisional Court. The question for decision was quite a different one, but there are passages in the judgments of LORD MERRIMAN, P., and of KARMINSKI, J., which show the view they then took,

A although I do not suppose that the point was argued. The President said (*ibid.*, at p. 371):

“ If the facts do convict the wife of adultery within the meaning of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, there is no more to be said about the matter, because the obligation to set aside the order is absolute.”

B And again, the President added ([1952] P. at p. 62):

“ It is no use saying that one is not perturbed by the point that a proved act of sexual intercourse by a divorced wife with a married man need not necessarily be held to be adultery within the meaning of the Summary Jurisdiction Acts when those Acts demand that if it is adultery there is no option but to discharge the order on that ground.”

C KARMINSKI, J., said ([1952] 1 All E.R. at p. 373):

D “ In a case of this kind the High Court is the suitable tribunal to investigate a claim by the wife for maintenance. The fact that a wife has committed adultery is not an absolute bar to the court awarding her maintenance on the dissolution of her marriage. The Matrimonial Causes Act, 1950, s. 19 (2), lays down what facts the court is to take into consideration regarding that matter, and among them is the conduct of the parties. In many cases the wife asks for maintenance although she herself has committed adultery during the marriage and for that reason has had to seek the exercise of the discretion of the court. That factor has to be taken into consideration. E Similarly, it has been held that the conduct of the parties after decree must also be considered, and there is no doubt that adultery by a petitioner wife after the dissolution of her marriage is also a matter for consideration. The High Court, therefore, has the power and the duty to consider the conduct of the parties, whereas, under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, once the wife has committed adultery, her order for maintenance must be discharged.”

F The decision of the Divisional Court in the present case is in conflict with the views then expressed as, indeed, it is with the decision in *Ruther v. Ruther* (1). In my opinion, the appeal should be allowed and the order of the justices should be restored. I regret this for a number of reasons into which I need not go. The husband is in default. He has not paid the arrears due. It does not appear G likely that the wife will ever receive them. I should have been glad if we could have refused to hear the appeal on the basis of the decision in *Leavis v. Leavis* (3) ([1921] P. 299), but leave to appeal had been given and the parties had undertaken responsibilities under the Legal Aid and Advice Act, 1949.

H **HODSON, L.J.:** This is an appeal by a husband from an order of the Divisional Court of the Probate, Divorce and Admiralty Division, which allowed an appeal by the wife from an order of the justices of the petty sessional division of Paignton. The wife had on Sept. 8, 1954, obtained from the justices an order for maintenance under the provisions of the Summary Jurisdiction (Married Women) Act, 1895. On June 29, 1955, the justices had before them a summons for revocation of the order on the grounds (1) that there had been a resumption of cohabitation between about Nov. 8, 1954, and Mar. 21, 1955; (2) that on or about May 8, 1955, and divers dates thereafter the wife had committed adultery. I The justices had before them at the same time a summons by the wife for the enforcement of the arrears due to her under the original order. The justices did not deal with the first of the grounds of the husband's claim, but found adultery (committed on May 8, 1955) proved, and discharged the order of Sept. 8, 1954, on that ground, while reserving to the wife the arrears due before the date of the adultery. The effect of this order was to remit in favour of the husband all arrears due from the date of the adultery to the date of their decision given on

June 29, 1955. The wife appealed to the Divisional Court, who held on the first point that there had been no resumption of cohabitation, and on the second point that the finding of adultery must stand. The court, however, went on to hold that the adultery which was only found to have occurred on May 8, 1955, was condoned by the husband, who on the same day had sexual intercourse with his wife with full knowledge of the facts. They therefore discharged the order of June 29, 1955, thus leaving in force the maintenance order made the previous year. The husband has appealed to this court, where the argument has proceeded on the basis that the adultery was proved, and also that condonation of that adultery was proved. A B

Each side expressly refrained from re-opening either of these issues, so that the only remaining question was whether the Divisional Court was right as a matter of law in discharging the order of June 29, 1955, which in its turn revoked the order of Sept. 8, 1954, on proof of adultery notwithstanding that the adultery complained of had been condoned. C

The main contention of the husband is that, the wife having committed adultery, he is entitled to have the order for maintenance discharged. He relies on the plain words of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, the concluding words of which are: D

"If any married woman upon whose application an order shall have been made under this Act, or the Acts mentioned in the Schedule hereto, or either of them, shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged."

To this section a proviso was added by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2 (1), as follows: E

"Provided that the court may, if the court think fit—(a) refuse to discharge the order if, in the opinion of the court, such act of adultery as aforesaid was condoned to by the failure of the husband to make such payments as in the opinion of the court he was able to make under the order . . ."

Subject to the proviso it is contended that the duty to discharge the order is absolute, especially as when one looks at s. 6 of the Act of 1895, which enacts that no order shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery, there is this proviso: F

"Provided that the husband has not condoned, or connived at, or by his wilful neglect or misconduct condoned to such act of adultery." G

Sections 6 and 7 of the Act of 1895 are the successors of s. 1 (2) of the Married Women (Maintenance in case of Desertion) Act, 1886, which was an Act to provide for the support of deserted wives and their families. Section 1 (2) [of the Act of 1886] reads as follows: H

"Provided always, that no order for payment of any such sum by the husband shall be made in favour of a wife who shall be proved to have committed adultery, unless such adultery has been condoned, and that any order for payment of any such sum may be discharged by the justices or magistrate by whom such order was made, or other justices or magistrate sitting in their or his stead, upon proof that the wife has since the making thereof been guilty of adultery." I

This proviso follows the lines of the proviso to s. 4 of the Matrimonial Causes Act, 1878. Hence it is argued that the maxim *expressio unius exclusio alterius* applies, and there is no room for any qualification of the word "adultery" in s. 7 of the Act of 1895 other than that added by the proviso introduced in 1925. The argument is reinforced by reference to the Acts of 1878 and 1886, where

A references to condoned adultery and adultery without any qualification are contained in the same sub-section so as to emphasise the contrast.

The husband relies also on the case of *Ruther v. Ruther* (1), a decision of the King's Bench Divisional Court on the construction of s. 7 of the Act of 1895. CHANNELL, J., put the effect of the decision shortly in these words ([1903] 2 K.B. at p. 276): "The proviso in s. 6 cannot be read into s. 7." That decision
 B dealt with "conduct conducing", which is the creation of statute and not part of the common law. The justices had there decided that the husband had, by his failure to comply with the order, conduced to the wife's adultery, and their indorsement to that effect was held to be mere surplusage. It is no doubt the fact that the decision led to the enactment in 1925 of the proviso to s. 7 of the Act of 1895 which I have read and which removes the particular
 C hardship which the decision in *Ruther v. Ruther* (1) revealed. The decision in *Ruther v. Ruther* (1) was followed since the passing of the Act of 1925 by the Divisional Court of the Probate, Divorce and Admiralty Division in *Read v. Read* (4) ([1952] P. 119), a case in which the magistrates had wrongly refused an order for revocation sought on the ground of adultery where the conduct conducing found was of a kind not covered by the language of the amending Act
 D of 1925.

The question of absolute bars to relief in divorce was expressly left open, and I for my part desire to throw no doubt on the validity of the decisions of either Divisional Court. I agree that the proviso in s. 6 cannot be read into s. 7 but do not accept that this solves the question of the meaning of the word "adultery" in the latter section. The Divisional Court have reached the conclusion that the
 E word "adultery" in its context in s. 7 can only mean adultery on which the husband can rely. The husband has contended for the full rigour of the Latin maxim; he says that nothing of the existing law can be read into the section. He concedes that at common law where a husband has connived at his wife's adultery, or condoned it, he has no defence to a claim by her for necessities, and that by the ecclesiastical law and the statute law relating to divorce and matrimonial
 F causes a husband's claim for relief was and is barred by the general law. Nevertheless, he contends that even if the adultery is connived at the order must be discharged because the words of the statute are absolute and imperative. He referred to *Abson v. Abson* (2), a decision of the Divisional Court of the Probate, Divorce and Admiralty Division which contains dicta on the absolute effect of
 G the section. I am unable to accept this contention. As LOPES, L.J., said in *Colquhoun v. Brooks* (5) (1888) (21 Q.B.D. 52 at p. 65), the maxim *expressio unius exclusio alterius* is often a valuable servant but a dangerous master in the construction of statutes or documents. Sections 6 and 7 are dealing with two different matters. The former deals with a wife's right to maintenance and states the exception in case of her adultery, with the proviso which states the exception to the exception. The wife as a wrong-doer is barred from her claim
 H unless she is excused by the proviso. Section 7, on the other hand, deals with the right of the husband to be relieved from his obligation to pay maintenance under an existing order and must be construed in that light. If the argument for the husband is accepted in full, a husband can force his wife to prostitution and live on the proceeds and then obtain a revocation of the order based on the adultery of which he himself was an active instigator.

I In *Wilson v. Glossop* (6) (1888) (20 Q.B.D. 354), an action for necessities brought against a husband who had connived at his wife's adultery, LORD ESHER, M.R., said (*ibid.*, at p. 356) with reference to the contention that such a man could turn his wife out of doors and declare that he was no longer liable for her maintenance,

"Nothing would induce me to declare that such was the law except a superior authority which would bind me."

I respectfully concur in the language of LORD ESHER, M.R., and know of no

authority which binds me so to decide on the construction of the section now under consideration. It may be said that the qualification as to connivance may be admitted because otherwise a husband would be enabled to rely on his own wrong, and, therefore, his claim for relief must in such a case be rejected. The recognition of this exception is, I should have thought, necessary to avoid a monstrous result and points the way to a true construction of the proviso. It is said, however, that there is no such monstrosity in admitting a husband's claim to relief on the ground of adultery when the adultery is condoned. Nevertheless, the principle involved is not wholly dissimilar. Condonation and connivance often have to be considered together. Connivance is a kind of condonation in advance, although, as DR. LUSHINGTON said in *Turton v. Turton* (7) (1830) (3 Hag. Ecc. 338 at p. 350) while condonation may take place without implying the slightest degree of blame, yet connivance necessarily involves criminality on the part of the person who connives. He also said this (*ibid.*, at p. 351):

" . . . I apprehend these are essentially different in their nature, though either may have the same legal consequence."

If adultery is condoned it is obliterated and as if it had never been. It has been blotted out so as to restore the offending party to the same position which he or she occupied before the offence was committed: see per LORD CHELMSFORD, L.C., in *Keats v. Keats & Montezuma* (8) (1859) (1 Sw. & Tr. 334 at p. 354). The wife's right to necessities subsists: see *Cooper v. Lloyd* (9) (1859) (6 C.B.N.S. 519 at p. 524). The husband has released the injury: see *Beeby v. Beeby* (10) (1799) (1 Hag. Ecc. 789), where SIR WILLIAM SCOTT said (*ibid.*, at p. 793):

" . . . condonation is forgiveness legally releasing the injury . . . In general it is a good plea in bar; it is not fit that a man should sue for a debt which he has released . . ."

Can it then on any principle be said that the husband is entitled to relief? I cannot see that he is. An order in his favour must cause an injustice to the wife. The effect in this case is that, the order of Sept. 8, 1954, being discharged as from June 29, 1955, the justices have remitted the arrears from May 8, 1955, to June 29, 1955, although the wife was entitled to be maintained by her husband during that period, her adultery committed on that day having been condoned on the same day. It is no answer to this injustice to say that she could at once issue another summons for maintenance on the discharge of her subsisting order. Had there been no arrears due or remitted on June 29, 1955, when the order was discharged the machinery of the court would have been invoked solely in order that the husband might have his wife, whom he had forgiven, branded as an adulteress although her right to maintenance was at all material times subsisting, and if the husband continued to neglect to maintain her she would at once be entitled to a fresh order in view of the terms of the proviso to s. 6 of the Act of 1895. I should be reluctant to hold that the legislature intended such an absurd result. The word "adultery" in s. 7 cannot be construed simpliciter as voluntary sexual intercourse between a married person and a person of the opposite sex. It must be construed in the light of its context, which is that of a claim by a husband for relief from an obligation imposed on him by a court order. I cannot construe the proviso as if the word "adultery" were followed by such words as "whether or not the adultery had been condoned". I have no doubt that the right to relief on proof of adultery is barred not only by connivance but also by condonation.

It is perhaps not superfluous to add that this is not the first time in which the presence or absence of the word "condonation" in a statute has given rise to

A questions of construction. Section 30* of the Matrimonial Causes Act, 1857, provided:

“In case the court . . . shall not be satisfied that the alleged adultery has been committed or shall find that the petitioner has during the marriage been accessory to or conniving at the adultery of the other party to the marriage or has condoned the adultery complained of or that the petition is presented or prosecuted in collusion with either of the respondents then and in any of the said cases the court shall dismiss the said petition.”

B In *Dent v. Dent* (11) (1865) (4 Sw. & Tr. 105) it was argued that the words of the statute were plain and subject to no qualification; but the argument was rejected by the Judge Ordinary, SIR JAMES WILDE, who granted a decree since the adultery complained of had been condoned and had been revived by later cruelty although revival of condoned offences was not mentioned in the statute. C Another striking illustration is, I think, to be found in the treatment of sodomy as a matrimonial offence, for by s. 27* of the Act of 1857 a wife was enabled to obtain divorce on the ground of sodomy. No mention of condonation of sodomy appears in the Act, yet when the matter came to be considered by the Court of D Appeal in *Statham v. Statham* (12) ([1929] P. 131) on the construction of s. 178† of the Supreme Court of Judicature (Consolidation) Act, 1925, which then regulated the duty of the court in dealing with condonation, not only of adultery but also of cruelty, all the members of the court expressed the view that condonation was a bar to relief. GREER, L.J., said ([1929] P. at p. 144):

E “When asked to make a decree of divorce or judicial separation, the court is not confined to the issues raised by the parties, but is bound to consider any facts proved in the course of the case which disentitle the petitioner to the decree for which she asks. Section 178 of the Judicature (Consolidation) Act, 1925, provides as follows: ‘(1). On a petition for divorce it shall be the duty of the court to satisfy itself so far as it reasonably can both as to the facts alleged and also as to whether the petitioner has been F accessory to or has connived at or condoned the adultery or not, and also to inquire into any countercharge which is made against the petitioner’. It is curious that this section only speaks of the petitioner being accessory to or conniving at or condoning adultery, that is to say, the cause of divorce G mentioned in s. 176 (a), and there is nothing about connivance or condonation of the causes of divorce mentioned in the first part of sub-s. (b), which include sodomy, but it is difficult to suppose that the court is bound to grant a decree for dissolution of marriage to a wife who upon her own evidence has consented to the act of which she complains. The rules with regard to condonation and connivance as a bar to a decree for divorce were well established in the practice of the Ecclesiastical Courts before the Act of 1857: see the cases cited in RAYDEN ON DIVORCE (2nd Edn.), pp. 107-110, H and especially *Curtis v. Curtis* (13) (1859) (4 Sw. & Tr. 234). In my judgment these rules apply to cases in which the ground alleged for divorce is sodomy.”

I It would have been surprising if the decision had been otherwise, for the heinousness of the offence ought not to have any bearing on the question of condonation so as to make the offence incapable of being condoned. If the matter is looked at from the point of view of public policy it can hardly be thought that condonation of sodomy would be intentionally excluded from the purview of the statute, for the more heinous the offence the more meritorious would the forgiveness be.

The law of condonation has thus been recognised and acted on as if it had been

* The section has been repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 226 and Sch. 6.

† Repealed by the Matrimonial Causes Act, 1950, s. 34 (1) and Schedule, and replaced by s. 4 of that Act.

set out in full in the statutes dealing with matrimonial relief, although the legislature has not always thought it necessary to write out such law in full when the consequence of a matrimonial offence has had to be considered. I see no reason to make any exception to this recognition in construing the section now under consideration. I agree with the judgment of the Divisional Court, and would reject the main ground of appeal. A

The husband further contended, as a separate ground of appeal, that the order should be discharged on the ground that the parties had resumed cohabitation. I think it is sufficient to say that on the facts of this case no such ground was established, for there was no such setting up of a common home as to amount to a resumption of cohabitation. I would accordingly have dismissed the appeal. B

ROMER, L.J.: I find myself compelled in this case to a different view from that which was taken by the Divisional Court and which has commended itself to HODSON, L.J. I differ from them with natural reluctance and more especially as I feel that the construction of s. 7 of the Act of 1895 which I believe to be the true and inescapable construction leads to a result which is both unexpected and inconvenient. These considerations are not, however, relevant if the language in which Parliament has expressed its intention is unambiguous. Counsel for the wife did not invite us to incorporate by implication in s. 7, as a qualification of the act of adultery therein mentioned, the proviso which appears in s. 6; and I am fully in agreement with the decision in *Ruther v. Ruther* (1) to the effect that that proviso cannot legitimately be so incorporated. Nevertheless it appears to me that the wife's argument does in fact involve reading the greater part of the s. 6 proviso into s. 7, for her counsel contended that the relevant words in the latter section should be read as "or shall commit an act of adultery on which the husband is entitled to rely for not maintaining his wife", which would seem to be only a lengthier substitute for the words C
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"provided that the husband has not condoned, or connived at . . . such act of adultery" F

which appear in s. 6. However that may be, the question is whether a court of construction can introduce the qualification of adultery into s. 7 for which the wife contends. In my opinion, so to do would constitute an illicit departure from the field of construction into the unauthorised field of legislation.

The following considerations have led me to this view: (1) The qualifications in s. 6 of the phrase "committed an act of adultery" show that the phrase, if taken without the qualifications, was intended in that section to bear its ordinary signification, videlicet sexual intercourse by a wife with some man other than her husband. When the same phrase was repeated in s. 7 the inference surely is that it was intended to have the same signification as in s. 6 in the absence of any similar or other qualifications; and there is none. It is, in my judgment, impossible to suppose, having regard to this marked difference of treatment in two succeeding sections of the same phrase, that the omission from s. 7 of any of the qualifications which appear in s. 6 was due to oversight or was other than deliberate. (2) The attention of Parliament was directed to s. 7 in 1925. If they had then thought that the "act of adultery" therein referred to was already impliedly qualified in the way for which the wife now contends, I find it inexplicable that they should have amended it in terms of s. 2 (1) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925. The wife's explanation is that Parliament was assuming as a matter of necessary implication that the adultery referred to in s. 7 was confined to adultery uncondoned and unconnived at but that nevertheless it did not exclude adultery conducted to by the husband's misconduct; and that accordingly, whilst qualifying this latter conception in the one respect mentioned in the amendment, it was unnecessary at the same time to exclude from the section adultery which had been condoned or connived at. This seems to me to be a very difficult explanation to accept. Parliament is G
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- A assumed to know the law: compare *R. v. Watford (Inhabitants)* (14) (1846) (9 Q.B. 626, per LORD DENMAN at p. 635); and *Young & Co. v. Royal Leamington Spa Corp.* (15) (1883) (8 App. Cas. 517, per LORD BLACKBURN at p. 526). In passing the amending legislation, therefore, of 1925, the legislature was presumably aware of the decision in *Ruther v. Ruther* (1), and it has indeed been suggested that it was in order to overrule that decision that the amending
- B legislation was passed. Now, it was of the essence of the judgment of the Divisional Court in *Ruther v. Ruther* (1) that the proviso in s. 6 cannot be read into s. 7, which means, as I understand it, that no part of the proviso can be introduced, by implication, into s. 7. In the light of that decision, which, ex hypothesi, was known to Parliament in 1925, it becomes impossible to attribute to it the assumption which I have mentioned as to the meaning of "adultery" in
- C s. 7; for that assumption could not reasonably co-exist with the decision in *Ruther v. Ruther* (1). The 1925 amendment is, on the other hand, readily intelligible if Parliament was attributing the ordinary signification to the word "adultery" in s. 7 and was cutting down the generality of that signification by introducing one qualification and one alone.

- On the construction, then, of the Act of 1895 by itself, and aided further by
- D the considerations which arise from the Act of 1925, I am unable to read the word "adultery" in s. 7 of the former statute in the narrow manner for which the wife has contended; for it means, in my opinion, "adultery" according to the ordinary meaning of that term and nothing else. The relevant Act which immediately preceded the Act of 1895 was the Married Women (Maintenance in case of Desertion) Act, 1886, and s. 1 (2) of that Act contains a proviso which
- E has already been quoted in my brethren's judgments* and which, therefore, I do not repeat. It would, as it appears to me, be virtually impossible, as a question of construction, to attach by implication to "adultery" in the second part of that proviso any such qualifications as are expressly attached to the word in the earlier part; for one could scarcely find, as I think, a clearer case than is to be found in the proviso for the application of the maxim *expressio unius alterius est exclusio*. When, therefore, one finds that for the purposes now relevant s. 6 and s. 7 of the Act of 1895 are in substance (subject only to the difference to which SINGLETON, L.J., has drawn attention) the successors of s. 1 (2) of the Act of 1886, it is extremely difficult to attribute to the former a drastically different effect from that which results from the language of the latter. In my view, accordingly, the effect of the concluding words of s. 7 of the Act of 1895 is that a husband can,
- G on proof of adultery by his wife, obtain the discharge of an order which has been made against him under s. 4, even though that adultery has been condoned. It was somewhat naturally objected that if this view were right a husband who had expressly connived at his wife's adultery could equally avail himself of the relief which s. 7 affords and which, it is said, Parliament could never have intended to extend to such a husband. I realise the force of this objection. As, however,
- H the position is not very likely to arise, since it can be but seldom, I should imagine, that connivance would occur where husband and wife are living separate and apart, the objection is, perhaps, more theoretical than practical. If, however, such a position should arise it may be (I say no more) that the husband would be barred from obtaining the discharge of an order for maintenance which was in force against him under the ancient rule that no man can take advantage of his
- I own wrong.

Apart from considerations such as that to which I have just referred, the only arguments which can really be adduced against what I venture to think is the plain construction of s. 7 are founded either on hardship to the wife or on the historical background of the legislation. I am not greatly impressed by the suggested hardship; for an adulterous wife who is deprived of her maintenance under s. 7 can, if her adultery has been condoned, apply under s. 4 for a fresh

* See p. 661, letter D, ante.

order. However that may be, if the meaning and effect of legislation are reasonably clear, considerations of hardship cannot justify the court in adopting a construction which is not in accord with the language used: *Wankie Colliery Co. v. Inland Revenue Comrs.* (16) ([1921] 3 K.B. 344, per LORD STERNDALÉ, M.R., at pp. 355, 356). The historical argument, however, is more formidable, and its cogency is apparent from the judgment which HODSON, L.J., has delivered. Nevertheless, I am unable for myself to avoid the conclusion that it is on the language of the Act of 1895, as amended in 1925, that this appeal falls to be determined; and as it appears to me that that language is not fairly open to any construction other than that which I have suggested it is not permissible to depart from it, notwithstanding the forceful considerations to which HODSON, L.J., has referred. I would accordingly allow the appeal.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Lucien A. Isaacs & Maxwell Simon*, agents for *Arthur Goldberg*, Plymouth (for the husband); *Evelyn Jones & Co.*, agents for *Gowman, Easterbrook & Co.*, Paignton (for the wife).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

R. v. APPEAL COMMITTEE OF COUNTY OF LONDON QUARTER SESSIONS, *Ex parte* ROSSI.

[COURT OF APPEAL (Denning, Morris and Parker, L.JJ.), February 10, 13, 29, 1956.]

Quarter Sessions—Appeal to—Adjournment sine die—Notice of adjourned hearing sent by registered letter—Letter returned—Hearing in absence of respondent—Irregularity—Summary Jurisdiction (Appeals) Act, 1933 (23 & 24 Geo. 5 c. 38), s. 3 (1) (as amended by the Criminal Justice Act, 1948 (11 & 12 Geo. 6 c. 58), s. 83 (3) and Sch. 10, and the Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), s. 131, s. 132 (1), Sch. 5 and Sch. 6)—Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 26.

In June, 1954, a complaint made by M. that R. was the father of her bastard child was dismissed. On July 8, 1954, M. gave notice of appeal and on Aug. 6, 1954, the clerk of the peace for the County of London sent registered letters to M. and R. giving each of them notice that the hearing of the appeal had been fixed for Aug. 13, 1954. On that date both M. and R. attended quarter sessions, but R. was not present when the case was called on and he was not represented. On an application made on behalf of M. in the absence of R. the case was adjourned sine die. On Sept. 21, 1954, the clerk of the peace sent letters by registered post to M. and R. giving notice that the hearing of the appeal had been fixed for Sept. 28, 1954. The letter to R. was addressed to him at his last known address, but was never delivered to him. It was returned to the clerk of the peace marked with a note of the postman that there had been "no response". On Sept. 28, 1954, M. attended the court. The appeal was heard in R.'s absence and he was adjudged to be the father of the child and ordered to pay £1 per week for the child's maintenance. R. applied for an order of certiorari to bring up and quash the order made by quarter sessions on the ground that, although notice of the date fixed for the appeal had been sent to him by registered post pursuant to s. 3 (1)* of the Summary Jurisdiction (Appeals) Act, 1933, yet notice had not been given to him within that enactment and s. 26* of the Interpretation Act, 1889, as the letter of notice had been returned undelivered.

Held: an order of certiorari should be granted because notice had not been given to R. within s. 3 (1) of the Summary Jurisdiction (Appeals) Act,

* The terms of the enactments are printed at pp. 679, 680, and 680, 681, post.

A 1933, as the notice had not been received by him and, having been returned through the post, was not deemed by virtue of s. 26 of the Interpretation Act, 1889, to have been given.

Per DENNING, L.J.: if the order had been regularly obtained there would be no ground for certiorari, and the only remedy of R. would be by application to quarter sessions to set aside the order made in his absence and to re-hear the appeal. It was suggested that quarter sessions had no power to set aside their own orders, even when made in the absence of a respondent, but I am satisfied that they have (see p. 675, letter G, post) . . . Where an order has been obtained irregularly without proper service quarter sessions can themselves set it aside (see p. 676, letter B, post).

C Summary of the effect of sending notices by registered post (p. 676, letter C, post).

Appeal allowed.

[For the Summary Jurisdiction (Appeals) Act, 1933, s. 3 (1), see 14 HALSBURY'S STATUTES (2nd Edn.) 968.]

Cases referred to:

- D (1) *St. Andrew's, Holborn (Inhabitants)*, v. *St. Clement Danes' (Inhabitants)*, (1704), 2 Salk. 606; Holt K.B. 511; 91 E.R. 514; 33 Digest 389, 1003.
- (2) *R. v. May*, (1880), 5 Q.B.D. 382; sub nom. *R. v. Essex JJ.*, 49 L.J.M.C. 67; 44 J.P. 538; sub nom. *R. v. Phillips*, 42 L.T. 772; 3 Digest 90, 288.
- (3) *Street's Case*, (1722), 7 Vin. Abr. 24 pl. 10.
- E (4) *R. v. Peters*, (1758), 1 Burr. 568; 97 E.R. 452.
- (5) *Pridgeon's Case*, (1633), Cro. Car. 341; 79 E.R. 899.
- (6) *R. v. Glynne*, (1871), L.R. 7 Q.B. 16; 41 L.J.M.C. 58; 26 L.T. 61; sub nom. *R. v. Flintshire JJ.*, 36 J.P. 406; 3 Digest 90, 287.
- (7) *Bayly v. Boorne*, (1720), 1 Str. 392; 93 E.R. 587; 16 Digest 107, 58.
- (8) *Jewell v. Hill*, (1722), 1 Str. 499; 93 E.R. 659.
- F (9) *T.O. Supplies (London), Ltd. v. Jerry Creighton, Ltd.*, [1951] 2 All E.R. 992; [1952] 1 K.B. 42; 2nd Digest Supp.
- (10) *Retail Dairy Co., Ltd. v. Clarke*, [1912] 2 K.B. 388; 81 L.J.K.B. 845; 106 L.T. 848; 76 J.P. 282; 25 Digest 100, 235.
- (11) *Browne v. Black*, [1912] 1 K.B. 316; 81 L.J.K.B. 458; 105 L.T. 982; 42 Digest 145, 1436.
- G (12) *R. v. Slawstone (Inhabitants)*, (1852), 18 Q.B. 388; 21 L.J.M.C. 145; 19 L.T.O.S. 105; 16 J.P. 279; 118 E.R. 145; 37 Digest 346, 1504.
- (13) *Stanley v. Thomas*, [1939] 2 All E.R. 636; [1939] 2 K.B. 462; 160 L.T. 555; 103 J.P. 241; Digest Supp.
- (14) *Holt v. Dyson*, [1950] 2 All E.R. 840; [1951] 1 K.B. 364; 114 J.P. 558; 2nd Digest Supp.
- (15) *Sandland v. Neale*, [1955] 3 All E.R. 571.
- H (16) *R. v. Richmond Recorder*, (1858), E.B. & E. 253; 27 L.J.M.C. 197; 31 L.T.O.S. 115; 22 J.P. 674; 120 E.R. 502; 37 Digest 337, 1411.

Appeal.

I Appeal of the applicant, Alfred Rossi, from a decision of the Divisional Court dated Oct. 13, 1955, dismissing his application for an order of certiorari directed to the Appeal Committee of County of London Quarter Sessions to remove into the High Court and quash an order made by them on Sept. 29, 1954. The appeal committee by their order allowed an appeal from an order of the court of summary jurisdiction sitting at Greenwich Magistrates' Court on June 28, 1954, who had dismissed a summons issued by Lilian Daisy Minors (hereinafter called "Mrs. Minors") alleging that the appellant was the father of her bastard child born in May, 1953. The appeal committee adjudged the applicant (hereinafter called "Mr. Rossi") to be the father of the child and ordered him to pay a weekly sum of £1 for the child's maintenance. Mr. Rossi appealed from the order of

the Divisional Court on the grounds that (i) the deputy chairman and the bench of justices wrongfully determined the said appeal in the absence of Mr. Rossi and without his knowledge, and (ii) there was a denial to Mr. Rossi of natural justice on the hearing of the said appeal. A

J. E. S. Simon, Q.C., and N. Vincent for the appellant.

J. M. Pearson for the respondent. B

Cur. adv. vult.

Feb. 29. The following judgments were read.

DENNING, L.J.: On May 20, 1953, Mrs. Minors gave birth to a daughter. She was a married woman separated from her husband. On May 7, 1954, she summoned Mr. Rossi before the Greenwich Magistrates' Court alleging that he was the father of her child. The case was heard on three days, May 31, 1954, June 14, 1954 and June 28, 1954. Mrs. Minors was represented by counsel on all three days. Mr. Rossi appeared in person on the first day, but he was then granted legal aid and appeared by a solicitor on the last two days. Both parties gave evidence and each side called one witness in support. In the result the metropolitan magistrate dismissed the summons. C

On July 8, 1954, Mrs. Minors gave notice of appeal to the magistrate's clerk and to Mr. Rossi. On Aug. 6, 1954, the clerk of the peace for the County of London sent registered letters to Mrs. Minors and Mr. Rossi giving each of them notice that the hearing of the appeal had been fixed for Friday, Aug. 13, 1954, at 10.30 a.m. at the Sessions House, 181, Marylebone Road, N.W.1. Attached to this notice there was a slip saying: D

"If this appeal should not be reached on the day stated in this notice, it will normally be heard at the next available sitting of the appeal court, but you should apply to the clerk of the peace for advice as to this before leaving the court." E

On Aug. 13, 1954, Mrs. Minors and her counsel attended the court of quarter sessions. Mr. Rossi attended in person, but he had no solicitor on this occasion. The case was not heard that day. The reason was that counsel for Mrs. Minors applied for an adjournment. Mr. Rossi was not in the court when the application was made, and the counsel for Mrs. Minors seems to have thought that he was not in attendance. Counsel told the court: F

"Rossi, I fancy, has been called, but he is not present, and, I suspect, is not represented and is very unlikely to be here today . . . The solicitors who previously acted are not acting at the present time. I am in a difficult position. Witnesses who should have been here have refused to come and there has been no time to do anything about it, and I would ask your Lordship to grant an adjournment of this matter." G

The deputy chairman said: "When do you want an adjournment to, next week?" Counsel replied: "I think I would ask for it to go over for a longer period than that." The deputy chairman said: "So be it", and the case was marked "Adjourned sine die." H

Counsel for Mrs. Minors was in error in thinking that Mr. Rossi was not in attendance on that day. He was somewhere in the vicinity of the court. Later he went up to an official and was informed by him that the case would not be heard on that day. He was not told the date when it would be heard. Indeed, no one could tell him, for the date had not then been fixed. Five weeks later, on Sept. 21, 1954, the clerk of the peace sent letters by registered post to Mrs. Minors and Mr. Rossi saying: I

"I beg to give you notice that the hearing of the above appeal has been fixed for Thursday, Sept. 28, 1954, at 10.30 a.m. at the Sessions House, 181, Marylebone Road, N.W.1."

- A The letter to Mr. Rossi was addressed to him at his address, 156, Milton Court Road, New Cross, S.E.; but it was never delivered to him. It was returned to the clerk of the peace stamped with the words "Undelivered for reason stated. Return to sender". The reason was stated in pencil by the postman: "No response to P. 739 B. 22-9-54". It appears, therefore, that on Sept. 22, 1954, the postman called at Mr. Rossi's address, but got no reply and was therefore
- B unable to deliver the letter, and that he took it back to the post office to be returned to the sender. The reason why it was not delivered is not far to seek. Mr. Rossi says that during this time he was away in Kent doing some fruit-picking. It may have been one of the days when he was away.

So the matter stood when on Sept. 28, 1954, the appeal was in the list for hearing at quarter sessions. Mrs. Minors and her counsel were present: but

C Mr. Rossi, of course, was not present, because he had not had the letter telling him the day. On this occasion counsel told the deputy chairman:

"A letter from this court has been returned marked 'unable to deliver', but I have heard that this man is living at that address and always has been . . . so I find myself having to ask your Lordship whether the appeal can proceed in the absence of the respondent . . . There is not the slightest doubt that he knows about the matter. I am in a position formally to prove that."

- D
- The deputy chairman asked: "Why has the letter come back if he is still living there?"

- E Counsel replied: "My evidence is that during the day he is concealing himself, and in the evening goes back to sleep there".

- In order to support his statement, counsel called two witnesses, Mrs. Minors herself and a Miss Lansdown. Mrs. Minors said that she had seen Mr. Rossi coming out of 156, Milton Court Road on the previous Friday, Sept. 24. Miss Lansdown said that she had seen him coming out of the street "last week". They both asserted that he was living at 156, Milton Court Road, but going to a lady's flat nearby. Mrs. Minors was asked: "Last appeals day, did you hear anything said to him about this appeal?" She answered: "Yes, he was told the case would come up at the end of September". The deputy chairman asked her: "Are you sure?" She said: "Yes, he knew it was coming up, because he had spoken to me and said he did not take any notice of it".

- After hearing that evidence quarter sessions decided to hear the case in the
- G absence of Mr. Rossi and did so. They heard the evidence of Mrs. Minors and a Mr. Scott on the first day, and Miss McTigue on the second day. They adjudged Mr. Rossi to be the father of the child and ordered him to pay £1 a week for the child and ten guineas costs. On Oct. 5, 1954, the order was served on Mr. Rossi. He consulted the Cambridge House (Trinity Hall) Legal Advice Centre and eventually applied to the Divisional Court for an order for mandamus and certiorari
- H to bring up the order of quarter sessions to be quashed. The Divisional Court refused the application. LORD GODDARD, C.J., said:

- "There is no ground for saying that there has been any failure to observe the procedure which is laid down by law . . . The section [s. 3 (1) of the Summary Jurisdiction (Appeals) Act, 1933] does not go on to say that notice of adjournment is to be given . . . If he does not choose to make arrangements to receive these notices of proceedings in which he is interested, that is a matter for him. It may be—I am not expressing an opinion about this—he could have gone back to quarter sessions and explained his absence. Certainly terms would have been imposed and sessions might—I am not saying they would—have heard the case; but what I am quite certain about is that this court cannot grant certiorari . . . There has been no defect in the procedure."

Mr. Rossi appeals to this court. The case raises the question of what is proper

service on appeals to quarter sessions. This is governed by s. 3 (1) of the Summary Jurisdiction (Appeals) Act, 1933, which provides that

" . . . the clerk of the peace . . . shall in due course give notice to the appellant, to the other party to the appeal, and to the clerk to the court of summary jurisdiction as to the date, time and place fixed for the hearing of the appeal. A notice required by this sub-section to be given to any person may be sent by post in a registered letter addressed to him at his last or usual place of abode."

There is no doubt that the clerk of the peace gave due notice of the first day for hearing, Aug. 13, 1954. He sent a letter by registered post to Mr. Rossi and he received it; indeed, he attended that day to answer the appeal. LORD GODDARD, C.J., seems to have thought that that was the only notice that need be given. He thought that so long as notice was given for the first day fixed for the hearing, no notice need be given of the second date. I cannot agree. It is just as important for the defendant to know the date of the adjourned hearing as the date of the original hearing. The word "hearing" in s. 3 (1) includes "hearings". Of course when a trial goes on from day to day, it is sufficient for the chairman at the end of each day to announce the time of the next sitting of the court. But when a case is adjourned sine die, it is incumbent on the clerk of the peace to give notice of the adjourned hearing just as he would of the original hearing. The clerk of the peace acted on that footing. He sent a letter by registered post to Mr. Rossi telling him the date, time and place of the adjourned hearing; but the letter was returned to him unopened and undelivered. In those circumstances was the Act complied with? Did the clerk of the peace "give notice in due course" to Mr. Rossi? It is argued that it is sufficient to comply with s. 3 (1) if he sends a registered letter to the respondent, even though it is not received by him, and known not to be received. I do not think that this is correct. When construing this section, it is to be remembered that it is a fundamental principle of our law that no one is to be found guilty or made liable by an order of any tribunal unless he has been given fair notice of the proceedings so as to enable him to appear and defend them. The common law has always been very careful to see that the defendant is fully apprised of the proceedings before it makes any order against him. In the old days the common law went so far as to compel the defendant to appear in person in court. It did this by a writ of *capias* directing the sheriff

" to take the body of the defendant and him safely to keep so that he may have him in court on the day of the return to answer to the plaintiff's claim ":

see BLACKSTONE COMMENTARIES III, 282. That has all been done away with, but the law still insists in most cases that the defendant shall be served personally so as to be sure that he knows of the proceedings against him. In modern times there have been a few statutes and rules which allow service by registered post, and this is one of them. The merit of registered post in this regard is that the postman will only deliver the letter to the person to whom it is addressed or to someone who will take responsibility for seeing that he gets it. Otherwise he will return it to the sender who will thus get to know, sooner or later, if the letter is not received.

The next thing to remember when construing the section is that the notice under s. 3 (1) (when given for the first date) fulfils a very important function. It is the first document issued by the court of quarter sessions to show that it is seised of the appeal. It is an originating process analogous to a writ of summons. It originates a new process against the respondent. He has already succeeded in the magistrates' court: and the appellant then wishes to bring him before a higher court, quarter sessions, for what is in truth and in fact a new hearing altogether. It is just as necessary that he should have fair notice of the hearing before quarter sessions as of the hearing before the magistrates. This is the

A function of the notice prescribed by s. 3 (1). Due service of it is, therefore, an essential preliminary to the hearing of the appeal. Unless the respondent appears before quarter sessions and admits the notice, the appellant must prove due service or an acknowledgment from him that it has been received. This is a preliminary step before the court will enter into the subject-matter of her complaint, cf. *NOLAN ON THE POOR LAWS* (1825), II, p. 531. If the case has been previously adjourned sine die, the appellant must prove due service of the notice for the second date just as for the first date.

B In the present case, therefore, when the case was called on for hearing on Sept. 28, 1954, and Mr. Rossi did not appear, it was essential for counsel for Mrs. Minors to prove service of the notice in accordance with s. 3 (1) of the Act of 1933. He had to prove that the clerk of the peace had in due course given Mr. Rossi notice of the date, time and place of the hearing. This could be done by proof that a notice had been sent to him in good time by post in a registered letter which had not been returned, for it could then be assumed that it had been delivered in the ordinary course of post: see the Interpretation Act, 1889, s. 26. When, however, it had appeared that the letter had been returned undelivered, then it was quite plain that Mr. Rossi had not been given notice at all of the date, time and place of the hearing. In short, service had not been effected; and the court should not have entered on the hearing at all.

At quarter sessions the suggestion was made by counsel for Mrs. Minors that Mr. Rossi was evading service. I do not think this suggestion was substantiated by the evidence. There was no reason why Mr. Rossi should seek to evade service. He had succeeded before the magistrate and would presumably wish to contest the case before quarter sessions, as he did before the magistrate. He had attended quarter sessions on the first day, Aug. 13, 1954. Why should he seek to avoid attending on the second day, Sept. 28, if he knew of it? All the evidence was quite consistent with the view that he was away from his home on Sept. 22, 1954, when the postman called. There was no evidence whatever that he knew of the second date for the hearing. In any case, even if he was evading service, it does not help Mrs. Minors. Evading service would be a ground for ordering personal service or substituted service, but not for dispensing with service altogether. In my opinion, therefore, once it had appeared that the registered letter was returned undelivered, quarter sessions ought not to have proceeded with the case, because there was no proper service. The order made by quarter sessions was obtained irregularly and should be set aside. Certiorari should issue to bring up the proceedings to be quashed.

I would just add this: if the order had been regularly obtained (as the Divisional Court thought) then I would agree that there would be no ground for certiorari: and Mr. Rossi's only remedy would be by application to quarter sessions to set aside the order made in his absence and to re-hear the appeal. It was suggested before us that the court of quarter sessions had no power to set aside its own orders, even when made in the absence of the respondent: but, on looking into the matter, I am satisfied that it has, and that the intimation of LORD GODDARD, C.J., on this point is well-founded. Suppose, for instance, that Mr. Rossi had received proper notice of the date of the hearing, but failed to attend because he was ill; and the court, not knowing of it, heard the appeal in his absence and decided against him. Or suppose that the registered letter had not been returned undelivered, so that the court were entitled to assume that it had been delivered in the ordinary course of post. In each of those cases the order of quarter sessions would be regularly obtained: but Mr. Rossi would be able to have it set aside on such terms as the court thought fit and he could be let in to defend on the merits. That was done over 250 years ago in the days of Queen Anne when HOLT, C.J., was clearly of opinion that quarter sessions has just the same power as the Queen's Bench to set aside a judgment or order made in the absence of a party: see *St. Andrew's, Holborn (Inhabitants), v. St. Clement Danes' (Inhabitants)*

(1) (1704) (2 Salk. 606); cf. *R. v. May* (2) (1880) (5 Q.B.D. 382); and so have inferior courts generally: see *Street's Case* (3) (1722) (7 Vin. Abr. 24 pl. 10), *R. v. Peters* (4) (1758) (1 Burr. 568). At one time the application to set aside had to be made during the same sessions, but that is no longer the case. Delay is a ground on which the court may in its discretion refuse relief but it is not an absolute bar. On the other hand, if the case has been heard on its merits with both sides present, quarter sessions have of course no power to set aside their own order: *Pridgeon's Case* (5) (1633) (Cro. Car. 341 at p. 350), *R. v. Glynne* (6) (1871) (L.R. 7 Q.B. 16). I may add that, where an order has been obtained irregularly without proper service, the quarter sessions can themselves set it aside (see *Bayly v. Boorne* (7) (1720) 1 Str. 392, *Jewell v. Hill* (8) (1722) 1 Str. 499); but so can the Queen's Bench by certiorari.

To sum up, when service of process is allowed by registered post, without more being said on the matter, then if the letter is not returned, it is assumed to have been delivered in the ordinary course of post and any judgment or order by default obtained on the faith of that assumption is perfectly regular. It will not as a rule be set aside except on payment of costs and showing of merits: see *T.O. Supplies (London), Ltd. v. Jerry Creighton, Ltd.* (9) ([1951] 2 All E.R. 992). If, however, the letter is returned undelivered and nevertheless, notwithstanding its return, a judgment or order by default should afterwards be obtained, it is irregular and will be set aside ex debito justitiae. The order of quarter sessions here was irregular because there was no proper service and it should be set aside. I would allow the appeal accordingly.

MORRIS, L.J.: A summons was issued by Mrs. Minors against Mr. Rossi alleging that he was the putative father of her child. The child was born on May 20, 1953. The summons was issued on May 7, 1954. After a hearing before the learned magistrate sitting at Greenwich, which occupied a part of several days, the summons was dismissed on June 28, 1954. Within fourteen days of that date, Mrs. Minors commenced an appeal by giving notice of appeal to the clerk of the magistrate's court and to Mr. Rossi: see the Magistrates' Courts Act, 1952, s. 84 (1). It then became the duty of the clerk of the peace, pursuant to the Summary Jurisdiction (Appeals) Act, 1933, s. 3 (1), as amended, to enter the appeal. That was done. It was further the duty of the clerk of the peace pursuant to that section in due course to give notice to Mrs. Minors, to Mr. Rossi and to the clerk to the court of summary jurisdiction as to the date, time and place fixed for the hearing of the appeal. That also was done. The date fixed was Aug. 13, 1954. Mr. Rossi attended court that day. He was not, however, present at the time when the case, having been called on, was mentioned by counsel for Mrs. Minors. Counsel explained that Mrs. Minors was in a difficulty owing to the absence of witnesses who it was said had refused to go to court, and asked for an adjournment for some period longer than a week. The application was granted and the case was adjourned sine die.

In my judgment the result of granting the adjournment "sine die" was that it became necessary to fix afresh the date for the hearing of the appeal. There was no question of an adjournment to some specified later date, but there was a general adjournment without any day being fixed. There was then no longer any date fixed for the hearing. At some later time a new date was fixed. The new date was Sept. 28, 1954. In the circumstances it became necessary for the clerk of the peace to give notices as to the date, time and place fixed. This the clerk of the peace proceeded to do. He sent a registered letter to Mr. Rossi. The letter was, however, returned to the sender by the postal authorities with an intimation that it had not been delivered as there was no response when the postman had called. When the case came on on Sept. 28, 1954, this was made known to the appeal committee. The returned letter was produced. Evidence was, however, given by Mrs. Minors that on the previous appeals day Mr. Rossi was told that "the case would come up at the end of September". Mr. Rossi

A was not present and Mrs. Minors' evidence went uncontradicted. In his affidavit in support of his motion for an order of certiorari Mr. Rossi stated that he attended the sessions on Aug. 13, 1954, and was informed by an official that the case would not be heard that day: he also stated that he was not informed as to the date when the case would be heard. On Sept. 28 Mrs. Minors further gave evidence to the effect that Mr. Rossi had recently been purposely absenting himself from his residence during the daytime: the suggestion presumably was that he was concealing himself and keeping out of the way. As Mr. Rossi was not present, this evidence could not be tested or challenged. In his affidavit Mr. Rossi stated:

"during the time between Aug. 13 and Sept. 29, 1954, I visited Kent to do some fruit-picking."

The issue which now arises is whether there are grounds for an order of certiorari. I respectfully agree with what LORD GODDARD, C.J., said in his judgment:

"It has been pointed out over and over again that certiorari is a very special remedy. People cannot get certiorari merely as a matter of appeal. It is not a matter of appeal. If they can show that some requisite imposed by law has not been fulfilled, it would be a ground for asking this court to quash the proceedings on the ground that quarter sessions had no jurisdiction to hear the case."

It now appears that there is a point whether a requisite imposed by law has been fulfilled. The point is whether Mr. Rossi was given notice of the hearing in accordance with a statutory requirement. When this matter was before the Divisional Court the transcript of what had been said in court to the appeal committee on Aug. 13, 1954, was for some reason not available. It is only fair that this should be stated. Now that it is available it shows that what happened on Aug. 13 was not that the appeal did not come on because earlier cases had taken longer than anticipated and that Mr. Rossi "was informed that the case would not be taken that day but would be taken on the next appeals day at the end of September", as the Divisional Court thought, but that an application for an indefinite adjournment was made on behalf of Mrs. Minors because of her difficulties about witnesses. It appears that there was an adjournment "sine die". It must be recognised that Mrs. Minors' evidence on Sept. 28, given in the absence of Mr. Rossi, that "he was told the case would come up at the end of September" is capable of the meaning that after the application on Aug. 13 was granted, somebody then arranged that the case would be taken at the end of September and so informed Mr. Rossi. A reading of the transcript of what was said on Aug. 13 suggests that this is not a probability. Mr. Rossi denied in his affidavit that he was told: a statement about "the end of September" is hardly a notification of a date; while it is seen that what the clerk of the peace later proceeded to do, and as I think very properly proceeded to do, was to endeavour to notify Mr. Rossi of the new date. There had been, as counsel for Mr. Rossi put to us, an "unfixing" of the date of hearing. The assigned date had been vacated. There then arose afresh the statutory obligation imposed by s. 3 (as amended) of the Summary Jurisdiction (Appeals) Act, 1933. The clerk of the peace did what he could, but the question arises whether Mr. Rossi was given notice. If he was not, then there was a defect in procedure of the kind referred to by LORD GODDARD, C.J.

The first words of s. 3 which have to be considered are as follows:

". . . shall in due course give notice to . . . the other party to the appeal . . . as to the date, time and place fixed for the hearing of the appeal."

There is an obligation to "give" such notice. The purpose of giving notice to a party of the hearing of a case is so that the party may have the opportunity to appear in order to assert or to defend his rights. It seems to me, therefore,

that it is of the very essence of such notice that it should be communicated to or should reach the party interested. It is fundamental in our system of administration of justice that a party should have the right and opportunity to be heard or to be represented. This is well recognised. The procedure laid down in relation to adjournments of hearings at petty sessions may be cited as an illustration, though illustration is hardly needed. The Magistrates' Courts Act, 1952, s. 46, provides:

"(1) A magistrates' court may at any time, whether before or after beginning to hear a complaint, adjourn the hearing, and may do so, notwithstanding anything in this Act, when composed of a single justice. (2) The court may when adjourning either fix the time and place at which the hearing is to be resumed or, unless it remands the defendant under the next following section, leave the time and place to be determined later by the court; but the hearing shall not be resumed at that time and place unless the court is satisfied that the parties have had adequate notice thereof."

A general statement of principle may be found in BROOM'S LEGAL MAXIMS (10th Edn.), p. 65:

"It has long been a received rule, that no one is to be condemned, punished, or deprived of his property in any judicial proceeding, unless he has had an opportunity of being heard."

Here is but an echo of the question of NICODEMUS*: "Doth our law judge any man, before it hear him, and know what he doeth?"

We were referred to a number of statutory provisions relating to the serving or sending of various kinds of notices in various circumstances and to certain decisions relating to these provisions. Though it was proper and helpful to be referred to such provisions and decisions, the present case must depend on the interpretation of this particular section of this particular Act. The normal and convenient method of giving notice will doubtless be by way of a written or documentary notice: certainty of communication as to date and time and place may best be secured, if the intimation is recorded in a document. The document could be given to the party interested; but a usual and convenient method of transmitting the document is by employing the machinery of the post office. This is recognised and permitted by the legislature for s. 3 (1) of the Summary Jurisdiction (Appeals) Act, 1933, enacts that:

"A notice required by this sub-section to be given to any person may be sent by post in a registered letter addressed to him at his last or usual place of abode."

Section 26 of the Interpretation Act, 1889, provides as follows:

"Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve', or the expression 'give' or 'send', or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post."

The Act of 1933 clearly permits or authorises the giving of a notice as to a hearing by sending a document by registered post. But if the primary obligation of giving notice means in this context the giving of some form of notice which reaches the party interested so that he may be present or represented at a hearing, then the permissive user of the post denotes a user so that notice may reach the party interested so that he may be present or represented at the hearing. It was, therefore, entirely proper to send a notice to Mr. Rossi by registered post. Applying the provisions of the Interpretation Act, 1889, s. 26, since no contrary

* St. John, ch. 7, v. 51.

A intention appears from the Act of 1933, the sending of the notice to Mr. Rossi was deemed to be effected by properly addressing, prepaying and posting the letter which contained the document. Then by the concluding words of s. 26, the sending of the notice was deemed, unless the contrary was proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of post. Here, however, the contrary was proved. It was
B proved not merely that the letter was not delivered in the ordinary course of post but that the letter was not delivered at all. Service cannot in this case be deemed "to have been effected" at some particular time, i.e., in the ordinary course of post: service was proved not to have been effected at all. When considering the giving of a notice of a hearing of an appeal the element of time is clearly of importance: the notice must be given at such time as will enable a
C party to be present at a hearing. Here it was not.

The primary obligation imposed by s. 3 of the Summary Jurisdiction (Appeals) Act, 1933, is to "give notice": in this context that denotes informing the parties interested: one permissive way in which that may be achieved is by sending a registered letter: normally that permissive way succeeds, and it is
D provided by the Magistrates' Courts Rules, 1952, r. 55 (2)*, that the service of a document required or authorised to be served, the proper addressing, prepaying and posting or registration for the purposes of service of a letter containing such a document and the place, date and time of posting or registration of any such letter, may be proved by a document purporting to be a certificate signed by the person by whom the service was effected or the letter posted or registered. But by the operation of the Interpretation Act, 1889, s. 26, on the uncontested facts
E in this case, it is shown that the procedurally correct permissive method by which it was sought to inform Mr. Rossi that the hearing of the appeal would be on Sept. 28, did not achieve its purpose: the attempt to give notice by post failed: it was shown not to have been effected that way. Though a letter was sent it did not arrive. A "notice" was sent, but Mr. Rossi was not given notice. The result was that it appeared that notice had not been given to Mr. Rossi. Even
F if the appeal committee had felt disposed to accept the somewhat vague testimony of Mrs. Minors given on Sept. 28 that "he (i.e., Mr. Rossi) was told the case would come up at the end of September", that could hardly prove that Mr. Rossi was given notice of "the date . . . fixed for the hearing of the appeal". As it was and is shown that notice was not given to Mr. Rossi in accordance with s. 3 (1) of the Summary Jurisdiction (Appeals) Act, 1933, it follows that a requisite
G imposed by law was not fulfilled and the appeal committee were not entitled to proceed to hear the appeal. It was not a matter for them within their discretion to decide. They could not overlook a failure to satisfy a statutory requirement. I think, therefore, that there should be an order of certiorari.

PARKER, L.J.: I have come to the same conclusion. The sole question,
H which is not an easy one, is whether the provisions of the Summary Jurisdiction (Appeals) Act, 1933, s. 3 (1), were complied with. If they were not, then the appeal committee had no jurisdiction to hear the appeal, and certiorari would lie. If, on the other hand, they were complied with, the committee had jurisdiction, and it was a matter for their discretion to hear the appeal forthwith, or to adjourn the case to give Mr. Rossi an opportunity of being heard. With such an
I exercise of discretion this court could not interfere, certiorari not being a remedy by way of appeal.

Section 3 (1) of the Summary Jurisdiction (Appeals) Act, 1933, as amended by the Criminal Justice Act, 1948, and the Magistrates' Courts Act, 1952, s. 131, s. 132 (1), Sch. 5 and Sch. 6, now reads as follows:

"In the case of an appeal to which this Act applies, on receipt of any notice of appeal required by rules made under s. 15 of the Justices of the Peace

Act, 1949, to be sent by a clerk to justices to the clerk of the peace, the clerk of the peace shall enter the appeal, and shall in due course give notice to the appellant, to the other party to the appeal, and to the clerk of the court of summary jurisdiction as to the date, time and place fixed for the hearing of the appeal. A notice required by this sub-section to be given to any person may be sent by post in a registered letter addressed to him at his last or usual place of abode."

The date originally fixed for the hearing was Aug. 13, 1954, and there is no doubt that notice of this was given to Mr. Rossi. He in fact attended the court that day. According to the transcript an application was then made by counsel for Mrs. Minors that the case should be adjourned sine die, and this was granted. Mr. Rossi, however, does not appear to have been in court when this application was made. In these circumstances, the first question which arises is whether a further notice must be given of the date later fixed for the adjourned hearing. Bearing in mind the fundamental principle of English law that a party should be given an opportunity of being heard, I see no reason for construing the sub-section in the narrow sense that only a notice of the hearing originally fixed need be given. At any rate where, as here, the appeal was never opened and at the outset it was adjourned sine die, I think that the statute requires a further notice to be given. The granting of the adjournment amounts to the unfixing of the date originally fixed, and contemplates that a new date will be fixed. Indeed it is to be observed that the clerk of the peace did in fact attempt to cause a notice of the hearing for Sept. 28 to be received by Mr. Rossi.

The next question accordingly is whether such a notice was given. The Divisional Court apparently understood that the case was not reached on Aug. 13, and that Mr. Rossi, being present, was then orally informed that the case would be taken on the next appeal day at the end of September. This was no doubt based, at any rate, partly on the fact that Mrs. Minors before the appeal committee had stated that he was told the case would come up at the end of September. It is to be observed, however, that she did not state who had told him, nor did she state that he had been informed as to any specific date or time. Unfortunately the transcript of the proceedings on Aug. 13 was not before the Divisional Court. This clearly shows that, as I have stated, an application for an adjournment sine die was made and granted in the absence of Mr. Rossi, and at any rate partly in the interests of Mrs. Minors. In the light of this, it seems to me that Mr. Rossi's statement in his affidavit is the more probable, viz., that he was told the case would not be heard that day, and that he was not told when it would be heard. Accordingly I do not think that there was an oral compliance with the section.

The matter does not, however, end there, since the clerk of the peace in fact sent by registered letter to Mr. Rossi at his last place of abode a notice of the hearing for Sept. 28, mentioning the time and place. Though the posting of the letter was not strictly proved, it was produced to the chairman of the appeal committee having been returned undelivered to the clerk of the peace. It was produced to us. It was apparently sent on Sept. 21, and was returned marked "no response" as on Sept. 22. Whether the dispatch of this letter, though undelivered, constituted the giving of a notice depends on the true construction of s. 3 (1) of the Summary Jurisdiction (Appeals) Act, 1933, read with the Interpretation Act, 1889, s. 26. The latter section—to which the Divisional Court were not referred—is in these terms:

"Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve', or the expression 'give' or 'send', or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the

A time at which the letter would be delivered in the ordinary course of post."

The section, it will be seen, is in two parts. The first part provides that the dispatch of a notice or other document in the manner laid down, shall be deemed to be service thereof. The second part provides that, unless the contrary is proved, that service is effected on the day when in the ordinary course of post the document would be delivered. This second part, therefore, dealing as it does with delivery, comes into play, and only comes into play, in a case where under the legislation to which the section is being applied the document has to be received by a certain time. If in such a case "the contrary is proved", i.e., that the document was not received by that time or at all, then the position appears to be that, though under the first part of the section the document is deemed to have been served, it has been proved that it was not served in time.

C Accordingly the question is whether s. 3 (1) of the Act of 1933 on its true construction provides that notice must be given within a certain time, and whether that time relates to receipt or merely to dispatch of the notice. Notice is to be given in due course, and, in its context, this must mean that it is to be given in a reasonable time after the hearing is fixed. But does this reasonable time apply to the receipt of the notice or merely to the dispatch of the notice? D As to this we were referred to a number of cases which show that the line of demarcation between the two categories is often a fine one. Each case must depend on the exact words used in the legislation in question, and on the object with which the document is sent. As RIDLEY, J., said in *Retail Dairy Co., Ltd. v. Clarke* (10) ([1912] 2 K.B. 388 at p. 393):

E "Sending in the ordinary sense is merely dispatching. The word 'send' may, however, be used in connection with other words so as to imply that by 'sending' is meant such a sending as that the thing may by the time specified pass into the hands of the person to whom it was sent. If s. 20 (1) of the Sale of Food and Drugs Act, 1899, had contained words to that effect it would be necessary to follow the decisions in *Browne v. Black* (11) ([1912] 1 K.B. 316) and *R. v. Slawstone (Inhabitants)* (12) (1852) (18 Q.B. 388). But F there are no such words in this section; nor is there any need for them, for no period is fixed by the Act of 1899 as being that which must elapse after the receipt of the document before the recipient can take such steps as may be necessary in consequence of its reception."

In that case the court held that there was nothing in the Sale of Food and Drugs Act, 1899, s. 20 (1), providing for the sending of a warrant or invoice by the defendant to the purchaser, which required the word "send" to be construed other than in its ordinary meaning of "dispatched". Again in the cases under the Road Traffic Act, 1930, s. 21, which requires that within fourteen days a notice of intended prosecution is to be "served on or sent by registered post" to the offender, it has been held again that "sent" merely means dispatched: G cf. *Stanley v. Thomas* (13) ([1939] 2 All E.R. 636), *Holt v. Dyson* (14) ([1950] 2 All E.R. 840), and *Sandland v. Neale* (15) ([1955] 3 All E.R. 571). On the other hand, in *R. v. Richmond Recorder* (16) (1858) (27 L.J.M.C. 197), the court construed "sent" in its context as meaning "delivered".

I Turning again to s. 3 (1) of the Act of 1933, the clerk of the peace is to "give notice" which contemplates not merely a written notice but an oral notice, and if the matter rested there, I think it is reasonably clear that the notice is to be delivered, and delivered in time to enable the party concerned to prepare for and attend the hearing. Much reliance is, however, placed on the concluding sentence which provides for the notice being "sent". That, however, is only providing a further method by which the clerk of the peace may "give notice" and cannot alter the nature of the obligation itself. Further, it is, I think, important to appreciate the object of the notice. The appeal to the appeal committee is in every sense a re-hearing. It is for the complainant who has lost her case below to begin, and to call her evidence afresh. The respondent to the

appeal, who has won below, ought, one would think, to be put into a position to appear and resist the case on the re-hearing if he so desires. So far as the original hearing before petty sessions is concerned there is an elaborate code laid down to ensure that the party against whom the complaint is made should have a full opportunity of appearing: cf. the Magistrates' Courts Act, 1952, s. 45, s. 46 and s. 47. It would be odd if s. 3 (1) of the Act of 1933 had to be construed so as to put him in a less favourable position in an appeal. I think that the obligation expressed by the words "shall in due course give notice" means in its context "shall cause notice to be received in a reasonable time to enable the party concerned to prepare for and attend the hearing."

Appeal allowed.

Solicitors: *Good, Good & Co.* (for the appellant); *S. Dalton* (for the respondent).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

GRANT v. NATIONAL COAL BOARD.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Tucker, Lord Keith of Avonholm and Lord Somervell of Harrow), January 26, 30, March 8, 1956.]

Coal Mining—Statutory duty—Security of travelling road—Bogie derailed by stone fallen from roof—Scope of protection under Coal Mines Act, 1911, s. 49—Whether accident caused by breach of statutory duty—Coal Mines Act, 1911 (1 & 2 Geo. 5 c. 50), s. 49.

The appellant, who was employed by the respondents at their colliery, was travelling at the end of his shift from his work place on a man haulage bogie along an underground travelling road. After going some distance the bogie ran over some redd or stone, which had fallen from the roof of the travelling road, and was derailed. The appellant was flung out of the bogie and was injured. He sued the respondents for damages for breach of statutory duty under the Coal Mines Act, 1911, s. 49.* It was not known when the fall of the redd or stone took place, but on the pleadings it was taken as not being denied that the fall happened some time during the appellant's shift. It was conceded for the purposes of the case that the roof of the travelling road was not secure when the fall occurred and that the respondents were in breach of s. 49, but they contended that the injury to the appellant was not one against which the section afforded protection.

Held: the appellant was entitled to damages for breach by the respondents of their statutory duty under s. 49 of the Coal Mines Act, 1911, because (i) liability under the section was not limited to a class of injuries caused in some particular way which would not include the appellant's injuries, and (ii) (per LORD REID, LORD TUCKER and LORD KEITH OF AVONHOLM) the appellant's injuries were caused by the breach of statutory duty since they occurred as a result of the fall of stone from the roof which was due to a breach of s. 49.

Gorris v. Scott (1874) (L.R. 9 Exch. 125) distinguished.

Appeal allowed.

[**Editorial Note.** The Coal Mines Act, 1911, is to be repealed by the Mines and Quarries Act, 1954, s. 189 and Sch. 5, and the enactment in that Act corresponding to s. 49 of the Act of 1911 is s. 48 (1). At the time of publication of this report the date of commencement of the Act of 1954 has not been appointed.

As to the security of travelling roads, see 22 HALSBURY'S LAWS (2nd Edn.) 798, para. 1646; and for cases on the subject, see 34 DIGEST 744, 1189.

For the Coal Mines Act, 1911, s. 49, see 16 HALSBURY'S STATUTES (2nd Edn.) 133.]

* The section is printed at p. 683, letter I, post.

A Cases referred to:

- (1) *Gorris v. Scott*, (1874), L.R. 9 Exch. 125; 43 L.J.Ex. 92; 30 L.T. 431; 41 Digest 498, 3269.
- (2) *Nicholls v. Austin (Leyton), Ltd.*, [1946] 2 All E.R. 92; [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5; 2nd Digest Supp.
- (3) *Gatehouse v. Summers (John) & Sons, Ltd.*, [1953] 2 All E.R. 117; 3rd Digest Supp.
- (4) *Carroll v. Andrew Barclay & Sons, Ltd.*, [1948] 2 All E.R. 386; [1948] A.C. 477; 1948 S.C. (H.L.) 100; [1948] L.J.R. 1490; 2nd Digest Supp.

B

Appeal.

C Appeal by the pursuer, George Grant, against an interlocutor of the Second Division of the Court of Session, dated Mar. 24, 1955, recalling an interlocutor pronounced by the Sheriff-Substitute of Fife and Kinross, dated Dec. 13, 1954, in favour of the appellant. The facts appear in the judgment of VISCOUNT SIMONDS.

Hector McKechnie, Q.C., and *R. H. McDonald* (both of the Scottish Bar) for the appellant.

D

J. O. M. Hunter, Q.C., and *A. J. Mackenzie Stuart* (both of the Scottish Bar) for the respondents.

The House took time for consideration.

Mar. 8. The following opinions were read.

E VISCOUNT SIMONDS: My Lords, this appeal from an interlocutor of the Second Division of the Court of Session, which recalled an interlocutor of the Sheriff-Substitute of Fife and Kinross, raises a question of some importance which has not, I think, previously come before the court.

F The appellant is a mineworker in the employment of the respondents at their Minto Colliery, Lochgelly, Fife, and in this action claims damages for injuries received by him in an accident which occurred in the course of his employment in the early morning of June 1, 1953. The admitted facts are that the appellant with another man was extending a conveyor belt in the underground workings of the colliery, and on completing his work at about 6 o'clock a.m. proceeded to make his way out of the workings; that in order to reach the surface he required to travel in the man haulage in the Bogie Dook in the colliery, and that along with another man he sat in one of the empty man haulage bogies and that the bogie started to travel up the Dook; that, after travelling some distance up the Dook, the bogie in which he was sitting ran over some redd or stone which had fallen from the roof of the Dook and the bogie was derailed and the appellant was flung out of it and sustained injury. Nothing else was proved or admitted. It is a matter of conjecture when the redd or stone fell, what was its bulk, and whether it had been shifted since its fall. The appellant is content to rest his case on the undoubted fact that there was, at some time, such a fall and, therefore, at some time the roof of the Dook was not secure. He relies, therefore, on s. 49 of the Coal Mines Act, 1911, claiming that the respondents have been guilty of a breach of their statutory duty and that he has suffered damage by that breach.

H

Section 49 is in these terms:

I "The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure."

It will be noticed that this is an absolute obligation; it is not qualified, as a statutory obligation sometimes is, by such words as "so far as possible". It is, moreover, a provision which has long found a place in legislation relating to mines, and naturally so; for the danger to mineworkers of a fall from roof or sides has long been known and anxiously guarded against.

The appellant's case, then, is simple enough; a breach, a fall of stone, ensuing injury. A

My Lords, where damages are claimed for breach of a statutory duty without any allegation of negligence, the pursuer must establish two things, first, that the breach is intended not only to be visited by a penalty but also to be the ground of civil liability to a class of persons of whom the pursuer is one, and, secondly, that the injury was one against which the legislation was designed to protect him. The first of these tests is undoubtedly satisfied in this case. No one questions that a civil action for damages can be founded on a breach of s. 49. It is at the second test that, in my opinion, a real difficulty arises, in which I am not prepared to differ from your Lordships, though I have been much pressed by the cogent arguments to be found in the judgments under appeal. B

The principle here invoked is to be found in *Gorris v. Scott* (1) (1874) (L.R. 9 Exch. 125). It is accurately stated in the first paragraph of the headnote: C

"When a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action in respect of such loss."

The defendant in that case had neglected to comply with a certain order made by the Privy Council under the Contagious Diseases (Animals) Act, 1869. The Act was passed, as appeared from the preamble and elsewhere, in order to prevent the introduction and spread of contagious and infectious diseases amongst animals; the defendant ignored an order containing provisions designed to this end, under which any ship bringing sheep or cattle from any foreign port to ports in Great Britain was required to have the place occupied by such animals divided into pens of certain dimensions and the floor of the pens furnished with battens or footholds. As KELLY, C.B., pointed out, the object of the order was to prevent animals from being overcrowded, and so brought into a condition in which the disease guarded against would be likely to be developed. As a result of the neglect of the order, the plaintiff suffered the loss of a number of sheep which were carried on the ship, not, however, because they contracted a contagious disease but because they were washed overboard; it was assumed that, had the order been complied with, they would not have been washed overboard. As I have already said, the plaintiff was held to be not entitled to recover. D
POLLOCK, B., said (*ibid.*, at p. 131):

"... the Act of Parliament was passed alio intuitu ... Suppose, then, that the precautions directed are useful and advantageous for preventing animals from being washed overboard, yet they were never intended for that purpose, and a loss of that kind caused by their neglect cannot give a cause of action." E

In that case, as in the case under appeal, the plaintiff did not rely on negligence at common law but rested his case solely on a breach of statutory duty. F

My Lords, the principle thus stated in *Gorris v. Scott* (1) more than eighty years ago has not, so far as I know, been questioned. The problem is whether it is applicable to this case. In *Gorris v. Scott* (1), it was, no doubt, easy to limit the scope of the enactment by reference to the preamble. In other cases, such as *Nicholls v. Austin (Leyton), Ltd.* (2) ([1946] 2 All E.R. 92), somewhat different considerations arose. In that case, the question was whether there had been an infringement of s. 14 of the Factories Act, 1937, which provides (by sub-s. (1)) that "Every dangerous part of any machinery . . . shall be securely fenced". On the generality of the words, it was argued that the section imposed a duty to guard not only against contact with dangerous machinery but also against dangerous materials being ejected from it. A different conclusion was reached by this House on a consideration of the context of the section. It was held that the obligation to fence a dangerous machine was satisfied if the dangerous part was so screened as to prevent the body of the operator from coming G
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I

A into contact with it. The only assistance, I think, to be derived from this class of case is that they confirm that the measure of statutory obligation is to be ascertained from the context in which it is found.

I turn again to s. 49 of the Coal Mines Act. More narrowly, the question, as I see it, is whether it is to be ascertained from its words in their context that the object is to secure the safety of the miners generally or only to protect them from a particular danger, i.e., being crushed or hurt by a fall. It was, I think, conceded that this was the primary danger, but it was urged that a fall which cut off the workmen from their exit was a danger no less to be apprehended and no less to be prevented by keeping the roof secure. From that, it is a short step to saying that the safety of the workman depends also on the roads being kept clear of debris from the roof or sides; for, if they are not, there must be a risk of derailment. The respondents relied on the fact that s. 47 (a new section which was introduced into the mining code by the Act of 1911) dealt with the matter of obstruction of haulage roads, and most strongly on the fact that s. 49 itself dealt with the roof and sides not only of travelling roads but also of working places. I have, as I have already said, been much pressed by the force of these arguments, but, on the whole, have come to the conclusion that they do not outweigh the considerations to which I have alluded.

If I do not deal more fully and explicitly with the judgments given in the Court of Session, I shall not, I hope, be thought to be wanting in respect to the learned judges who delivered them. I do not do so only because I have read and agree with the opinions which will be given by my noble and learned friends.

E **LORD REID:** My Lords, the appellant raised this action of damages in the Sheriff Court at Dunfermline. He was employed by the respondents at Minto Colliery, and at about 6 a.m. on June 1, 1953, he was travelling from his work place at the end of his shift in a man haulage bogie along a travelling road referred to as "the Dook". He avers:

F "After travelling some distance up the Dook, the bogie in which the pursuer was sitting ran over some redd or stone which had fallen from the roof of the said Dook and the bogie was derailed",

and he avers further that he was flung out of the bogie and suffered the injuries in respect of which he claims damages. The respondents in their defences expressly admit the averment which I have quoted, and also admit that the appellant was flung out of the bogie and sustained injuries. Neither party moved for a proof, except as regards the amount of damages. The respondents plead that the appellant's averments are irrelevant, and the appellant pleads that the defences are irrelevant, except as regards quantum of damages. The sheriff-substitute sustained this plea for the appellant, but, on appeal, the Second Division recalled the sheriff-substitute's interlocutor and dismissed the action.

H Before your Lordships, counsel for the respondents criticised the adequacy of the appellant's averments. It does not appear that any point was made with regard to this in the Sheriff Court or in the Court of Session, but, as the point has been raised, I must now deal with it. It is true that the averments are very brief, but, fairly read, I think that the critical averment means that, at some time before the accident, a substantial quantity of "redd or stone" had fallen from the roof to the place where it was when the bogie ran over it and was derailed. "Redd or stone" appears to me to indicate something more substantial than a few small pieces which could easily be overlooked when the road was being inspected, and there is no suggestion in the defences that this material might have fallen somewhere else and then have been placed on the rails by some person. There was considerable argument about the time which might have elapsed between the fall and the accident. We do not know when the last inspection of the road took place before the accident, but, unless the respondents

were in breach of their duty, the redd or stone cannot have been lying on the rails for very many hours before the accident. I am, therefore, prepared to take the case on the footing that the fall may have occurred at any time within a period of some hours before the accident. A

Section 49 of the Coal Mines Act, 1911, provides:

"The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure." B

Counsel for the respondents admitted, for the purpose of this case, that the averments which have been admitted by the respondents show that the roof was not secure at the time when the fall occurred, and that the respondents were then in breach of s. 49. C

The first question is whether this breach of s. 49 caused the accident. If it did not, then the case is at an end. But, in my opinion, the respondents' admissions are sufficient to show that the appellant's injuries were caused by this breach. If the fall from the roof had occurred only a few moments before the accident, I do not see how this could be disputed. The breach of s. 49 certainly caused the fall from the roof and, in such a case, I do not see what else than this fall could be said to have caused the accident. It is not said that the bogie was being driven negligently, nor is it suggested that the accident could be attributed to anything but the fall of the roof. The fall may, however, have occurred a considerable time before the accident. Does such a lapse of time make any difference as regards causation? It could, I think, only make a difference if it were reasonable to suppose that something may have happened during that time which could be said to have caused the accident or broken the chain of causation between the fall and the accident. No such occurrence has been, or, I think, could reasonably be, suggested. It may be that, if some days had elapsed between the fall and the accident, then the accident could be attributed not to the fall but to failure to remove the fallen material. But I do not think that that can reasonably be suggested in this case. Apart from other considerations, it would mean that the respondents had gravely neglected their duty to inspect the road and to remove obstructions. D

The question whether an employer is liable to an employee for injuries caused to him by breach of a statutory duty depends on whether there can be implied from the terms of the statute imposing the duty an enactment that the employer shall be so liable. In general, that is implied from the enactment of a duty in the interest of the safety of employees, and, in this Act, there is no room for doubt that civil liability must be implied, because s. 102 (8) gives a defence to an action for damages if the mineowner can show that it was not reasonably practicable to avoid or prevent the breach. That defence is not pleaded in this case. But it is argued that it is not enough to show that there was a breach, and that this breach caused the accident. If the accident happened in a way which the statute did not contemplate, then it is said that it cannot be implied that Parliament intended that there should be civil liability. In the present case, it is argued that all that can be implied from s. 49 is an enactment that the mineowner shall be liable for injury caused by material falling from the roof while it is actually falling, because that is the only kind of injury which s. 49 is intended to provide against. E F G H I

As authority for this limitation of liability, the respondents found on *Gorris v. Scott* (1) (1874) (L.R. 9 Exch. 125). There the purpose of the enactment was to prevent the spread of contagious diseases among animals, and in a ship pens had to be erected to enable animals to be segregated. This was not done and some sheep were washed overboard and lost; if there had been proper pens this would have been prevented. It was held that there was no liability for this loss, because the enactment had nothing to do with safety; its sole purpose was to

A prevent the spread of disease. I do not doubt that this case was properly decided; if the enactment implied civil liability at all, then the appropriate implication was liability if a breach caused or contributed to a spread of disease. But it seems to me to be a very different thing to say that, where the object of the enactment is to promote safety, the implication is that liability only arises if the breach causes injury in a particular way.

B There appears to be no reported case where such a limitation of liability for consequences of a breach of a safety provision has been adopted. In *Gatehouse v. John Summers & Sons, Ltd.* (3) ([1953] 2 All E.R. 117), a man was pulling an electric cable to release it from a jam; it broke and he fell back and was killed. It was ultimately held that there was negligence at common law, but the question of liability in respect of a breach of statutory duty was raised and dealt with. One of the Electricity Regulations* having effect under the Factories Act, 1937, provided that:

“Every electrical joint and connection shall be of proper construction as regards conductivity, insulation, mechanical strength and protection.”

D The accident occurred owing to failure of mechanical strength; no current was passing, electricity had nothing to do with the accident, and *Gorris v. Scott* (1) was cited. But LORD GODDARD, C.J., said (*ibid.*, at p. 119):

“... it does not seem to me to matter whether the injury which the deceased man received was an electric burn or shock or some other form of injury, provided it resulted from the defect in the electrical joint and was, therefore, caused by a breach of reg. 6.”

E I have not found any other case which deals with this matter. Reference was made in argument to *Nicholls v. Austin (Leyton), Ltd.* (2) ([1946] 2 All E.R. 92), and *Carroll v. Andrew Barclay & Sons, Ltd.* (4) ([1948] 2 All E.R. 386), but those cases do not appear to me to raise the point. There the question was whether there had been any breach, and it was held there had not. I find nothing there to throw light on the question whether there can be liability for injuries caused in one way by an admitted breach of a safety provision but not for similar injuries caused in a different way by a similar breach.

F I do not think that there can be any general rule. In every case the problem is to ascertain the intention of Parliament from the terms of the statute—whether any, and if so what, civil liability is to be implied. If the statute is only aimed at preventing a certain kind of injury, then it seems reasonable to hold (as in *Gorris v. Scott* (1)) that civil liability only results if that kind of injury is caused by a breach. But, in this case, there is no question of limitation to a particular kind of injury; admittedly, there would be liability for any kind of injury caused by material when falling from the roof. What is here suggested is limitation so as to exclude injury which is not caused in a particular way, no matter what kind of injury it may be. Let me suppose, for example, that the roof had fallen so as to form an obstruction on the rails only a second or two before the bogie ran into it. Why should the implied enactment of civil liability be supposed to exclude that case? Section 49 is one of the sections whose purpose is to promote safety and prevent accidents, and I cannot see why it should matter just how the accident was caused, provided that it was, in fact, caused by a breach of the section. I see no ground for imputing to Parliament an intention to make the mineowner liable for some of the consequences of his breach but to relieve him of liability for others. Let me take another case, and suppose a widespread fall of the roof so that men in a travelling road or working place were cut off and suffocated. I find it difficult to suppose that Parliament intended to exclude civil liability in such a case.

* Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factories and Workshops Acts, 1901 and 1907 (S.R. & O. 1908 No. 1312), reg. 6.

Section 49 applies to working places as well as to travelling roads, and it was argued that inferring civil liability for all injuries caused by falls from the roof of a working place would lead to results which Parliament cannot have intended. For example, if a piece of stone fell from the roof of a working place and later a man coming to, or going from, his working place tripped over it and was injured, it was said that it would be unreasonable to hold the mineowner liable, subject only to the possibility of a defence under s. 102 (8), particularly if the piece of stone had been lying unheeded for a long time. But, in such a case, it might be that something had happened to break the chain of causation, and that the cause of the man's injuries was something subsequent to the fall from the roof. And one must also take the case of a fall of the roof behind a miner when he is working, and I am not at all convinced that it would be unreasonable, or that Parliament cannot have intended, that there should be civil liability if the man suffered injury through being trapped or through hurrying over the debris to reach safety in case a further fall should occur. I do not profess to be familiar with conditions at a working place, but the argument from conditions there does not appear to me to be such as to require an unusual limitation to be attached to civil liability in respect of breaches of s. 49.

The Lord Justice-Clerk (LORD THOMSON) used the phrase "a new and static set of circumstances". But he indicates that, in his view, causal connection between the breach and the accident was not established. If that were so, I would agree with his reasoning, but I have given my reasons for holding that the breach did cause the accident. LORD PATRICK said:

"The mischief, the obstruction on the road, may have been the natural and probable consequence of a breach of the duty imposed by s. 49 to make the roof secure, but it was not the mischief which that section was designed to prevent."

In my view, the mischief cannot be so narrowly limited; the section was designed and intended to prevent falls from the roof causing injury to miners, and this fall did cause injury to the appellant.

The matter can be put in another way: to whom does the owner owe a duty to support the roof? If only to those who are immediately below it then this appeal would fail, because the breach of s. 49 ceased when the roof fell. But that view would equally exclude liability if the roof had fallen a few seconds before the bogie collided with the obstruction caused by the fallen material. And I do not think that the duty can be confined to those in the vicinity. The duty must, I think, be to those who ought reasonably to have been in contemplation as likely to be injured as a result of the breach, and it appears to me that this must, at least, include all miners who, in the ordinary course of their work and without any unusual or unforeseeable occurrence, sustain injuries caused by the breach. There was nothing unusual or unforeseeable in this case. If a roof falls onto rails, the next bogie travelling on the rails may well run into the obstruction, and there is no averment to show that that was not a probable consequence in this case.

Then it is said that injuries caused by material which has fallen and become an obstruction are excluded, because obstruction is dealt with by s. 47, which provides that every haulage road shall be kept clear of obstruction as far as possible. But, again, take the case of material falling only a few moments before the bogie runs into it. It would not be possible to remove that before the accident, so s. 47 would not apply. Is the mere presence of s. 47 to modify an otherwise general implied enactment that there shall be civil liability for injuries caused by breach of s. 49 by adding an exception? It would not be a very easy exception to draft. I suppose it would be that there shall be no civil liability under s. 49 if the fallen material which causes the injuries shall have become an obstruction in a haulage road before the injuries are sustained. Section 47 deals with haulage roads, and s. 49 deals with travelling roads. In this case, it is

A admitted that, at the relevant time, the Dook was both a haulage and a travelling road, and it may often be the case that a road comes within both classes. But I do not think that a limitation of civil liability under s. 49 can be inferred from the existence of another section which purports to deal with a different class of road from that dealt with by s. 49.

B I am, therefore, of opinion that this appeal should be allowed. The case must go back to the Sheriff Court for the assessment of damages.

C **LORD TUCKER:** My Lords, the decision of this case depends entirely on the application of s. 49 of the Coal Mines Act, 1911, to the facts which have been admitted on the pleadings or by counsel at the Bar. These admissions include the following:—(i) That a fall of redd or stone from the roof of a travelling road occurred, (ii) That when this redd or stone fell the roof was insecure, (iii) That this fallen redd or stone caused the derailment of the bogie on which the appellant was travelling, (iv) That the appellant was injured as a result of the derailment of the bogie.

D The difficulty which I have felt is whether it has been sufficiently averred and admitted that the roof was insecure at a material time. It is not, I think, permissible in a case which falls to be decided on the pleadings to speculate or draw any inference as to the length of time that had, in fact, elapsed since the fall of redd. It is, in my view, essential for the appellant to prove that the roof was insecure at some moment of time which can be causally related to his accident.

E Section 49 applies to working places as well as travelling roads, and I am far from satisfied that this section enables a miner to recover damages merely by proving that he has tripped over a piece of stone that has fallen from the roof of a working place at some unascertained time. I am not, however, prepared to differ from the views of my noble and learned friends, LORD REID and LORD KEITH OF AVONHOLM, that the pleadings in the present case sufficiently aver a fall at some material time. If this is correct, no question arises as to any break in the chain of causation. Once this difficulty is overcome, I think the appeal must succeed, since I agree with my noble friend, LORD REID, that where the object of an enactment is to promote safety, there can be no implication that liability for a breach is limited to one which causes injury in a particular way, and that *Gorris v. Scott* (1) (1874) (L.R. 9 Exch. 125) is to be distinguished on the ground that the implied civil liability in that case was limited to breaches causing or contributing to the spread of disease.

G I would, accordingly, allow the appeal.

H **LORD KEITH OF AVONHOLM:** My Lords, the facts which are intended to raise the legal question which was argued to your Lordships are in very small compass. The appellant is a mineworker and, on the night of May 31/June 1, 1953, was employed by the respondents, in company with another man, in extending a conveyor belt in the underground workings of the Minto Colliery, Lochgelly. On completing his work about 6 a.m., he proceeded to make his way out of the underground workings. In order to reach the surface the appellant required to travel in the man haulage in the Bogie Dook in the said colliery. Along with another man, he sat in one of the empty man haulage bogies which then started to travel up the said Dook. After travelling some distance up the Dook, the bogie in which the appellant was sitting ran over some redd or stone which had fallen from the roof of the Dook, and the bogie was derailed. The appellant was flung out of the bogie and sustained certain injuries. As a point was raised on the pleadings, I should say that all the facts I have set out are averred by the appellant and admitted by the respondents. The appellant goes on to aver that the accident was due to the breach by the respondents of s. 49 of the Coal Mines Act, 1911, which says, *inter alia*, "The roof and sides of every travelling road . . . shall be made secure . . ." He then avers that the Bogie Dook is a travelling

road, and that the said s. 49 applies thereto. He refers to the duty of the respondents to comply with the provisions of s. 49, specifies the manner in which the respondents failed to keep the roof secure "so as to prevent the fall of redd from the centre of the roof on to the rails", and avers that, had the respondents complied with the provisions of s. 49 and made and kept the roof secure, the accident to the appellant would not have happened. Beyond referring to s. 49 for its terms, the respondents deny these averments. A

I agree with my noble and learned friend, LORD REID, that there is no substance in the respondents' criticism of the adequacy of the appellant's pleadings. I would observe also that the respondents have no plea that calls for an inquiry into the facts. They have only two pleas, one that the appellant's averments are irrelevant and insufficient in law to support the crave of the writ, and the other that the damages claimed are excessive. On their plea to relevancy, the appellant's averments must be taken *pro veritate*. Their denial of these averments goes, therefore, merely to a denial of their liability at law on the facts averred. The appellant's averments, fairly read, must, in my opinion, be taken as meaning that the fall had taken place some time during the appellant's shift, and that what fell from the roof fell in part at least on to the rails and was not insignificant in amount. It was, in fact, "redd," as averred, which, in mining and other parlance, means rubbish or waste material and, according to the appellant's averment, which, as I have said, must be accepted as true, it fell "from the centre of the roof on to the rails". If the facts were otherwise, it was for the respondents to aver them and to ask for a proof. B

There remains for consideration the two questions of law which were argued in the courts below and in this House, namely, what is the scope of s. 49 in relation to the protection of persons working in a mine and, if the section is wide enough in scope to be relevant to the type of accident that happened here, whether breach of the section is causally connected with the accident. C

On the facts admitted, there clearly was a breach by the respondents of s. 49. This was, indeed, admitted in the courts below, as stated by the sheriff-substitute in the Sheriff Court, and by LORD PATRICK and LORD BIRNAM in the Court of Session, if not conceded before this House. It was maintained, however, for the respondents that the section was intended to ensure the safety of a mineworker only against a direct or indirect hit by some material falling from an insecure roof. The Lord Justice-Clerk, in his opinion, did not go so far as this. He said: D

"There might be a case where injury happened so soon after the fall and was so intimately connected with the fall that it would not avail the defenders to say that their liability had ceased because the fall was over." E

This, I think, might be a relevant consideration on the question of causation, but it would appear to throw loose the whole question as to the nature of the protection afforded by the section. LORD BIRNAM does not deal with this point. He regards the effects of the fall from the roof as having spent themselves, and the roof as being secure at the time of the accident. He thus arrives at the easy conclusion that the accident was not caused by a breach of s. 49. LORD PATRICK goes, I think, furthest in the respondents' favour: He says: F

"Section 49 in terms deals only with the roofs and sides of travelling roads and working places. These are to be made secure obviously against the risk of material falling on men travelling on or working in them. It is silent as to any duty to keep the floors of travelling roads and working places free of obstructions, and yet when the statute wishes to impose such an obligation it does so in other sections in express terms and with or without qualification according to the circumstances with which it is dealing." G

He is referring in this last sentence to s. 42 to s. 47 of the Act, and particularly I

A to s. 47, which enacts: "Every haulage road shall be kept clear as far as possible of pieces of coal and other obstructions." Later, his Lordship says:

"The pursuer must therefore establish the existence of such a duty, if it exists, not by founding on a breach of s. 49, but by founding on s. 47 of the statute, or by alleging a breach of duty under the common law to take due care."

B

My Lords, I cannot find any sure ground for limiting the protection afforded by s. 49 to protection against what I may call a hit, or a near hit, from falling material. The roof or sides of a travelling road, or a working place, might fall or cave in without any immediate injury to a man, either close to or some distance from the man, and he might die hours afterwards from suffocation as a result of all means of egress and ventilation being stopped. Other types of accident can be imagined as, for instance, by falls damaging haulage or electric apparatus with consequent injury to workmen. No doubt a direct hit may be the commonest, or most likely, type of injury caused, or to be contemplated from an insecure roof, but I cannot, with any confidence, say that that was all that the statute contemplated. I can deduce from the language used only that the section was passed for the protection of workmen and that, if a workman is injured by a breach of the statute, he has a remedy in damages against his employer. There may be some other statutory provision, or regulation, on which he can rely, but there is no reason why protective provisions may not overlap, and it is common experience to find an injured workman relying, sometimes successfully, on breach of two or more statutory provisions, or regulations.

E

Reference was made to *Gorris v. Scott* (1) (1874) (L.R. 9 Exch. 125). This case might be in point if it could be postulated that s. 49 was confined to protecting workmen from injury through being hit by falling material. As LORD PATRICK put it, the obstruction of the road would not be the mischief which the section was designed to prevent. But, for the reasons I have given, *Gorris v. Scott* (1) cannot, in my opinion, be invoked here.

F

There remains the question of causation. The case for the respondents was put most clearly by LORD BIRNAM, when he said that the true cause of the accident was not the fall of the roof but the failure to clear away the resulting debris. He regarded the breach of s. 49 as having been spent at the time of the accident. It is, in my opinion, not possible so to regard the matter. It does not, in my view, matter whether the fall took place a few minutes before the accident, or a few hours before the accident. Presumably the fall had not been discovered before the accident, or the respondents would have done something about it. Either they knew of it, or should have known of it, and did nothing about it, or they, without any blame on themselves, knew nothing about it. I take the hypothesis most favourable to them, though I do not think it matters. A second failure in duty could hardly relieve them from the consequences of the first failure.

H

On this view, I see nothing to break the causal chain between the breach of duty and the injury which followed. The fall from the roof caused the obstruction; the appellant was injured by the obstruction; the appellant was injured as a result of the fall which caused the obstruction and which, ex hypothesi, was due to a breach by the respondents of their duty under s. 49. Unless there were some fresh circumstances introducing a novus actus interveniens, the initial breach of duty cannot, in my opinion, be regarded as spent.

I

I would allow the appeal.

LORD SOMERVELL OF HARROW: My Lords, as I have come to a conclusion which differs from that of the Second Division of the Court of Session, I will briefly state my reasons. I agree with the Lord Justice-Clerk that the case turns on the ambit of s. 49. That section makes it an offence not to make secure the roof and sides of every travelling road and working place. Its object is to prevent a fall or collapse. There may be an offence although there has been no

fall. The fall is not the offence, but the consequence of it. Whether the fall A
injures anyone is irrelevant to the offence.

It is admitted that the appellant, in order to reach the surface after his work,
had to travel, as he did, in the man haulage in the Bogie Dook, a haulage road
which was also a travelling road. It is admitted that the bogie on which the
appellant was travelling was derailed by some redd which had fallen from the B
roof. It is admitted that this derailment caused the injuries for which the claim
is brought. It was admitted before the sheriff-substitute, though I think not on
the pleadings, that the fall of the redd was due to a breach of s. 49. No novus
actus interveniens was suggested. It is submitted for the respondents that the
only injuries resulting from a failure to make secure which can give rise to civil
liability are those due to direct impact between the falling roof or collapsing
sides and the miner. I am unable so to restrict its ambit. It was not suggested C
that there was anything unusual in a travelling road having rails on which
man haulage bogies are run. So far as such roads are concerned, the risk of
derailment may well be greater than that of a direct hit. As a danger, it seems
to me equally obvious. Another example of an obvious danger was suggested
in the course of the argument. The roof and sides might collapse as a result of
their not being made secure, so that a travelling road would be totally obstructed. D
Men might be cut off and die, or suffer injuries, from lack of air or food. This,
again, seems to me an obvious possible result of a failure to make secure, though
no man would be injured by impact. I, therefore, cannot agree that the section
is silent as to obstructions except on the basis that it is silent, as it is, as to all
consequences, including direct impact. Total or partial obstruction is an obvious
consequence of a fall and is, to my mind, an obvious possible cause of danger, E
two examples of which I have set out.

It is said that the application of the section to working places creates a
difficulty, in that the only danger there would be from impact. I will accept
this, though I have no sufficient knowledge to affirm it. This does not, to my
mind, create any difficulty. Assume three possible mischiefs prima facie within
the ambit of a statutory prohibition. The fact that one can only occur in part F
of the locality covered by the prohibition would not, in itself, be any argument
for excluding it.

It is submitted that the prima facie ambit of s. 49 is limited by s. 47. One
may find in a statute a section plainly intended by its wording to deal with all
cases of X, although, if it had not been there, some cases of X would have arisen
and been differently dealt with under another section. It seems to me impossible G
so to construe s. 47. On its wording, it is not dealing with the same area as s. 49.
It is only the fact that, as in the present case, a haulage road may also be a
travelling road that makes the argument possible. There is a further difficulty.
Section 47 would apply to obstructions which were not the result of any
antecedent breach. One would want clear words to include in the same provision
obstructions which were the result of an antecedent breach. That argument, I H
think, fails. The point is a short one. I differ because I am unable to hold that
the "mischiefs" of derailment by a fall from an insecure roof is not within the
ambit of the section.

I would allow the appeal.

Appeal allowed.

Solicitors: *Beveridge & Co.*, agents for *Macbeth Currie & Co.*, Dunfermline,
and *J. & A. Hastie*, Edinburgh (for the appellant); *D. H. Haslam*, agent
for *James Allan*, Edinburgh (for the respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

A FIRESTONE TYRE AND RUBBER CO., LTD. v. LEWELLIN
(INSPECTOR OF TAXES).

[COURT OF APPEAL (Lord Evershed, M.R., Jenkins and Birkett, L.JJ.), February 7, 8, 9, 10, 13, 1956.]

B *Income Tax—Foreign company—Subsidiary in United Kingdom—Contracts with foreign distributors—Subsidiary accepting and discharging orders—Whether agents of foreign company—Whether foreign company carrying on trade within United Kingdom—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), Sch. D, para. 1, All Schedules Rules, r. 5, r. 10.*

C Under agreements with various European distributors, an American company making and selling branded tyres, and having a world-wide organisation, granted to the distributors the exclusive right to sell the branded tyres in their areas in return for an undertaking not to sell or distribute other kindred products and to keep a sufficient stock of the branded tyres. The American company fixed prices by lists and undertook to deliver against ninety-day sight drafts. Under a separate agreement between the American company and the taxpayers, who were an English subsidiary of the American company and manufactured branded tyres for the American company, the taxpayers were to use their best endeavours to fulfil orders for the European market "obtained by" the American company, and the taxpayers were to give such instructions for payment of the price of tyres supplied as the American company should request. In consideration of these services the American company undertook to pay to the taxpayers the cost price (as defined) of the tyres supplied plus five per cent. In fact the American company supplied the European distributors with lists of manufacturers, including the taxpayers, who would fulfil the distributors' orders; the taxpayers received orders by post direct from the distributors and executed them by delivering the tyres f.a.s. vessels at an English port, and collected the price and dealt with it in accordance with the requirements of the American company. The taxpayers were assessed to income tax as agents for the American company in the sum of £10,000 for each of the five years of assessment 1940-41 to 1944-45.

F **Held:** (i) the American company were exercising by means of the taxpayers a trade within the United Kingdom in respect of which tax was chargeable under para. 1 (a) (iii) of Sch. D to the Income Tax Act, 1918*, and the tax was assessable on the taxpayers by virtue of r. 5 of the All Schedules Rules, and

G (ii) the exception provided by r. 10 of the All Schedules Rules did not apply since the taxpayers were an authorised person carrying on a regular agency of the American company within the rule.

Appeal dismissed.

H [As to taxation of non-residents in the United Kingdom, see 17 HALSBURY'S LAWS (2nd Edn.) 172-174, paras. 357-362; and for cases on the subject, see 28 DIGEST 32-37, 166-198.

I For the Income Tax Act, 1918, Sch. D, para. 1 and the All Schedules Rules, r. 5 and r. 10, see 12 HALSBURY'S STATUTES (2nd Edn.) 151, 183, 185; and for the replacing provisions of the Income Tax Act, 1952, s. 122, s. 369, s. 373 (1), see 31 HALSBURY'S STATUTES (2nd Edn.) 112, 354, 356.]

Cases referred to:

- (1) *Maclaine & Co. v. Eccott*, [1926] A.C. 424; 10 Tax Cas. 481; Digest Supp.
- (2) *Weiss, Biheller & Brooks, Ltd. v. Farmer*, [1923] 1 K.B. 226; 92 L.J.K.B. 179; 128 L.T. 471; 8 Tax Cas. 381; 28 Digest 35, 180.
- (3) *Greenwood v. Smidth (F. L.) & Co.*, [1922] 1 A.C. 417; 91 L.J.K.B. 349; 127 L.T. 68; sub nom. *Smidth (F. L.) & Co. v. Greenwood*, 8 Tax Cas. 193; 28 Digest 36, 186.

* This and rr. 5, 10, are printed at pp. 694, 695, post.

- (4) *Sulley v. A.-G.*, (1860), 5 H. & N. 711; 29 L.J.Ex. 464; 2 L.T. 439; 24 A.J.P. 676; 2 Tax Cas. 149n.; 157 E.R. 1364; 28 Digest 25, 132.
- (5) *Grainger & Son v. Gough*, [1896] A.C. 325; 65 L.J.Q.B. 410; 74 L.T. 435; 60 J.P. 692; 3 Tax Cas. 462; 28 Digest 35, 185.
- (6) *Lamb (W. T.) & Sons v. Goring Brick Co., Ltd.*, [1932] 1 K.B. 710; 101 L.J.K.B. 214; 146 L.T. 318; Digest Supp.

Appeal.

The taxpayers (called "Brentford" in the Stated Case) carried on the business of tyre and rubber manufacturers at Brentford, Middlesex. They appealed to the Special Commissioners of Income Tax against two alternative series of income tax assessments made on them under Sch. D to the Income Tax Act, 1918, for 1940-41 to 1944-45 inclusive. The first series of assessments was made under Case I of Sch. D in respect of their profits as tyre manufacturers in the sum of £5,000 in each year respectively. The second series of assessments was made on them as agents for an American corporation, Firestone Tire and Rubber Export Co., of Akron, Ohio, in the United States of America (called "Akron" in the Stated Case) in respect of agency profits in the sum of £10,000 in each year respectively. These assessments were in addition to the assessments made on Brentford in respect of their own business of tyre manufacturers. The questions for determination were: (a) whether Brentford were themselves carrying on a trade on their own behalf of selling tyres to persons outside the United Kingdom; and, if not, (b) whether Akron were exercising within the United Kingdom a trade of selling tyres to persons outside the United Kingdom; and, if so, (c) whether that trade was carried on by Akron through the agency of Brentford. Brentford contended that no such trade was being carried on or exercised by themselves or by Akron and that they were not acting as agents for Akron. The Crown contended that either Brentford were carrying on the trade on their own behalf or that Akron were carrying on the trade through the agency of Brentford. The Special Commissioners held that Brentford were not carrying on on their own behalf a trade of selling tyres to customers of Akron, but that Akron were exercising a trade in the United Kingdom through the agency of Brentford. They therefore held that the appeal failed in respect of the assessments made on Brentford as agents for Akron. On Oct. 20, 1955, HARMAN, J., dismissed Brentford's appeal by way of Case Stated against that decision. The taxpayers (Brentford) appealed.

Sir Millard Tucker, Q.C., and *G. G. Honeyman, Q.C.*, for the taxpayers.
Sir Frank Soskice, Q.C., and *Sir Reginald Hills* for the Crown.

LORD EVERSHERD, M.R.: The bulk of those who are liable to pay income tax are the subjects of Her Majesty resident in the United Kingdom; but there are cases in which persons not subjects of Her Majesty, and not resident in the United Kingdom, may pay the tax. Thus, the Income Tax Act, 1918, Sch. D, para. (1), provided:

"Tax under this Schedule shall be charged in respect of—(a) The annual profits or gains arising or accruing . . . (iii) to any person, whether a British subject or not, although not resident in the United Kingdom . . . from any trade, profession, employment, or vocation exercised within the United Kingdom . . ."

That tax liability of foreign non-residents is qualified and governed as regards assessment by the General Rules applicable to Sch. A, B, C, D and E. Rules 5 and 10 assumed their form as successors of the Income Tax Act, 1842, as amended by the Finance (No. 2) Act, 1915, s. 31. Rule 5 provided:

"A person not resident in the United Kingdom, whether a British subject or not, shall be assessable and chargeable in the name of any such trustee, guardian, tutor, curator, or committee, or of any factor, agent, receiver,

A branch, or manager whether such factor, agent, receiver, branch, or manager has the receipt of the profits or gains or not, in like manner and to the like amount as such non-resident person would be assessed and charged if he were resident in the United Kingdom and in the actual receipt of such profits or gains."

B But r. 10 provided:

C "Nothing in these rules shall render a non-resident person chargeable in the name of a broker or general commission agent, or in the name of an agent not being an authorised person carrying on the regular agency of the non-resident person or a person chargeable as if he were an agent in pursuance of these rules, in respect of profits or gains arising from sales or transactions carried out through such a broker or agent."

D From para. 1 of Sch. D and these two rules, it follows that in the case of an attempt to tax a non-resident person via a "regular" agent, two requirements must be shown to be satisfied: first, the non-resident must be, not merely trading with the United Kingdom, but exercising, i.e., carrying on, a trade or profession, etc., within the United Kingdom; and, secondly, for the purposes of that trade, profession, etc., there must be what is called an authorised person as regular agent of the non-resident trader.

E The claim to income tax in the present case relates to the five tax years 1940-41 to 1944-45 inclusive. That was a period of severe war-time restriction in this country on trading between the United Kingdom and foreign parts, a matter which has some bearing on this case.

F The non-residents sought here to be taxed are the Firestone Tire and Rubber Export Co., a company incorporated in the State of Maine but having their principal place of business in the city of Akron in the State of Ohio in the United States. I will call that company "Akron". The alleged regular agents who are to be taxed on behalf of the non-resident Akron company are an English company known as the Firestone Tyre and Rubber Co., Ltd., whose factory and offices and place of business are at Brentford in the environs of London. That company I will refer to as "Brentford". Brentford are wholly controlled by Akron; but I agree with counsel for the taxpayers that the effect of the separate legal entity which Brentford are cannot be disregarded and the question raised in this appeal cannot be answered by treating Brentford as though they were a mere emanation of Akron.

G The questions to be decided as stated by the commissioners in the Case Stated are:

H "The questions for determination before us were as follows . . . (b) whether Akron was exercising within the United Kingdom a trade of selling tyres to persons outside the United Kingdom; and, if so, (c) whether that trade was carried on by Akron through the agency of Brentford."

I The decision in every case before the court in the end depends on its particular facts, and the facts of the present case are in many respects special and peculiar. As counsel for the taxpayers said, in the old cases in which the taxing of non-resident persons came before the courts (e.g., the "champagne" cases) the non-resident generally sold in the United Kingdom goods made abroad; and it was in particular reference to cases of that type that VISCOUNT CAVE, L.C., in *Mac-laine & Co. v. Eccott* (1) (1926) (10 Tax Cas. 481) used language quoted many times (*ibid.*, at p. 574):

"The question whether a trade is exercised in the United Kingdom is a question of fact, and it is undesirable to attempt to lay down any exhaustive test of what constitutes such an exercise of trade; but I think it must now be taken as established that in the case of a merchant's business, the primary object of which is to sell goods at a profit, the trade is (speaking generally)

exercised or carried on (I do not myself see much difference between the two expressions) at the place where the contracts are made. No doubt reference has sometimes been made to the place where payment is made for the goods sold or to the place where the goods are delivered, and it may be that in certain circumstances these are material considerations; but the most important, and indeed the crucial, question is, where are the contracts of sale made?" A

On its facts this case is very different in material respects from the "champagne" cases. In some respects it may be said to be the converse of them, since the goods here in question were made in the United Kingdom and then sold abroad. B

As regards the Akron business, para. 4 of the Case Stated, a finding of fact by the commissioners, states: C

"Akron, an American corporation registered in Akron, Ohio, is the head of a world-wide organisation consisting of a large group of corporations operating in America and in various parts of the world. Some of its associated and subsidiary corporations manufacture and sell tyres in the countries in which they are registered and others sell, in the countries in which they are registered, tyres which have been manufactured in America or by subsidiary corporations in other countries." D

Whether Akron manufacture tyres does not appear to have been proved in evidence, but, on the basis of the finding of the commissioners, I assume that Brentford are an important member of the general Akron organisation. The business of that organisation is the marketing and distribution of Firestone tyres and other Firestone products. Firestone tyres are branded articles. Besides being in fact a trade mark, the name "Firestone" is a valuable part of the goodwill of Akron. I assume also that tyres which bear that mark as a guarantee of the quality by Firestone are made in accordance with some particular process, whether patented or not, and that that process is a valuable part of the business undertaking and property of Akron. E

The distribution of Firestone products outside the United States, and particularly in Europe, appears to be conducted by Akron through distributors under "distributor" agreements. The substance of the obligation imposed on distributors is that they were bound to promote the sales in their countries of Firestone products and not to sell any competing products themselves at the same time. F

In order that such a distributor should get supplies, Akron have established as part of their organisation controlled manufacturing companies (of which Brentford is one) whose function it is to make Firestone tyres and other Firestone products according to the strict directions and specifications of Akron, and to dispose of those tyres subject only to the terms imposed by Akron. G

The distributor agreement called the master agreement is typical of the type of agreement made by Akron with their distributors. I will call it the Swedish master agreement, for it is made between Akron and a company situated in Stockholm. A good deal of the argument has turned on its true effect. It provides (I will call the distributor referred to "Sweden"):

"(1) [Akron] hereby grants to [Sweden] upon the terms and conditions hereinafter mentioned, the exclusive right to sell Firestone branded . . ."
tyres, etc., in the territory of Sweden, and in consideration of that grant Sweden agrees to buy, sell and distribute such Firestone branded products exclusively, to keep on hand a sufficient stock to meet demand, and to use their best endeavour to promote the sale and distribution, etc. H

"(2) Prices: Subject to [Akron's] right to change prices . . . [Sweden] shall be entitled to the prices . . ."
I

A on the branded tyres as per attached lists. The lists in fact were not attached to our copy, but we understood from counsel for the taxpayer that, as is common I take it with most branded articles, there was a controlled price which Sweden had to pay and a controlled price at which Sweden had to sell. Then there was a provision for permitting Akron to change the prices.

B “(3) Deliveries: [Akron] will make deliveries f.a.s. vessel provided always that the shipment shall weigh [so much]. Delivery to carrier shall constitute delivery to [Sweden].

“ (4) Terms: The terms of [Akron] shall be ninety days’ sight draft, documents against acceptance.”

Then there are further provisions about changes in price, and a further obligation C on Sweden to keep stocks on hand. Clause 9 provides that Akron reserves the right to sell Firestone products to companies and others who customarily purchase their tyres in the United States, etc., even though such products may be shipped to the distributor’s territory, that is Sweden.

Clause 12 provides that Akron:

D “shall not be liable for delays or failures to make delivery of goods ordered hereunder occasioned by war, fires, the elements, labour trouble, interruption or shortage of transportation facilities, inability to obtain goods, or from any cause beyond the control of [Akron].

E “(13) It is understood and agreed that this agreement is not to be construed as constituting [Sweden] an agent of [Akron] for any purpose whatever.

F “(14) The contract between the parties hereto is fully set forth in this agreement and has been entered into under the considerations herein expressed and no others, and shall become effective only when executed by the duly authorised representative of [Akron] at Akron, Ohio, it being agreed that this agreement is to be construed under the laws of the State of Ohio in the United States of America ”;

and it is not to be altered or modified except by written indorsement, etc. There is a power of cancellation which is irrelevant.

Although it was perhaps implicit rather than clearly expressed, it seems to me clear on the face of it that the effect of the master agreement was that Akron G would themselves sell to Sweden such tyres and other products as Sweden should require, or at least would provide the tyres, etc., that Sweden would require, at the prices and subject to the other conditions contained in the agreement. Throughout the case and in the other documents Sweden have been treated as and called a customer of Akron.

H The second master agreement, between Akron and Brentford, again a typical one of a kind, which I will call the Brentford master agreement, came into being in 1936, although Brentford had been in existence many years before that. It provides:

I “(1) In consideration of the payment by [Akron] hereinafter mentioned [Brentford] will from time to time use its best endeavours to fulfil either by manufacture or from its existing stocks all orders obtained in Europe or elsewhere by [Akron] as and when requested so to do by [Akron].

“ (2) [Akron] shall upon each request being made forward to [Brentford] full particulars of such order.

“ (3) [Brentford] shall upon the receipt of such order with all possible dispatch forward the goods thereby ordered to the purchaser and shall give such instructions for payment of the purchase price by the purchaser as shall be requested by [Akron].

“ (4) In consideration of the above mentioned services [Akron] will pay to [Brentford] in the manner hereinafter mentioned a sum equal to the cost

price to [Brentford] of the goods supplied hereunder plus five per centum thereof.” A

Then the expression “cost price” is defined. Clause 5 provides for accounts between the parties. Clause 6 provides that the agreement shall continue for a specified period, but it has continued ever since.

Unlike the Swedish master agreement, there is no provision here that nothing in the agreement should constitute Brentford as the agent of Akron for any purpose. I think it is clearly contemplated on the face of the document that, when Akron receive an order from any of their customers or purchasers they will or may pass it on to Brentford for execution, with such directions as to price and so on as they may give. Brentford would be bound to execute it, or at least to use their best endeavours to do so. B

On the face of the documents, the case would be fairly analogous to the example, given by counsel for the taxpayers, of the man who desires to present a bunch of flowers to the lady of his choice, and orders them from a florist. The florist, not being able in fact to supply those flowers, gets another florist to do so, and the lady receives in due course the flowers in fact from the second florist. In such a case (and I dare say the result would be similar if the arrangement had gone strictly according to the letter of the master agreement) it is at least probable that the second florist never enters into any contractual relations with the customer who orders the flowers. C

But things did not work out quite as the agreements, on the face of them, stated that they should. That was due partly to the English war-time controls, which rendered Brentford unable to comply with orders for tyres save such as the appropriate governmental authority either permitted or indeed directed them to supply. The main difference in practice was that the orders were not sent to Akron by Sweden and then passed on to Brentford. They were sent direct to Brentford. The variation in procedure was authorised, and Akron gave to customers or distributors a list of persons or firms in European and other countries to whom they could send their orders direct. D

Paragraph 12 of the Case states: E

“Throughout the period concerned in this Case [1940 to 1946] sales were invoiced to the appropriate distributor in the name of Brentford and a sight bill of exchange on the distributor for payment in London was drawn in the name of Brentford. Brentford arranged for the shipment to the distributors of the tyres, etc., ordered by them from Brentford. In respect of each transaction Brentford furnished to Akron copies of the export invoice, the export manifest, the sight draft and the bill of lading. Akron was also notified by the bank when Brentford received payment for the goods. These documents and this information was sent for the purpose of enabling Akron to prepare their own sales ledgers. No sales ledgers for accounts of distributors outside the United Kingdom were kept by Brentford.” F

Then, in the statement of the conclusions, para. 16 (c) of the Case states: G

“It seems to us that in the relevant years the arrangements subsisting between Akron and Brentford were as follows: By virtue of the agreement of Feb. 8, 1936, [the Brentford master agreement] Brentford agreed to fulfil orders obtained by Akron when requested to do so by Akron. The orders to be fulfilled were limited to those from customers approved by Akron and these orders were to be fulfilled on terms laid down by Akron in master agreements executed outside the United Kingdom. Brentford was authorised by Akron to fulfil orders coming from Akron’s approved customers without any intervention by Akron and all the documents for the fulfilment of the orders were made out in the name of Brentford. Moreover the proceeds of the sales arising from the fulfilment of the orders were paid to Brentford in the United Kingdom. These sales moneys were paid into a special bank H

I

- A account and transferred to Brentford's bank account at the end of each month."

It may be said that, since there was difficulty in transmitting money from the United Kingdom to America, the amounts for which Brentford were accountable to Akron were treated as though they were loans by Akron to Brentford.

- B Two particular transactions comprised supplies of Firestone tyres to the government of New Zealand and to the government of France in Great Britain, the so-called Free French government. These two orders covered goods to the value of £49,000 out of a total of £728,000 with which this case is concerned. The supplies to the New Zealand and Free French governments were not in fact in accordance with the Akron-Brentford arrangements or the Akron master agreements. They were directed by the British government. They were treated
- C by Brentford quoad Akron, however, as though they had been within the scope of the master agreements, and the Crown has been content to treat them as though they were in consimili casu with the whole of the rest of the transactions.

- To illustrate my judgment, let me take an imaginary order from Stockholm, Sweden, for a thousand tyres. Sweden send direct to Brentford an order for the supply of one thousand Firestone tyres. Having regard to the terms of the
- D Brentford master agreement, Brentford may not have been bound or, indeed, having regard to war-time controls, able to accept it. But if they accept it, they supply all the tyres, and, in accordance now with the terms of the written master agreements, deliver them free alongside ship, that constituting delivery to Sweden. As between Brentford and Sweden, the transaction is in all respects governed by the dictates of Akron in accordance with the Swedish master
- E agreement, i.e., all the details as to the price to be charged, the method of collection, delivery, etc.

- On a true analysis, what is the result of a transaction taking that form? Counsel for the taxpayers has said it is one of two things: either (a) the sole trading operation was an operation between Sweden on the one hand and Brentford on the other, an English contract becoming in due course an English sale, and
- F the arrangement between Brentford and Akron about the subsequent apportionment of the purchase price collected being something altogether outside the scope of the trading operation, with the consequence that Akron are not trading or carrying on a trade within the United Kingdom; or, (b) on the giving of the order by Sweden, a new contract between Sweden and Akron came into existence, or alternatively a contract between Brentford and Akron, with the purpose or
- G having the effect that the thousand tyres which were to be delivered to Sweden became the property of Akron. In either case there was a point of time when the property passed to Akron, and from that time forward the transaction was exclusively governed by the terms of the Swedish master agreement, which was made out of England and is governed by the laws of the State of Ohio; and therefore it follows also that Akron are not carrying on a trade within the United
- H Kingdom at all.

- Certainly the way in which counsel put the case has all the attractions of simplicity. I think that it is too simple, and that when the matter is more closely examined very severe difficulties confront counsel. In my judgment HARMAN, J., came to a correct conclusion, for on examination, neither of counsel's propositions can be established.

- I In my imagined simple case, on the order being given by Sweden and accepted by Brentford I think there arose between Brentford and Sweden a contract of sale made in England, which became a sale under the Sale of Goods Act, 1893, when the tyres were delivered by Brentford free alongside ship in accordance with the other arrangements. Like the learned judge, I reject the notion that there arose at some point of time what I think was aptly described by HARMAN, J., as a philosophical contract between Brentford and Akron sufficient to pass the property in those tyres from Brentford to Akron before delivery. It is possible—

the learned judge assumed it was the fact, but I do not go so far—that, when Sweden sent their order to Brentford, there also arose between Sweden and Akron a contract subsidiary to the Swedish master agreement on the footing that, properly construed, the Swedish master agreement operated as a continuing offer by Akron to sell or to provide tyres, that offer being accepted when Sweden gave an order for tyres in pursuance of and in reliance on it. If such a fresh contract comes into existence it would occupy a very subsidiary and ancillary position. To go back again to my case, for example, if Brentford committed some default, having accepted the order, I think that on my analysis Sweden would be entitled to sue Brentford for breach of contract. It may be that Sweden could also sue Akron under the Swedish master agreement for having failed to provide the tyres, or set up against Akron what I have called a subsidiary and ancillary contract. But any such contract between Akron and Sweden would be of a purely incidental character.

The possibility of such a contract has some aspects of danger for counsel for the taxpayers, for this reason. We do not know the exact arrangements whereby communications passed between Sweden and Akron. Assuming that there was by the Swedish master agreement a continuing offer, it may be that, to create contractual relations, acceptance must first be communicated to the offeror, and that for Sweden merely to put the order in the Swedish post box would not suffice to create a contract. If that is right—I think counsel for the taxpayers conceded this—then the communication in the imagined case was made, not to Akron direct, but to Brentford, and Brentford must at least be the agent of Akron to receive communication of the acceptance, with the possible result that (I say no more), even on the second alternative which counsel put forward, there would arise a contract with Akron in England because the acceptance of the offer was communicated to Akron via their agents in England. I need not pursue that aspect of it further. In my judgment it suffices that, on Sweden sending an order for tyres to Brentford, there came into existence in England a contract for sale between Brentford and Sweden.

If that is so, are Akron carrying on a trade within the United Kingdom? In my judgment they are. The typical English contract of sale between Brentford and Sweden which I have supposed is an incident deliberately contrived of Akron's business of marketing and distributing Firestone branded tyres in England and in Europe, and indeed in every country of the world. Firestone tyres are branded proprietary articles of the Akron organisation.

My conclusion does not involve the proposition that Brentford, instead of being an independent legal entity, are a mere branch of Akron. Though a separate entity, Brentford are wholly controlled by Akron, and, in the making of what may be described as Akron proprietary branded articles, they act under the close direction of Akron in all respects, and they sell those articles to Akron's customers on terms fixed by Akron, so that, after allowing Brentford their costs and a percentage thereon, the whole of the profits on the transactions go to Akron.

In *Weiss, Biheller & Brooks, Ltd. v. Farmer* (2) (1922) (8 Tax Cas. 381), a Dutch company, which manufactured gas mantles in the Netherlands, made a business arrangement with an English company for the distribution and marketing of their gas mantles here. The substance of the arrangement was that the Dutch company sold the gas mantles first to the English company, the two acting as principals, vendors and purchasers, and the English company then sold them again to customers in England, again acting as principals, as vendors. Ultimately the profits of those transactions were divided between the Dutch and the English companies in certain proportions. I do not suggest that that case is entirely parallel with the present one, and the reference in the somewhat obscurely worded agreement between the Dutch company and the English company to *del credere* certainly lends much force to the view that the English company were regarded as agents of the Dutch company, in some respects at any rate. But the case shows,

A and illustrates the principle, that the fact that an English company sell goods as a principal to the customers does not negative the proposition that the parent company, from which the goods emanated, may not equally be carrying on or exercising a trade within the United Kingdom. I think it was rightly regarded by HARMAN, J., as lending support to the view which he formed.

B There remains the third and final question. If Akron are carrying on this trade within the United Kingdom, then, for the purposes of r. 5 and r. 10 of the All Schedules Rules (pp. 694, 695, ante), are Brentford their "regular" agents? To my mind the answer must be in the affirmative. If Akron are trading in the United Kingdom, they must be doing so through someone's agency, since admittedly Akron are not here themselves, nor are any of their officers, nor have they got here any branch or office. Indeed, as I understood him, counsel for the taxpayers C did not argue otherwise than that, given the premise that Akron were exercising a trade here by means of or as a result of Brentford's sale transactions, Brentford must be treated as a regular agent within the terms of r. 10. Having regard to the Brentford master agreement, there cannot be any doubt that, if Brentford are for this purpose an agent at all, they certainly are a regular agent and not merely (the phrase to be found in the cases) an irrelevant agent.

D The view of the case which I have taken makes it unnecessary for me to discuss the further question also debated before us, whether, on the assumption that contracts for sale to Sweden of tyres were contracts with Akron made outside the United Kingdom and governed by United States law, still Akron were exercising a trade within the United Kingdom because so many incidents of the performance of the contract (delivery, receipt of the purchase price, etc.) take E place here: in other words, the point that the exceptional facts of this case take the matter out of the general rule enunciated by LORD CAVE, L.C., in *MacLaine & Co. v. Eccott* (1) cited at pp. 695, 696, ante. The learned judge was inclined to the view that an affirmative answer should be given to that question, i.e., that the case was so exceptional in its facts that, to support his answer, he could invoke the language used by ATKIN, L.J., in *F. L. Smidth & Co. v. Greenwood* (3) (1921) F (8 Tax Cas. 193 at p. 204):

"I think that the question is, where do the operations take place from which the profits in substance arise?"

In the view which I have taken it is unnecessary for me to discuss that matter, and I express no conclusion about it; but for the reasons given I think HARMAN, J., G came to a correct conclusion, and I would dismiss this appeal.

JENKINS, L.J.: I agree. The question whether Akron were during the relevant years exercising a trade within the United Kingdom through the agency of Brentford is a question of fact, which the Special Commissioners have answered in the affirmative, and their decision on that question, as the tribunal of fact, H is not to be disturbed on appeal, unless the facts as found by them are incapable in law of supporting such decision.

Counsel for the taxpayers has argued that, on the facts found, and on a proper appreciation of the legal effect of the distributor agreement and the agreement of 1936, and of the course of dealing between Akron and Brentford and the various distributors whose orders were dealt with by Brentford, the only proper conclusion I as a matter of law is that Akron were not at any material time exercising a trade within the United Kingdom, or at all events were not exercising a trade within the United Kingdom through the agency of Brentford.

I think the effect of counsel's argument may fairly be thus summarised: (i) Akron and all the distributors whose orders for tyres are material to the case were resident outside the United Kingdom, and the distributor agreement entered into between Akron and each of these distributors was made outside the United Kingdom. (ii) Each of the distributor agreements amounted to a standing offer by Akron to supply the distributor concerned with tyres as and when ordered by such

distributor. If the terms of the distributor agreements had been strictly adhered to, the distributors would have given their orders for tyres to Akron, and each such order would have constituted an acceptance of Akron's standing offer, and thus have given rise to a contract between Akron and the distributor concerned for the sale by the former to the latter of the tyres ordered—see POLLOCK ON CONTRACTS (13th Edn.), at p. 141. The acceptance would be complete on the dispatch by the distributor in his own country by post or cable of his order for tyres. The contract would thus be made in the distributor's country of residence, i.e., outside the United Kingdom. A

(iii) If the terms of the distributor agreements had been strictly adhered to, the position under the agreement of 1936 between Akron and Brentford would have been that, as and when contracts for the sale of tyres by Akron to distributors were concluded in the way above described, Akron, if so minded, would have passed them to Brentford to carry out under the agreement of 1936; and thereupon, as between Brentford and Akron, Brentford would have been bound, so far as they were able, to fulfil those contracts on the terms as to remuneration and otherwise contained in that agreement. B

(iv) It follows that, if the terms of the distributor agreements had been strictly complied with, Akron might well have been carrying on a trade of selling tyres to distributors outside the United Kingdom, but could not have been exercising that trade within the United Kingdom because all the contracts for the sale of tyres would have been made outside the United Kingdom; and the balance of authority is strongly in favour of the view that a merchanting trade, that is to say a trade concerned with the sale of goods, is (generally speaking) carried on in the place where the contracts are made—see, e.g., *MacLaine & Co. v. Eccott* (1) per LORD CAVE, L.C. (10 Tax Cas. at p. 574). The fact that a non-resident trader, who has made a contract outside the United Kingdom with another non-resident for a sale of goods to the latter, obtains those goods from a trader resident in the United Kingdom is not enough to displace the general rule so as to make the trade of either non-resident a trade exercised within the United Kingdom—see *Sulley v. A.-G.* (4) (1860) (2 Tax Cas. 149n.), and the distinction drawn by LORD HERSCHELL in *Grainger & Son v. Gough* (5) (1896) (3 Tax Cas. 462 at p. 467), between trading with a country and carrying on trade within a country. C

(v) The fact that the strict terms of the distributor agreements were departed from in practice (both before and after the date of the agreement of 1936), so as to allow distributors to order any tyres they required from any listed manufacturer of Firestone tyres selected by them, does not affect the above conclusion. The distributor's order addressed to any listed manufacturer equally raised a contract made outside the United Kingdom between Akron and the distributor concerned immediately on the dispatch by letter or cable of the distributor's order, the listed manufacturers simply playing the role of agents empowered to receive such orders on Akron's behalf. D

(vi) If the foregoing submissions in their application to the practice actually followed are wrong, and the effect of that practice was to make an order for tyres addressed to Brentford an offer requiring the acceptance of Brentford in England, so that the contract in each case was made in this country, that does not make good the contention that Akron were exercising a trade within the United Kingdom; for on this footing the contracts were contracts with Brentford for the sale by Brentford to the distributors concerned of Brentford's tyres, not Akron's tyres, and the trade exercised in the United Kingdom was Brentford's, not Akron's. E

This merely resuscitates the Crown's abandoned claim that Brentford were carrying on on their own account the trade of selling tyres to persons resident outside the United Kingdom, and cannot assist the case for the Crown on the present appeal. F

(vii) In any case and on any view of the matter the tyres supplied or sold by G

- A Brentford to distributors outside the United Kingdom were Brentford's own tyres, not Akron's, as appears from the terms of the agreement of 1936, and it is a legal impossibility for a person to sell his own goods as agent for another—see the distinction drawn in *W. T. Lamb & Sons v. Goring Brick Co., Ltd.* (6) ([1932] 1 K.B. 710), between the relationships of vendor and purchaser and principal and agent. It follows that Brentford cannot have been selling their own tyres
- B to distributors as agents for Akron, and it follows further that Brentford either must have been selling on their own account to distributors outside the United Kingdom (a theory which, as appears above, cannot advance the case for the Crown) or else must be regarded as having been selling to Akron, at a price corresponding to the rate of remuneration fixed by the agreement of 1936, the tyres required by Akron to fill contracts made by Akron outside the United
- C Kingdom with non-resident distributors. In neither alternative could it be held that Akron were exercising a trade within the United Kingdom, and Brentford have already been assessed to the whole of the tax which would be payable on the footing that they, as part of their own trade, were selling to Akron.

- Whatever the position might have been if the terms of the distributor agreements had been strictly adhered to, in my judgment, the argument of counsel
- D for the taxpayers breaks down on the course of dealing actually followed. An order placed by a distributor direct with Brentford as one of the listed manufacturers of Firestone tyres could at most only create a contract between the distributor and Akron to the effect that the distributor would purchase, and Akron would cause the manufacturer to sell to the distributor, the tyres ordered on the terms and conditions of the distributor agreement. There was no privity
- E of contract between distributor and manufacturer quoad the distributor agreement, and it is, I think, quite impossible to hold that the mere placing of an order with any one of the listed manufacturers would, without more, oblige that manufacturer to deliver the tyres ordered. As between the distributor and the listed manufacturer, the matter must have been one of offer and acceptance, that is to say an order placed by the distributor with the manufacturer and
- F accepted by the latter. The order and its acceptance would alone constitute the effective contract under which the distributor could call on the manufacturer to deliver the tyres ordered, and would be bound on his own part to take and pay for them. Such contracts in the case of Brentford would be made in England as the place of acceptance. On applying this view of the contractual position
- G to the facts found, it appears that, during the material period, Brentford were selling to distributors abroad under contracts made in the United Kingdom tyres manufactured by Brentford in the United Kingdom, and deliverable in the United Kingdom to the purchasers thereof against payment in the United Kingdom of the contract price; and, furthermore, were in fact effecting delivery of and receiving payment for such tyres in the United Kingdom. It further
- H appears on reference to the agreement of 1936 that Brentford were under contract with Akron to do these things as services to Akron in return for a stipulated remuneration, subject to which all profits arising were to belong to Akron.

- In these circumstances I am of opinion that there was ample evidence to justify the Special Commissioners in concluding, as they did, that Akron during the relevant years were exercising a trade in the United Kingdom through the agency
- I of Brentford. Moreover, I cannot regard this conclusion as displaced by the circumstance that the tyres sold by Brentford were Brentford's and not Akron's. This seems to me to be mere machinery which did not affect the substance of the relationship of Akron and Brentford in regard to the trade in question, which in my view was Akron's trade carried on by Brentford on behalf of and for the benefit of, or in other words as agents for, Akron. I think the argument for the Crown on the question of agency derives some assistance from *Weiss, Biheller & Brooks, Ltd. v. Farmer* (2).

I entirely agree with the views as to the relations between Akron and Brentford thus expressed by the Special Commissioners in para. 16 (d) of the Case: A

"We are unable to accept the proposition put forward on behalf of Brentford that the fulfilment of each order by Brentford involved a sale of goods to Akron with delivery to the latter's orders. It seems to us that the effect of the agreement of Feb. 8, 1936, and the course of the dealings between Akron and Brentford was to set up standing arrangements whereby Brentford agreed to hold goods of its own at the disposal of Akron and to sell the same on Akron's behalf to customers approved of by Akron and subject to terms imposed by Akron; and, further, to account to Akron for the proceeds of the sales less the cost of the goods sold plus five per cent." B

I am accordingly of opinion that the Special Commissioners and the learned judge came to a right conclusion in this matter, and I would dismiss this appeal. C

BIRKETT, L.J.: I agree with the two judgments which have just been delivered. In opening his case, counsel for the taxpayers said there were two questions only for determination: were Akron exercising a trade within the United Kingdom, and were Brentford, their wholly owned subsidiary, the authorised regular agents of Akron for that purpose? If the first question is answered in the affirmative, the second question becomes academic. D

The facts of this case are unusual, and many cases were cited to try to bring them within decisions of the courts. Counsel for the taxpayers said that whether a non-resident was exercising a trade within the United Kingdom could be decided by the crucial and a practical test of where the contracts of sale were made. In support of that, he cited the views of LORD HERSCHELL and LORD WATSON, and the concurring speech of LORD MACNAGHTEN in *Grainger & Son v. Gough* (5). It was not enough that payment and delivery were made and orders for tyres received in England. In pursuance of that argument, he was concerned to show that the contracts here involved were made abroad. E

The distributor agreement between Akron and Sweden in substance said: "We, Akron, will provide you in Sweden with Firestone tyres. You will have the exclusive right to sell Firestone tyres throughout Sweden. In consideration for that you will undertake to buy your tyres only from us". Counsel for the taxpayers said that Akron were saying to Sweden "We agree to sell, and you agree to buy" and therefore the contract was made abroad. He said further that, by a clause of the subsequent agreement with Brentford, "Akron arranged with Brentford merely to supply those goods which Akron had sold". That argument involved the point that some time before the delivery of the order to Sweden there had somehow been a sale of the tyres from Brentford to Akron. If a thousand tyres were ordered by Sweden, and the order was sent direct to Brentford, and then Brentford sent the thousand tyres, they were in fact the tyres of Akron, and it was all done in pursuance of a non-resident making a contract outside the United Kingdom. F G

As the argument developed it became almost impossible to maintain that position, for at some subsequent date there was a modification of the written agreement between Akron and Brentford. The agreement had specified: H

"Whereas the parties hereto are desirous of concluding an arrangement for the fulfilling by [Brentford] of orders obtained in Europe and elsewhere by [Akron]", I

and by cl. 2,

"[Akron] shall upon each request being made forward to [Brentford] full particulars of such order",

which suggests that the course of business would have been for Sweden to say to Akron, "I want a thousand tyres", and Akron to say to Brentford, "Here are particulars of an order which we desire you to fulfil on the terms specified in

A this agreement as to payment, price, delivery and so on". But that was clearly modified because we had to deal with the case on the footing that there was no such communication between Sweden and Akron. Apart from the original distributor agreement between Akron and Sweden, Akron did nothing except receive the main profit on the transaction. Sweden sent orders direct to Brentford —although entitled to send to any other subsidiary of Akron—and Brentford

B fulfilled the orders without any reference to Akron. They delivered the tyres free alongside ship according to the terms of the agreement; they charged prices which Akron had prescribed; they received payment in the form which Akron had laid down; they accounted for it in the manner in which Akron desired; and they retained for themselves five per cent. on the cost price for their services.

C Apart from entering into the original agreement and receiving the profits on every transaction which arose out of it, Akron in substance did nothing. It seemed to me, therefore, quite impossible to maintain the position that this was a contract made abroad, that that was the crucial test and delivery and price did not matter, and, therefore, that there was no trading within the United Kingdom. In my view this form of trading was clearly a trade within the United Kingdom. An order for a thousand tyres received by Brentford was an order given by Sweden

D to Brentford and Brentford could either accept or reject that order. The contract so made between Sweden and Brentford was clearly made in England, and that contract was devised and designed by Akron as part of their world-wide trade.

The Case Stated sets out the position admirably in paras. 4 and 5:

E "Akron, an American corporation registered in Akron, Ohio, is the head of a world-wide organisation consisting of a large group of corporations operating in America and in various parts of the world."

That is one of the overriding facts. Akron are the head and the trunk of all the vast organisation, and Brentford a wholly owned subsidiary of that head, on the terms of the documents doing that which Akron devised and designed that they should do.

F "Some of its associated and subsidiary corporations manufacture and sell tyres in the countries in which they are registered and others sell, in the countries in which they are registered, tyres which have been manufactured in America or by subsidiary corporations in other countries. For convenience, certain matters in regard to the business of the organisation carried on outside the United States of America have been conducted by other subsidiary

G companies of Akron . . . Brentford is an English company registered in 1922 with an issued capital of £20,000 in £1 ordinary shares. This capital was increased to £140,000 in 1938. All the shares in Brentford are owned by Akron. The board of directors of Brentford consists of individuals resident in the United Kingdom with the exception of Mr. Harvey Firestone, the chairman of the board of directors of Akron, who is a director of Brentford

H and occasionally attends meetings of its directors."

The history of Brentford is given. They formerly sold the tyres manufactured in America, but when it became an economic, commercial proposition to make them here, they did so.

I LORD EVERSHERD, M.R., has pointed out that the thing sold was a branded article, Firestone tyres, trade mark, patents, and processes no doubt all belonging thereto. Brentford could not sell that tyre without the consent of Akron as the owners. There was a distributor agreement between Akron and Sweden, and when Sweden sent an order for Firestone tyres to Brentford it seems to me plain that the contract was between Sweden and Brentford, devised and designed by Akron. Brentford were a separate and a distinct entity of their own, but it was part of the business of Akron that this trade should go on; it was part of their world-wide organisation. The real profits of that trade went to Akron, the only money retained by Brentford above cost price being five per cent.,

expressly stated to be the price for services rendered. All the elements of delivery, price and so on were in this country. I cannot doubt that the answer to the first question, "Do Akron exercise a trade within the United Kingdom?" must be given as "Yes".

With regard to the second question, I have nothing to add, because, as my Lord has pointed out, if Akron are carrying on a trade within the United Kingdom, they must be trading through Brentford. It is not suggested that there would be anybody but Brentford, and I should hold that it follows that Brentford here were the regular authorised agents for that purpose of Akron. I think the judgment of HARMAN, J., was right, and that this appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Lovell, White & King* (for the taxpayers); *Solicitor of Inland Revenue*.
[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

CORPORATION OF THE CITY OF GLASGOW v. WESTERN HERITABLE INVESTMENT CO., LTD.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Tucker, Lord Keith of Avonholm and Lord Somervell of Harrow), January 23, 24, March 1, 1956.]

Housing—Subsidised houses—Construction promoted by local authority—Statutory special conditions for annual subsidy made applicable by agreement with building owner—Subsidy paid by local authority who received contribution from government funds—Whether building owner entitled to sell houses without consent of the Secretary of State—Housing (Financial Provisions) Act, 1924 (14 & 15 Geo. 5 c. 35), s. 3 (2).

In 1926 the appellants issued a statement setting out the terms and conditions on which they were prepared to grant financial assistance to private enterprise in the building of houses. They were prepared to make a maximum annual subsidy of £13 10s. per house for a period of forty years for houses erected for letting. The statement stipulated that houses in respect of which an annual subsidy was payable "must comply with" conditions (a)-(c) and (e) "of s. 3 (2) of the Housing (Financial Provisions) Act, 1924". By condition (c) no house might be sold except with the consent of the Secretary of State for Scotland. The respondents applied for subsidy on the terms of the statement, and a subsidy was paid to them in respect of several thousand houses in Glasgow which they built between 1926 and 1933. The appellants received from government funds contribution (£9 annually for each house) in respect of the subsidy which the appellants paid. In compliance with the conditions the respondents let, and, as houses became vacant, re-let the houses up until the end of 1952; after that date they ceased to re-let vacant houses as they found that course uneconomic and they applied to the Secretary of State for his consent to the sale of houses, which he refused. The appellants contended that the houses were inalienable by sale without such consent, although the houses and land on which they stood were the respondents' absolute property.

Held: the respondents were entitled to sell the houses without the consent of the Secretary of State because

(i) on the true construction of s. 3 (2) of the Act of 1924 the observance of the conditions thereby enacted was necessary only if the subsidy were to be received and, though the subsidy might be lost if the land were sold without such consent, yet the land was not rendered unsaleable without consent, and

(ii) although the respondents were bound in contract by the terms of the

* The sub-section is printed at pp. 710, 711, post.

A statement issued in 1926, the purpose of introducing therein statutory conditions from s. 3 (2) was to ensure that the appellants' obligations to the Secretary of State were fulfilled, and, accordingly, the statement imposed no greater burden than the statutory conditions and did not prohibit a sale of the land.

Appeal dismissed.

B [For the Housing (Financial Provisions) Act, 1924, s. 3 (2), see 11 HALSBURY'S STATUTES (2nd Edn.) 414.]

Appeal.

C Appeal by the defenders, the Corporation of the City of Glasgow, against an interlocutor of the Second Division of the Court of Session, dated July 21, 1955, affirming an interlocutor pronounced by the Lord Ordinary (LORD WALKER), dated Feb. 4, 1955, in an action of declarator that the pursuers, the Western Heritable Investment Co., Ltd., were entitled to sell certain dwelling-houses in Glasgow of which they were the heritable proprietors without the consent of the defenders or the Secretary of State for Scotland*. The facts appear in the opinion of VISCOUNT SIMONDS.

D *R. S. Johnston, Q.C.*, and *Douglas Reith* (both of the Scottish Bar) for the appellants.

The Dean of Faculty (C. W. Graham Guest, Q.C.), and *A. M. Johnston* (both of the Scottish Bar) for the respondents.

The House took time for consideration.

E Mar. 1. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appeal is brought by the appellants, the Corporation of the City of Glasgow, against the unanimous decision of the Second Division of the Court of Session which affirmed an interlocutor of the Lord Ordinary, LORD WALKER. The case is not without difficulty, but the able argument of learned counsel for the appellants has not satisfied me that it has been wrongly decided.

F The respondents, a company incorporated under the Companies Acts, in the years 1926 to 1933 built over six thousand so-called cottage flats in the King's Park and other districts of Glasgow, most of which they still own, and they raised this action against the appellants and the Secretary of State for Scotland, claiming that they were entitled to sell such houses without the consent of either of the defenders, but subject to the appellants' power to discontinue payment of subsidy to the respondents in respect of any houses so sold. The Secretary of State lodged defences, but these were withdrawn before the Record was closed. The issue lies between the present appellants and the respondents. It is whether the latter can, as they claim, sell the houses in question without the consent of the Secretary of State.

H The facts are not in dispute. They are accurately stated by the Lord Ordinary substantially as follows. About May, 1926, the appellants issued a statement setting out the terms and conditions on which they were prepared to grant financial assistance to private enterprise in the building of houses. In respect of houses erected for letting, the appellants were prepared to make a maximum grant of £13 10s. per house for a period of forty years. Houses in respect of which such an annual sum would be payable had to comply with four of the five conditions of s. 3 (2) of the Housing (Financial Provisions) Act, 1924. The respondents applied for, and the appellants paid, an annual grant in respect of

* The Housing (Financial Provisions) Act, 1924, s. 3 (2), refers to "the Minister", but in relation to land in Scotland such references refer to the Secretary of State for Scotland by virtue of s. 16 (1) of that Act, the Housing (Scotland) Act, 1930 (20 & 21 Geo. 5 c. 40), s. 49 (1) and the Reorganisation of Offices (Scotland) Act, 1939 (2 & 3 Geo. 6 c. 20), s. 1 (1), s. 6 (1); Order by the Secretary of State for Scotland, dated Aug. 4, 1939, fixing appointed days for the purposes of the last mentioned Act (S.R. & O. 1939 No. 865).

some six thousand cottage flats erected by the respondents as already stated. A
 The appellants, in their turn, received from the Secretary of State, or his predecessors the Scottish Board of Health, an annual contribution of £9 per house. The appellants, in their turn, received from the Secretary of State, or his predecessors the Scottish Board of Health, an annual contribution of £9 per house. Most of the houses have remained in the ownership of the respondents, and are subject to all the special conditions of s. 3 (2) of the Act of 1924. In compliance with those conditions, the respondents had let and, as they fell vacant, re-let the houses to resident tenants at restricted rents, but, since the end of 1952, B
 they have ceased to re-let vacant houses, because they say that, having regard to rising costs, they have found that course to be an uneconomic one. They have asked the Secretary of State to consent to a sale of the houses, but he has not given it. The appellants contend that his refusal operates as an absolute bar to the sale by the respondents of houses which are their absolute property. Two reasons for this result are advanced: the first rests solely on the terms of C
 the statutes which I will examine, the second on a contractual basis.

The Housing, etc., Act, 1923, introduced a novel feature into the legislation dealing with the provision of houses for the working class. It authorised for the first time a subsidy or contribution by the Board of Health towards the provision of such houses by local authorities. The contribution could be either a lump sum for each house, or an annual sum of £6 for a period of twenty years. D
 Such contributions were to be made direct to the local authorities, who were themselves authorised to promote the building of such houses by giving assistance in various ways, including (i) the grant of lump sum payments after completion of the houses, (ii) the payment of annual sums for a period not exceeding twenty years, and (iii) the undertaking to pay any part of the periodical sums payable to a building society in respect of advances made as therein mentioned. E

The Housing (Financial Provisions) Act, 1924, increased the board's power of contribution to £9 per annum for forty years, if the houses were subject to special conditions as thereafter provided in the Act. These conditions, so far as relevant, were, in the case of houses provided by the local authority, that (i) the houses should be let for occupation by tenants who intended to reside therein; (ii) that every letting should contain a term against assignment or sub-letting, except as F
 therein mentioned; (iii) that, if the local authority desired to sell or (save by such lettings as aforesaid) dispose of the houses, such sale or disposal should not be effected except on, and subject to, such stipulations as the Minister* might think proper for the reduction of the amount and curtailment of the duration of any contribution payable by him in respect of the house, and (iv) that the rents should be restricted as therein mentioned. The position then was that a G
 local authority could get (a) a lump sum grant, or (b) under the Act of 1923 an annual contribution without special conditions, or (c) under the Act of 1924 an increased annual contribution with special conditions attached to the grant. And it was clear that the local authority could sell such houses as it thought fit, subject only to the possible penalty of the contribution of the Minister, if it was on the higher scale under the Act of 1924, being reduced. H

The Act had to provide for two classes of houses, (a) those provided by the local authority itself with which I have dealt, and (b) those "promoted" by the local authority, i.e., houses built by private enterprise in respect of which they had undertaken to give financial assistance. In regard to these latter houses (with which this appeal is concerned), the Act makes the somewhat curious provision, by s. 3 (2), that they shall be "deemed to be subject to special conditions" if the local authority undertakes, in accordance with rules made by the Minister and approved by the Treasury, that certain conditions thereafter specified would be complied with in relation to the houses. These conditions are substantially those which I have already set out, except that the restriction on sale is more stringent. It is (s. 3 (2) (c)) that I

"no house shall be sold or (save by such lettings as aforesaid) otherwise

* See footnote p. 707, ante.

A disposed of except with the consent of the Minister, which may be absolute or subject to such reasonable stipulations as the Minister thinks proper, including, if the Minister thinks fit, stipulations for the reduction of the amount or the curtailment of the duration of any contribution payable by the Minister in respect of the house . . . ”

B within the limits therein stated. The appellants, no doubt, gave in respect of the houses here in question the appropriate undertaking, and they are, accordingly, deemed to be subject to the special conditions. The question is what is the result of their being so subject.

My Lords, I cannot accept the contention of the appellants that the result is to create a real burden on a house so subject which could make it inalienable for all time. I say “for all time”, for learned counsel was constrained to admit
C that his contention led to that result. The right of an owner of property freely to dispose of it is so inherent in ownership that I should not regard it as displaced except by very clear words. Far from that being the case here, the Act clearly contemplates the sale of a house with, or without, the consent of the Minister, for, by s. 3 (4), it makes specific provision for the event of any undertaking given
D under the section or any of the special conditions to which a house is subject under the section not being complied with, and that provision exactly accords with the scheme of the Act, viz., that the Minister may withdraw or reduce his future contributions. In effect, this receipt of aid is made conditional on compliance with conditions—a workmanlike and reasonable arrangement. I concur so fully with the judgments of the Lord Ordinary and their Lordships of the Inner House that I do not think it necessary to add anything on this part of the
E case.

The alternative ground of appeal was based on an alleged contract between the parties containing an absolute prohibition against sale without the consent of the Secretary of State. It was not, I think, suggested that this would bind anyone except the respondents themselves, and it is not clear to me whether, according to the practice of the Scottish courts, an interdict would be granted to
F restrain a sale, even if the appellants were otherwise right in their contention. But, in my opinion, they are clearly wrong for the reasons given by the Lord Ordinary and affirmed in the Inner House.

In May, 1926, as I have already said, the appellants issued a statement by which they offered financial assistance for building houses, and the respondents applied for assistance on the terms of that statement. That they are bound by those terms is clear. But that is not enough for the appellants unless, on its
G true construction, the contract imposes an absolute obligation against sale without consent. In my opinion, it does not. The statement purports to be a statement of the “Terms and conditions of assistance to be granted to private enterprise by the corporation”. It begins by saying that the assistance will only be given in respect of houses certified as therein mentioned and “complying with
H the conditions set forth in the appended schedules”. Then, after dealing with assistance by way of lump sum subsidy, it provides, in respect of houses erected for letting only, for an annual maximum grant of £13 10s. per house for a period of forty years to the person for the time being in receipt of the rent of that house. Then come the words on which the appellants rely:

I “The houses in respect of which an annual subsidy is payable must comply with the conditions as to type and size included in Sch. 1 hereto, and must also comply with the following special conditions of s. 3 (2) of the Housing (Financial Provisions) Act, 1924.”

These conditions are then set out verbatim, with the exception of the condition as to fair wages. I will assume, as I have said and as was conceded by the respondents, that, having applied for assistance on these terms, they were bound by them. But it is clear that the purpose of introducing them into the bargain between the appellants and the respondents was to ensure that the obligation

of the former to the Secretary of State was fulfilled, so that they might not remain liable to the respondents when he was no longer liable to them. The contract can, and should, be read in this way. I am content to adopt the words of the Lord Ordinary:

"In such a framework and context I can find no warrant for reading in, as an independent stipulation of the contract, that the pursuer company . . . undertake that the houses shall not be sold."

I agree, and think that the legitimate and proper construction of the bargain is that, if and so long as the terms are complied with, the respondents may expect their subsidy; if they are not complied with, the respondents will be in mercy.

I would dismiss this appeal with costs.

My Lords, my noble and learned friend, **LORD TUCKER**, who is unable to be here this morning, has asked me to say that he has read my opinion, agrees with it and has nothing to add.

LORD REID: My Lords, in this case, the respondents seek a declarator that they are entitled to sell certain dwelling-houses in Glasgow which belong to them, and the appellants maintain that they are not entitled to sell any of these houses without the consent of the Secretary of State for Scotland. The consent of the Secretary of State has been refused in respect of certain houses for the sale of which consent was requested by the respondents.

The houses, about six thousand in number, were built by the respondents between 1926 and 1933, and in respect of them the parties to this case entered into a contract, under which the respondents have been receiving from the appellants an annual subsidy of from £9 to £13 10s. per house. Part of this subsidy is money which the appellants receive from the Treasury under the Housing (Financial Provisions) Act, 1924, and which they pass on to the respondents and, at least in some cases, part of it is provided by the appellants themselves. The appellants found on the terms of this Act and also on the terms of their contract with the respondents, in denying that the respondents are entitled to the declarator which they seek. The respondents admit that they would not be entitled to receive any further subsidy in respect of any house which they might sell, but maintain that there is nothing, either in the Act or the contract, to prevent them from selling if they so desire.

The Act of 1924 authorised local authorities, including the appellants, to promote the erection by private builders of houses for letting, and entitled a local authority, in respect of any house so promoted which complied with special conditions, to receive an annual subsidy of £9 for forty years. There is nothing in the Act which expressly imposes any obligation or confers any right on the private builders who erect such houses, but it is implicit that the local authority cannot claim subsidy from the Treasury in respect of such a house, unless that subsidy is passed on to the owner. Section 3 (2) of the Act of 1924 provides:

"Houses . . . the construction of which is promoted by a local authority in accordance with s. 2 of the said Act [the Housing, etc., Act, 1923], as amended by this Act, shall be deemed to be subject to special conditions if . . . the local authority . . . undertake, in accordance with rules made by the Minister and approved by the Treasury, that the following conditions will be complied with in relation to the houses:—(a) that the houses shall be let for occupation to tenants who intend to reside therein; (b) that it shall be a term of every such letting that the tenant shall not assign, sub-let, or otherwise part with the possession of the house, or any part thereof, except with the consent in writing of . . . the local authority or some person authorised by them in that behalf . . . and that such consent shall not be given unless it is shown that no payment other than rent has been or is to be received by the tenant in consideration of the assignment, sub-letting, or

- A other transaction; (c) that no house shall be sold or (save by such lettings as aforesaid) otherwise disposed of except with the consent of the Minister, which may be absolute or subject to such reasonable stipulations as the Minister thinks proper, including, if the Minister thinks fit, stipulations for the reduction of the amount or the curtailment of the duration of any contribution payable by the Minister in respect of the house, or for both
- B reduction and curtailment, but so nevertheless that the contribution in respect of any house sold before the expiration of a period of twenty years from the date when that contribution first became payable shall not be reduced by more than £3, or in the case of a house in an agricultural parish by more than £6 10s., and the duration thereof shall not be curtailed by more than twenty years; (d) that a fair wage clause which complies with the
- C requirements of any resolution of the House of Commons applicable to contracts of government departments and for the time being in force shall be inserted in all contracts for the construction of houses; and (e) that the rent charged in respect of any house shall not exceed the appropriate normal rent together with a sum equivalent to the average excess, if any, above the appropriate normal rent which can be charged by the local authority in
- D accordance with this section in the case of houses provided by the local authority themselves, and that no fine, premium or other like sum shall be taken in addition to the rent."

We were not referred to any relevant rules made by the Minister, or, in Scotland, the Secretary of State*.

- E The method of drafting this sub-section causes me some difficulty. A house is to be deemed to be subject to special conditions if the local authority, who are not themselves owners, give an undertaking in terms of the sub-section. To say that X is deemed to be Y, generally means that X is not, in fact, Y, but is to be treated for certain purposes as if it were Y, and if that is the meaning here, then a house to which the sub-section applies is not, in fact, made subject to special conditions, but is only to be treated for certain purposes as if it were so subject.
- F The main purpose of referring to special conditions in this sub-section appears to be to bring in the provisions of s. 2 of the Act of 1924, because it is only if houses are subject to special conditions that the subsidy of £9 per annum for forty years is payable to the local authority by the Treasury, and the effect of deeming the house to be subject to special conditions is to enable that subsidy to be paid in respect of it.

- G But, if one merely takes the language of s. 3 (2) in isolation, it is, I think, capable of meaning that, although the conditions contained in the local authority's undertaking could not normally affect the house, because the undertaking was not given by anyone who had a right to affect it, yet those conditions are to be deemed to affect the house itself. The appellants maintain that this is so.
- H Although the Act nowhere expressly requires the owner of the house to carry out the terms of the local authority's undertaking, or authorises the local authority or the Secretary of State or anyone else to compel the owner to do so, yet it is said that the sub-section must be held to mean that the fact that the local authority has given this undertaking in some way puts the owner of the house under a legal disability, so that, once the undertaking is given, he cannot, without the consent of the Secretary of State, sell the house. If that were so, it must,
- I I think, follow that the owner is also put under a disability, so that he cannot let the house otherwise than to a tenant who intends to live in it, or do anything else which would be in contravention of any of these conditions. Moreover, I do not see how condition (d), regarding the fair wage clause, fits in with this interpretation of the sub-section. Leaving that aside, and taking only the alleged disability of the owner to sell, I do not see how such a disability could be enforced. For example, if the owner offered the house for sale, an intending purchaser might

* See footnote p. 707, ante.

have no knowledge of the owner's disability because there would be no notice of it in the Register of Sasines. Would a sale to such a purchaser be a nullity, or would the local authority or some other person be entitled to reduce the disposition to the purchaser? I cannot see how that could be. If it had been intended that the fact that the local authority had given this undertaking was to disable the owner from selling his house or from letting it to a tenant who did not intend to reside in it, I would have expected not only that this would be stated expressly but that some method of effectually preventing the owner from doing so would have been enacted. I find it difficult to suppose that so fundamental an interference with the owner's right of property would have been left to depend on an implication from this rather ambiguous sub-section. It appears to me that the only purpose of deeming houses to which the sub-section applies to be subject to special conditions is to bring in the provisions of s. 2, and thereby enable the subsidy of £9 to be paid.

I am re-enforced in this conclusion by the terms of s. 3 (4):

"If at any time it is shown to the satisfaction of the Minister that any undertaking given under this section, or that any of the special conditions to which a house is subject under this section has not been complied with, any contribution payable in respect of the house may be discontinued or the amount thereof may be reduced, and the duration thereof may be curtailed, according as the Minister thinks proper."

It appears to me that the discontinuance or reduction of the amount of subsidy is the only consequence which follows from the owner doing something with his house which is in conflict with the undertaking given by the local authority, and I am, therefore, of opinion that, so far as the appellants' case is rested on the terms of the Act of 1924, it fails.

But the appellants also rely on their contract with the respondents. That contract arises in this way. In May, 1926, the appellants issued a statement offering financial assistance to private builders of houses which complied with a number of detailed requirements, and complied with other conditions set out in the statement. The respondents then made application for assistance on the terms and conditions set forth in that statement, and their application contains the sentence:

"It is understood that this application will not form the basis of a contract until an acceptance has been received from the town clerk, stating that the corporation have approved of the proposal."

It appears that the appellants did approve of the proposal, and that a subsidy varying between £9 and £13 10s. per house has been paid annually to the respondents. The most important part of the statement, for the purposes of this case, is in these terms:

"(a) The houses in respect of which an annual subsidy is payable must comply with the conditions as to type and size included in Sch. 1 hereto, and must also comply with the following special conditions of s. 3 (2) of the Housing (Financial Provisions) Act, 1924."

Then the statement sets forth at length the conditions (a), (b), (c) and (e), which are set out in s. 3 (2).

The appellants rely on the words in the third of these provisions "that no house shall be sold . . . except with the consent of" the Secretary of State, who is now the appropriate authority. They maintain that, whatever may be the position under the statute, the respondents have bound themselves by this contract not to sell without such consent. But these words must be read in their context. The statement requires compliance with "the following special conditions of s. 3 (2)", and this is one of the "following special conditions". In my opinion, the conditions set out in the statement, being referred to as the special conditions of s. 3 (2), must be read as having the same meaning as they have in the Act

- A itself. The purpose of inserting these conditions in the appellants' contract with the respondents is to make sure that the appellants do not have to continue to pay subsidy after the Treasury subsidy to the appellants has been discontinued by reason of the undertaking given by the appellants in terms of s. 3 (2) being no longer fulfilled. Apart from the reference to s. 3 (2) in the statement itself, I would be inclined to think that the conditions set out in the statement must have
- B the same meaning as they have in the Act, but the reference to the section seems to me to put this beyond doubt. I have already said that, in my opinion, there is nothing in the conditions in the Act to prevent the respondents from selling their houses, and, if that be so, it follows that there is nothing in the contract which would have that effect. It is clear under the contract that, if the respondents sell any of their houses, subsidy from the appellants in respect of
- C those houses will cease at once, and the respondents admit this. But, in my opinion, the contract does not prevent the respondents from selling, and they are, therefore, entitled to the declarator which they seek.

I am, therefore, of the opinion that this appeal should be dismissed.

- D **LORD KEITH OF AVONHOLM:** My Lords, there is little that I would add to what has already been said by your Lordships and by the judges in the court below. The contention that the houses are subject to a statutory condition which operates as a kind of real burden is, in my opinion, not supportable. I deal more fully with some of the statutory provisions under the other branch of the appellants' argument, and I would only here observe that the statutory condition invoked is couched in language very inapposite to impose any such
- E restriction on the sale of the houses. It is relevant, I think, to look first at s. 3 (1) (c) of the Housing (Financial Provisions) Act, 1924, which relates to houses provided by a local authority themselves. It seems clear that this sub-section contemplates a sale by the local authority subject only to such stipulations as the board (now the Secretary of State) thinks proper for reduction of the amount or curtailment of the duration of the state contribution in respect of the house,
- F within certain specified limitations. At worst, all that could happen to a local authority in case of a sale would thus be withdrawal of the contribution. This cannot, in my opinion, be construed as involving a statutory prohibition of sale. It would be strange if, none the less, the legislature contemplated a statutory restriction of sale in the case of trust houses or promoted houses under para. (c) of sub-s. (2). The language here again seems to me very inapposite to effect any
- G such result. The Secretary of State may give his absolute consent to the sale with the result of leaving the contribution payable to the local authority unaffected, or may consent subject to reduction of the amount or curtailment of the duration of this contribution. (It is to be observed that it is the contribution to the local authority that is dealt with in sub-s. (2) (c) and not the subsidy payable by the local authority to the builder.) If, however, a house is sold
- H without consent of the Secretary of State, sub-s. (4) of s. 3 is brought into play, which provides for discontinuance of the contribution or reduction of its amount or curtailment of its duration, in this and other cases. The statute thus, in my opinion, provides a complete code for what is to happen in the event of a sale with, and a sale without, the consent of the Secretary of State. That some further absolute prohibition of sale without consent of the Secretary of State is to be read into the statute is not, in my opinion, consistent with the provisions
- I to which I have referred. To be effective, moreover, such a condition would have to be operative in some way at the instance of the appellants or of the Secretary of State, not only against the builder of the houses but against a purchaser from him. It is not enough to say that it can be enforced against the builder by an interdict. That is not the method of enforcing a real burden, and does not meet the case where a house has, in fact, been sold. It would be necessary to say that, if the builder has conveyed a house to a purchaser without the consent of the Secretary of State, the transaction is a nullity and the conveyance can be

reduced, with the result of restoring the property into the ownership of the builder. It would be most anomalous for a third party who has no vestige of legal title or interest in the property to be able to produce such a result. But it is enough to say that there is nothing in the statute that says that any such result should follow a breach of the condition against selling a house, and such a result cannot, in my opinion, be implied. That is enough to dispose of the argument on the statute. A

The case on contract raises somewhat different considerations. It is relevant to this question to consider the statutory background. The Housing, etc., Act, 1923, by s. 2, gave a local authority power to promote the building of houses of a certain type and size by private enterprise, by giving, or undertaking to give, financial assistance in the shape of annual sums specified in proposals approved by the board for a period not exceeding twenty years and to impose conditions of such payments, also with the approval of the board. The Act did not specify the nature or the terms of these conditions other than that the house should not be used otherwise than as a separate dwelling-house and should not be added to or enlarged except with the consent of the local authority. The Act, by s. 1, also authorised the board (now the Secretary of State) to make contributions out of moneys provided by Parliament towards the expenses incurred by a local authority in, inter alia, promoting the construction of such houses. This contribution was fixed by the Act, subject to a minor exception, at £6 per house per annum for a period of twenty years. This Act was amended by the Housing (Financial Provisions) Act, 1924, s. 2 of which increased the annual contribution to a local authority in respect, inter alia, of promoted houses to £9 per house for forty years, "if the houses are subject to special conditions as hereinafter provided in this Act". By s. 3 (2) of that Act, houses promoted by the local authority are deemed to be subject to special conditions if the local authority undertakes that certain specified conditions will be complied with. As the local authority was not itself, in the case of promoted houses, constructing the houses, it could not itself fulfil the conditions, and the manner in which it discharged its undertaking was to insert the statutory conditions in the conditions imposed on the builders. Thus, in the present case, the conditions agreed between the appellants and the respondents include verbatim the special statutory conditions (with one immaterial omission) with which the local authority undertook to comply for the purpose of obtaining the grant from the Secretary of State. By s. 3 (4) it is provided that: B C D E F

"If at any time it is shown to the satisfaction of the [Secretary of State] that any undertaking given under this section, or that any of the special conditions to which a house is subject under this section has not been complied with, any contribution payable in respect of the house may be discontinued or the amount thereof may be reduced, and the duration thereof may be curtailed, according as the [Secretary of State] thinks proper." G

This provision is very relevant as pointing to the effect under the statute on the scheme of annual contributions as between the Secretary of State and the local authority, but it has no application to the agreement or arrangement between the local authority and the builder in the matter of the local authority's subsidy in respect of the houses. It may seem reasonable to assume that what applies to the Secretary of State's contribution to the local authority should apply in turn to the local authority's subsidy to the builder, but the statute does not say so, and I can find no implication in the statute that this should be so. The appellants have introduced no corresponding provision into their agreement with the respondents. But what the statute has done is to authorise the local authority, with the approval of the Secretary of State, to impose conditions on the giving of financial assistance to promote the building of houses (s. 2 (4) of the Act of 1923). Accordingly, in the statement No. 16 of process which was H I

A issued by the appellants and accepted by the respondents in their application for a grant there appears the following:

“(a) The houses in respect of which an annual subsidy is payable must comply with the conditions as to type and size included in Sch. 1 hereto, and must also comply with the following special conditions of s. 3 (2) of the Housing (Financial Provisions) Act, 1924.”

B There then follow the four special statutory conditions. The statement then proceeds:

“(b) Persons or other bodies erecting houses eligible for annual subsidy will be required to enter into an agreement with the corporation undertaking —(i) To comply with the special conditions above detailed; and (ii) To produce to the authorised agents of the corporation for inspection when required the rent books, tenancy agreements, and such documents or other evidence as may be required to enable the corporation to satisfy themselves that the special conditions of the subsidy are being complied with.”

C I have come to the view that the proper construction to put on these clauses is that observance of these special conditions is necessary only in order to earn the subsidy. This seems to me also to fit in with the general purpose and intent of the statutes. If the building of small dwelling-houses had been an economic proposition, there would have been no need to encourage their building by proffering a subsidy. If the builder now finds that it is no longer an economic proposition to continue to accept a subsidy there would seem to be no reason why he should not now forgo it. The provision of dwelling-houses will not be prejudiced. Once the houses were built (and it was not until they were built that subsidy became payable), it was improbable that they would be used for any other purpose. The population, so far as the houses went, would be housed, whether the houses were let or sold. If a builder chooses to sell a house without consent, he will forfeit the subsidy for that house. I find nothing in the agreement that compels me to the view that he cannot do so, and it would seem to me an unreasonable construction to hold that, once he has accepted a subsidy, he is restricted for all time in his freedom to deal with his own property.

F I would dismiss the appeal.

LORD SOMERVELL OF HARROW: My Lords, I agree.

Appeal dismissed.

Solicitors: *Martin & Co.*, agents for *Town clerk*, Glasgow, and *Campbell, Smith, Mathison & Oliphant*, Edinburgh (for the appellants); *Stilgoes*, agents for *Breeze, Paterson & Chapman*, Glasgow, and *Gray, Muirhead & Carmichael*, Edinburgh (for the respondents).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

R. v. SILVER AND OTHERS.

[CENTRAL CRIMINAL COURT (His Honour Judge Maude and a Jury), January 23, 24, 25, 26, 27, 30, 31, February 1, 2, 3, 6, 7, 8, 9, 1956.]

Criminal Law—Vagrancy—Living on earnings of prostitution—Landlords and agents letting flats to known prostitutes—Whether living on earnings of prostitution—Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 13, as amended by the Criminal Law Amendment Act, 1912 (2 & 3 Geo. 5 c. 20), s. 4—Vagrancy Act, 1898 (61 & 62 Vict. c. 39), s. 1, as amended by the Criminal Law Amendment Act, 1912 (2 & 3 Geo. 5 c. 20), s. 7 (1), (5).

An indictment* charged eight of the nine defendants with living wholly or in part on the earnings of prostitutes contrary to the Vagrancy Act, 1898, s. 1, as amended by the Criminal Law Amendment Act, 1912, s. 7. The other defendant, a woman, was charged with aiding and abetting the commission of the offences. It was alleged that, either as landlords or estate agents, the eight defendants had let or been concerned in letting flats to individual prostitutes knowing that the tenants intended to use the flats for the purposes of prostitution, and that the rents charged were higher than the ordinary rent at which the flats would otherwise have been let.

Held: that the defendants had not been guilty of any offence under s. 1 of the Vagrancy Act, 1898, as amended, because, although the defendants by receiving moneys from the tenants in the circumstances either as rent or in consideration of granting tenancies or of work as estate agents were receiving moneys which wholly or in part had been derived from prostitution, yet moneys so received were the earnings of the defendants who were not, therefore, living on the earnings of prostitutes.

[As to living on earnings of a prostitute, see 10 HALSBURY'S LAWS (3rd Edn.) 676, para. 1294.

For the Vagrancy Act, 1898, s. 1, as amended by the Criminal Law Amendment Act, 1912, s. 7 (1), see 5 HALSBURY'S STATUTES (2nd Edn.) 923; and for the Criminal Law Amendment Act, 1885, s. 13, as amended by the Criminal Law Amendment Act, 1912, s. 4, see *ibid.*, p. 912.]

Cases referred to:

- (1) *Sivour v. Napolitano*, [1931] 1 K.B. 636; 100 L.J.K.B. 151; 144 L.T. 408; 95 J.P. 72; Digest Supp.
- (2) *R. v. Gorman*, (Sept. 8, 1954), unreported.
- (3) *Strath v. Foxon*, [1955] 3 All E.R. 398; [1956] 1 Q.B. 67; 119 J.P. 581.
- (4) *Calvert v. Mayes*, [1954] 1 All E.R. 41; [1954] 1 K.B. 342; 118 J.P. 76; 3rd Digest Supp.
- (5) *Ledwith v. Roberts*, [1936] 3 All E.R. 570; [1937] 1 K.B. 232; 106 L.J.K.B. 20; 155 L.T. 602; 101 J.P. 23; Digest Supp.
- (6) *A.-G. v. Brown*, [1920] 1 K.B. 773; 80 L.J.K.B. 1178; 122 L.T. 558; 84 J.P. 113; *on appeal*, [1921] 3 K.B. 29; 42 Digest 643, 469.
- (7) *R. v. Chapman*, [1931] 2 K.B. 606; 100 L.J.K.B. 562; 146 L.T. 120; 95 J.P. 205; Digest Supp.
- (8) *Prince Ernest of Hanover v. A.-G.*, [1955] 3 All E.R. 647.

Trial on indictment.

The defendants were tried on an indictment containing five counts. The first count charged Bernard Silver, Cyril William Pullinger, Wilfred Jerome Delmaine, Robert Edward Clement, Robert Laurant Falzon and Patrick Wilkinson,

* By the Criminal Law Amendment Act, 1912, s. 7 (5), a person charged with an offence under the Vagrancy Act, 1898, may, instead of being proceeded against as a rogue and vagabond, be proceeded against on indictment.

- A on divers days between June 23, 1951 and Apr. 18, 1955 with living wholly or in part on the earnings of prostitutes then occupying certain flats at 34, Romilly Street, 3, Peter Street and 34, D'Arblay Street, London, W.1. Albertine Falzon was charged in the same count with aiding and abetting the offence. In the second count a similar offence in respect of premises at 35, D'Arblay Street, 14, Wardour Mews, 12, Earlham Street, and 3, St. George Street, London, W.1,
- B was charged against Silver, Pullinger, Maurice Blair, Delmaine, Clement, Robert Laurant Falzon and Wilkinson, and Albertine Falzon was charged with aiding and abetting. In the third count Silver, Pullinger, George Modebadze, Delmaine, Clement, Robert Laurant Falzon and Wilkinson were charged with a like offence in respect of premises at 46, Old Compton Street, London, W.1, and Albertine Falzon was charged with aiding and abetting. The fourth count
- C charged Clement alone with a like offence in respect of premises at 82, Dean Street and 12A, Old Compton Street, London, W.1. The fifth count charged Silver, Pullinger, Delmaine, Clement, Robert Laurant Falzon and Wilkinson with a like offence in respect of certain flats other than those referred to in the counts one to four, and also charged Albertine Falzon with aiding and abetting. The offences charged, other than the aiding and abetting, were laid under the
- D Vagrancy Act, 1898, s. 1, as amended by the Criminal Law Amendment Act, 1912, s. 7 (5).

J. M. G. Griffith-Jones and S. A. Morton for the Crown.

J. N. Hutchison for Silver and Albertine Falzon.

V. A. C. Durand and John Abrahams for Pullinger.

R. E. Seaton for Modebadze.

E

Tudor Price for Delmaine.

R. J. A. Batt for Clement.

D. A. Hollis for Robert Laurant Falzon.

B. L. Leary for Wilkinson.

The defendant Blair was not represented.

F

JUDGE MAUDE: I have come to the conclusion, having heard the evidence for the Crown, that within the law as it is at the present time there is no case for these persons in the dock to answer, and, as this is a matter which may be considered of some public importance, I think it is right that I should set out in what I say to you the reasons for coming to that decision. You yourselves, members of the jury, will not have to make any decision at all; you will simply, at the right moment, return a verdict of "Not guilty" on the whole indictment.

G

This is a case in which a number of persons, nine in all, have been indicted under the Vagrancy Act, 1898, with knowingly living wholly or in part on the earnings of prostitution. To summarise the case against them, it is this: that a minority of those in the dock are in fact landlords, and that they have been knowingly letting flats to prostitutes; that is to say, one flat one prostitute; others are said to be engaged in the utterly immoral activity, equally so as the activity of the landlords, of letting the flats, in the capacity of agents, to prostitutes knowing that they were going to be used for the purposes of prostitution.

H

At first sight, without most careful consideration, it would appear in ordinary language that all the persons in the dock were clearly knowingly living thus in part on the earnings of prostitution; but the position is not so. All down the recent centuries the common law, as administered in the Sovereign's courts, has known how to deal with what are called brothels. They are places where two or more women in the same premises are plying their trade as prostitutes. That is different from premises where one woman only is operating. The Criminal Law Amendment Act, 1885, s. 13, added to the scope of the criminal law, in that it first of all made it punishable to keep, or manage, or act, or assist in the management of a brothel. That added little, if anything, to the existing law.

I

But that section, as amended by the Criminal Law Amendment Act, 1912, s. 4, A said that any person who

“ . . . (2) being the tenant, lessee, or occupier . . . of any premises, knowingly permits such premises or any part thereof to be used as a brothel or for the purposes of habitual prostitution . . . ”

should be liable to certain penalties. B

It is noticeable that it does not speak of the lessor or landlord; it is the tenant, lessee, or occupier, or, as was added by a later Act of Parliament, the person in charge of any such premises. They are the persons to be punished. He or she who stood in the position of a lessor or landlord, or the agent of the lessor or landlord, letting the same or any part thereof with the knowledge that the premises were to be used as a brothel, comes within a different paragraph, para. (3). So that the lessor or landlord was committing an offence if he knowingly let the premises or any part thereof to be used as a brothel, whereas the tenant, lessee, or occupier could be punished, not only for so dealing with premises for the purposes of a brothel, but also for the purposes of habitual prostitution. One must be certain that the distinction between the lessor and the landlord on the one hand and the tenant, lessee, or occupier, or person in charge on the other hand was of importance to Parliament. The Queen's courts can only administer the law as they find it, and they must, and I must, administer it strictly. Any feeling of indignation which the general public or the judiciary might have at a state of affairs that would appear to be grossly immoral is irrelevant to my present purpose, unless the facts show that an offence has been committed against the existing law. C D E

That being the position in 1885, it is quite obvious that persons who let their premises for the purposes of habitual prostitution for one prostitute only were impossible to hit; they could not be struck at; only the tenant, lessee, or occupier, or person in charge could be. Those who, no doubt, felt strongly that this sort of immorality should be discouraged to the full found in 1931, in *Sivour v. Napolitano* (1) ([1931] 1 K.B. 636), that a tenant, for instance, who was permitting premises to be used in a way forbidden by s. 13 (2) of the Act of 1885 could claim the more privileged position of the lessor or landlord if he or she sublet. From 1885 until 1898 that was the position, and one must realise that it was so. Some thirteen years passed, and it was then clear to Parliament, in 1898, that so far as prostitution was concerned something more needed to be done. It was then made an offence, for the first time, to do something quite different, that is to say, knowingly to live wholly or in part on the earnings of prostitution. F G

From 1898 until 1912, the Vagrancy Act, 1898, remained unamended. From 1898 to 1912 no attempt whatsoever was made by the prosecuting authorities to strike at landlords or agents concerned in the letting of premises for prostitution only, as opposed to brothels, by virtue of the Vagrancy Act, 1898; and after the Vagrancy Act, 1898, had been amended in 1912 until the present time—viz., until *R. v. Gorman* (2), a prosecution which was launched at the County of London Quarter Sessions on Sept. 8, 1954—no attempt was made to invoke the Vagrancy Act, 1898, s. 1, in the manner in which it has been invoked in this case. So that up to date, so far as is known by the extremely experienced counsel who appear both for the Crown and for the defence or by myself, there has never been any attempt of the kind before 1954. It does not mean because a statute has been allowed to slumber that in fact it is of no effect. If in fact it is there, so to speak, as a bit of artillery ready to hand, it can be brought out years, may be hundreds of years, later on and properly used. H I

A The question now arises, for the second time so far as is known, what is meant by the words "knowingly lives wholly or in part on the earnings of prostitution". It might seem to those who did not give careful consideration to the question, that anybody who received money earned by a prostitute would be committing an offence. For instance, the chemist who sells medicines and other things to the prostitute knowing that she is a prostitute would in part be living on the earnings of prostitution, in one sense, the broadest sense; the doctor who attends her, the lawyer who appears for her, if those persons know that she is in fact a prostitute, would appear to be committing an offence. That cannot be the intention of the Act, for if it were, the state of the prostitute in this world would be appalling; she would be able to get no services, or to get them only with the utmost difficulty, and the same would apply to the goods which she wanted to buy.

C It has been said in argument before me, by both sides, that the doctor, for instance, who treats the prostitute knowing that she is a prostitute is not really living on her earnings, although the money that is handed over is her earnings; what he is doing is, in fact, living on his own earnings. The doctor has earned his money. The shopkeeper, the grocer and the baker and so on, they earn their money. On the one hand, the doctor gives his services, and on the other, in D the case of the shopkeepers, they give their goods in exchange for money: they, in fact, are earning their living. They are not, therefore, knowingly living in part on the earnings of prostitution at all. But it is said now—and it seems to be the only instance to which I should be directing my attention—that where a landlord lets his premises for the purpose of prostitution and gets what I propose to call a prostitute rent, a wholly different situation arises; viz., since the E ordinary moral rent is less than the prostitute rent, then to the extent of the excess of the prostitute rent over the moral rent he is living on the earnings of prostitution. I do not think he is. I think that what the landlord is doing is living on his own earnings, just like the shopkeeper. A shopkeeper who grossly over-charged a prostitute because she was a prostitute would, nevertheless, be living on his own earnings—utterly, completely and disgustingly immoral, but they are F his earnings. The doctor earns his money, the barrister earns his money, and the landlord earns his money, and so does the estate agent; they are all earning their money; they are living in part—or wholly, I suppose, although the professional man has other clients—on money that comes from a prostitute, but they are living on those moneys as the earnings of their profession.

G The situation is, no doubt, and will be thought by many to be, a grave one. Times have changed; so one understands from history that, when there were brothels, there was very little individual prostitution in flats, and it may be that the problem is so grave that Parliament must do something about it. That is not for me. The Vagrancy Act, 1898, s. 1 (3), as amended, provides that:

H "Where a male person is proved to live with or to be habitually in the company of a prostitute or is proved to have exercised control, direction, or influence over the movements of a prostitute in such a manner as to show that he is aiding, abetting, or compelling her prostitution with any other person or generally, he shall, unless he can satisfy the court to the contrary, be deemed to be knowingly living on the earnings of prostitution."

I There is no evidence of that kind in this particular case, in my view. Therefore, this is an important, clear-cut case where the statements made by some of the defendants reveal with appalling clarity the situation, which as I say amounts to what must be, according to any standard of morality, utterly immoral, but that does not bring them within this particular Act.

I should just like to say this. The matter was argued before me with great care; a number of decisions were quoted to me, and in case at any time what I say should be of assistance in any direction to other persons who have this

matter under consideration, I will simply indicate what those were. Needless to say, the leading text-book, ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE, was referred to; the relevant statutes, including the original Vagrancy Act, 1824, were referred to; then there were *Strath v. Foxon* (3) ([1955] 3 All E.R. 398), *Calvert v. Mayes* (4) ([1954] 1 All E.R. 41), *Ledwith v. Roberts* (5) ([1936] 3 All E.R. 570), *A.-G. v. Brown* (6) ([1920] 1 K.B. 773), *R. v. Chapman* (7) ([1931] 2 K.B. 606), and *Prince Ernest of Hanover v. A.-G.* (8) ([1955] 3 All E.R. 647). I may not even now have enumerated them all, but I believe I have.

I should also like to add this. It looks to me as though the reason for this Act not having been used before 1954 is, in substance, that times have been changing and that in the view of those in charge of prosecutions what was not a serious menace has become one now, and every endeavour ought to be made to test, through the courts, the power of the police. That has now been done. If my decision is a correct one, then, as I say, it only remains for Parliament to interfere if they think fit. The result is that the persons in the dock will be discharged. Those who have read their statements, or heard them read in court, will have seen narratives of conduct which could not possibly be thought to be other than, in the case of most of them, utterly and disgustingly immoral. That is not what I am here for, and that is not what you are here for, members of the jury; we are not a court of morals.

I hope that I have done enough to indicate the reasons why I feel certain in my own mind that this is the right decision. I am absolutely certain that my duty, sitting here to administer the law, is to tell you now that there is no evidence on this indictment which would justify your convicting them of the offences charged, and that your duty is to say in answer to the clerk as to their guilt or otherwise that they are not guilty.

On his Lordship's direction, the jury returned a formal verdict of "Not guilty" in respect of all the defendants on all the counts, and they were discharged.

Solicitors: *Solicitor, Metropolitan Police* (for the Crown); *William Foux & Co.* (for the defendants Silver and Albertine Falzon); *Alfred Kerstein & Co.* (for the defendant Pullinger); *Tarlo, Lyons & Co.* (for the defendant Modebadze); *Clerk to the Central Criminal Court* (for the defendants Delmaine, Clement, Robert Laurant Falzon, and Wilkinson).

[Reported by T. J. KELLY, Esq., Barrister-at-Law.]

A NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA,
LTD. v. ATTORNEY-GENERAL FOR NEW ZEALAND.

[PRIVY COUNCIL (Viscount Simonds, Lord Oaksey, Lord Reid, Lord Keith of Avonholm and Lord Somervell of Harrow), November 1, 2, 3, 7, 8, 9, 1955, February 6, 1956.]

B *Money—Currency in which government stock repayable—New Zealand inscribed stock—Principal and interest repayable at Melbourne free of exchange—Whether payable in Australian currency or New Zealand currency.*

C By s. 2 of the New Zealand Inscribed Stock Act, 1917, inscribed stock is defined as the claim which any person has against the public revenues by virtue of an entry made pursuant to that Act on the register of inscribed stock under the name of that person. In the years 1925 to 1927 the appellant subscribed at par of exchange at Wellington, New Zealand, for inscribed stock of the government of New Zealand and was issued with such stock, the amount being expressed in pounds without stating whether the pounds were New Zealand pounds or Australian pounds. The entry in the register relevant to the stock issued to the appellant included the words "Principal and interest payable at Melbourne free of exchange". In August, 1948, the official rates of exchange of New Zealand and Australian currency diverged, and thereafter at all material times, subject to banking fluctuations £100 N.Z. was the equivalent of £125 Australian. The stock matured on Feb. 1, 1951. All payments made to the appellant in respect of interest or principal of the stock were made at Melbourne in Australian currency, and after August, 1948, were accepted by the appellant under protest. It was common ground that the proper law of the contracts for the issue of the stock was the law of New Zealand. The appellant claimed that he was entitled to the equivalent in Australian currency of the full nominal amount of the interest and principal of the stock in New Zealand currency.

F **Held:** the obligation of the New Zealand government was to pay in Melbourne in Australian currency the face value of the interest or stock, and the words "free of exchange" meant that the rate of exchange between New Zealand and Australian currency at the time when any payment became due was to be disregarded in determining the amount of Australian currency payable (see p. 728, letter B, post).

G Per CURIAM: if there is only one place of payment for interest and principal of government stock, that is an important, but not a decisive, factor in determining whether the currency of the government which issued the stock or the currency of the place of payment is the measure of the obligation. Nor is the measure of the obligation conclusively determined by finding what is the proper law of the contract (see p. 726, letter H, post).

H *Bonython v. Commonwealth of Australia* ([1951] A.C. 201) considered. Appeal dismissed.

[As to the currency in which payment is to be made, see 23 HALSBURY'S LAWS (2nd Edn.) 173, para. 251; and for cases on the subject, see DIGEST SUPPS.]

Cases referred to:

- I (1) *Bonython v. Commonwealth of Australia*, [1951] A.C. 201; 2nd Digest Supp.
(2) *Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.*, [1934] A.C. 122; 103 L.J.Ch. 85; 150 L.T. 281; Digest Supp.
(3) *National Bank of Australasia, Ltd. v. Scottish Union & National Insurance Co., Ltd.*, [1952] A.C. 493; 3rd Digest Supp.

Appeal.

Appeal by the National Mutual Life Association of Australasia, Ltd., from an order of the Full Court of the Supreme Court of New Zealand, dated May 31, 1954. The appellant had its principal place of business at Wellington, New Zealand,

and carried on business in New Zealand and elsewhere, as a life insurance office. **A**
The facts appear in the judgment of the Board.

Sir Garfield Barwick, Q.C. (of the Australian Bar), and *R. I. Threlfall* for the appellant.

Sir Frank Soskice, Q.C., and *E. J. Haughey* for the respondent.

LORD REID: This is an appeal from a judgment of the Full Court of the Supreme Court of New Zealand (*FAIR, HAY and NORTH, JJ.*, *GRESSON and STANTON, JJ.*, dissenting), dated May 31, 1954, in an action brought by the present appellant against the respondent. The question in dispute is the nature and extent of the obligations of the New Zealand government in respect of five parcels of New Zealand 5½ per cent. Inscribed Stock and one parcel of bearer debentures, all of which matured on Feb. 1, 1951. Interest was payable on Feb. 1 and Aug. 1 in each year, and it is not disputed that interest was duly paid down to, and including, Aug. 1, 1948. But the appellant alleges that thereafter the New Zealand government failed to pay to it the whole of the interest due to it and that, on maturity, they failed to pay, or repay, the whole of the principal sum due. It is not disputed that the appellant only accepted under protest the sums paid to it. In this action, the appellant sues for the difference between the amounts of interest and principal in fact paid to it and the amounts which it alleges were due to it, and the Supreme Court of New Zealand has adjudged that the appellant do recover nothing against the respondent and do pay to the respondent certain costs. **B**

The register of inscribed stock kept for the New Zealand government bears with regard to the stock belonging to the appellant the words "Principal and interest payable at Melbourne free of exchange", and the appellant's certificates of title bear the same words. All the payments made to the appellant in respect of that stock were made at Melbourne in Australian pounds. The appellant contends that the payments ought to have been made in New Zealand pounds. In 1949 and the subsequent years, the New Zealand pound was worth more than the Australian pound and, if the appellant's contention is well founded, it is entitled to recover the sums sued for in this action. The parties are agreed that the decision of this case ultimately depends on the true construction of the entry in that register, but they are not in agreement as to what facts ought to be taken into consideration in determining this question. As will appear, their Lordships are of opinion that most of the facts, the admissibility of which is in dispute, would throw no material light on this question, and they do not propose to set out more than a summary of these facts. There is before their Lordships an elaborate statement of agreed facts, and there is a full statement of the facts in the leading judgment of *FAIR, J.* **C**

The State Advances Act, 1913, as amended, enabled the Minister of Finance, on being authorised by the Governor-General in Council, to raise sums of money on the security of and charged on the public revenues of New Zealand. The Minister of Finance was duly authorised on Mar. 23, 1925, to raise by way of loan for certain purposes sums amounting to £6,500,000 for the financial year ending Mar. 31, 1926, and he was similarly authorised to raise loans for the same purposes to the extent of the same amount for the next financial year. Pursuant to these authorities, the Minister duly borrowed £3,002,500. The statement of agreed facts sets out, in para. 5, the conditions subject to which this sum was borrowed. It was borrowed in three parts. £1,250,000 was subscribed by English investors and made available at Wellington at par of exchange. There is a London register of inscribed stock, and, in respect of this borrowing, there was issued inscribed stock inscribed on the London register, and holders of £1,000,000 of this stock were specifically given the option of payment of interest and repayment of principal at London, New York or Wellington, such payment and repayment at New York to be on the basis of 4 dollars 86½ cents to the **D**
E
F
G
H
I

A United Kingdom pound. The remaining £250,000 and the interest thereon were respectively payable in London only.

The sums with which this case is concerned were part of £1,644,500 subscribed by Australian investors and made available at Wellington at par of exchange. The inscribed stock issued in respect of this borrowing was inscribed in the New Zealand register, and the principal and interest moneys were respectively repayable and payable in some cases at Melbourne and in others at Sydney (as arranged at the time of issue) free of exchange. There was no option to change the place of repayment or payment of interest. There was also a sum of £108,000 subscribed by Australian investors in respect of which bearer debentures were issued which provided for payment at Melbourne with no option to transfer the place of payment.

C In September, 1925, there were negotiations between the Secretary to the Treasury and a firm of stockbrokers with a view to obtaining loans: no prospectus was issued, but, after some correspondence, the appellant, through the stockbrokers, applied for £72,500 New Zealand 5½ per cent. Inscribed Stock, and £72,500 was received from the appellant by the Bank of New Zealand at Melbourne for the credit of the Public Account and was, by direction of the Treasury,

D remitted to that bank at Wellington. The stockbrokers were paid 10s. per cent. by the New Zealand government, and, out of that commission, they paid the cost of the exchange so that the full sum of £72,500 was provided for the New Zealand government at Wellington. The appellant later applied and paid for further large amounts of inscribed stock, the last application being in August, 1926. It was agreed that, on these later occasions, the procedure was similar, and it is unnecessary to narrate the steps taken on each of these occasions. In due course the appellant received certificates of title. In some cases, the appellant had sold part of the stock before receiving the certificates and, in respect of the first transaction, it received after a considerable time a certificate which stated that the appellant

F "is the registered holder of sixty-one thousand five hundred pounds 5½ per cent. New Zealand Inscribed Stock, maturing Feb. 1, 1951, which amount has been duly inscribed in the books of the Treasury under the name and address mentioned above. This certificate is conclusive evidence of the ownership of the stock to which it relates, and is proof that no stock certificate is outstanding in respect of that stock."

G The certificate bore on its face the words "Principal and interest payable at Melbourne free of exchange".

Section 2 of the New Zealand Inscribed Stock Act, 1917, defines inscribed stock as

H "the claim which any person has against the public revenues by virtue of an entry made pursuant to this Act on the register of inscribed stock under the name of such person"

and it is, therefore, essential to see how the entries with regard to the appellant were made. The heading is

"State Advances Act, 1913 (Advances to Settlers Branch)
Maturing Feb. 1, 1951, interest at 5½ per cent. payable Feb. 1, Aug. 1
Principal and interest payable at Melbourne free of exchange
Warrant to go to General Manager,

I The National Mutual Life Association of Australasia, Ltd., 395 Collins Street, Melbourne, Victoria."

Then there follows a tabular statement. On the right side of the page is the first entry "Oct. 15, 1925 51/2 By cash 72500". Below that are other entries showing further sums paid. On the left of the page are numerous entries for 1927 and 1930 showing various amounts of stock sold by the appellant against

the words "To transfer". And in the middle of the page there is a column which apparently shows the amount of stock owned by the appellant after each operation. The first figure in this column is 72,500, and below that is a series of figures which increase to 402,500 by reason of the payments made for stock taken up by the appellant in 1926, and then diminish by reason of the appellant's various sales of stock. The last figure in this column is 117,500, and against it is the entry "Feb. 1, 1951 To redemption DE 327 117500".

The statement of agreed facts states, with regard to the matter which has given rise to this litigation:

"38. On or about Aug. 20, 1948, the official exchange rates of the Dominion of New Zealand and of the Commonwealth of Australia diverged and thereafter at all material times subject to banking fluctuations £125 Australian currency was the equivalent of £100 New Zealand currency.

"39. Thereafter the New Zealand government through its agents continued to pay the interest due on Feb. 1, 1949, and all subsequent payments of interest accruing in respect of all the said parcels of inscribed stock and of the said bearer debentures in Melbourne at the rate of $5\frac{1}{2}$ per cent. per annum on the nominal or face value thereof on the basis that the measure of its obligation thereunder was in Australian currency or money of account.

"40. The New Zealand government through its agents tendered and paid in Melbourne on Feb. 1, 1951, in repayment of the principal moneys due in respect of all the said parcels of inscribed stock and of the said bearer debentures at the nominal or face value thereof measured in Australian currency or money of account, namely, the sum of £526,500 in Australian currency or money of account."

The statement of agreed facts then narrated that the appellant accepted all payments after Aug. 20, 1948,

"with a full reservation of its claim that the indebtedness of the New Zealand government could only be discharged by payment of the nominal or face value of the several obligations in New Zealand currency or its equivalent in Australian currency in Melbourne at the current rate of exchange applicable as at the date of each payment."

The question for decision in this case is difficult but it is narrow in scope. It is admitted that, at all relevant times, the monetary systems of New Zealand and Australia were different and that, even while they were of the same value, the New Zealand pound and the Australian pound were different units. It is further admitted that the proper law of the contracts is the law of New Zealand and that, to succeed, the respondent must show that the obligations of the New Zealand government construed by that law were obligations to pay Australian pounds.

Their Lordships must first notice arguments by the appellant which, if correct, would lead to the conclusion that it was ultra vires of the New Zealand government to enter into an obligation to pay interest on New Zealand Inscribed Stock, or to repay the principal of such stock in anything but New Zealand money. It was, of course, not maintained that it would be ultra vires to undertake to pay, out of New Zealand, in the currency of the place of payment, an amount equivalent at the time of payment to a sum in New Zealand pounds, but it was argued that, by the law of New Zealand, the measure of every obligation in respect of inscribed stock must be New Zealand pounds. This argument was based on the relevant New Zealand statutes. It was said that the Governor-General in Council can only authorise borrowing under the State Advances Act, 1913, in New Zealand pounds, and that, if the Minister of Finance should undertake an obligation in some other money of obligation or money of account, it could not be determined whether such borrowing was within the amount authorised by the Governor-General in Council; if the New Zealand currency should depreciate,

A such an obligation might well require for repayment of the loan the raising from the public revenues of a larger sum than that authorised to be borrowed.

There is reference in the judgments of the Supreme Court to difficulties which might arise if obligations were undertaken to repay loans in foreign currency, but the question whether an obligation to pay foreign currency would be ultra vires was not clearly raised or dealt with, and it is not raised in the appellant's reasons in this appeal. Reference has already been made to para. 5 of the statement of agreed facts, which states that certain subscribers were specifically given the option of payment in New York on the basis of \$4.86½ to the United Kingdom pound, and it is difficult to see how the giving of that option could be intra vires if this argument is well founded. It is true that the rights of those subscribers are not affected by this case, but the submission of this statement and the absence of any suggestion of ultra vires emphasise the fact that this point has never been properly raised. It is a matter on which it would be of the utmost importance to have the views of the learned judges of the Supreme Court and, in view of the far-reaching consequences which a decision of this question might have, their Lordships are not prepared to deal with this new argument in this appeal.

D But the appellant is entitled to argue, and does argue, that there is a strong presumption that a government will not undertake an obligation to repay money borrowed on the security of its revenues except on the basis that the sum to be repaid is to be measured by its own currency. In *Bonython v. Commonwealth of Australia* (1) ([1951] A.C. 201), it was said (*ibid.*, at p. 222):

E "The government of a self-governing country, using the terms appropriate to its own monetary system, must be presumed to refer to that system whether or not those terms are apt to refer to another system also. It may be possible to displace that presumption, but, unless it is displaced, it prevails . . ."

In their Lordships' judgment, the question for decision in the present case is the true construction of the obligation undertaken by the New Zealand government taking that presumption into account.

F The obligation of the government of New Zealand is contained in the entry in their register of inscribed stock which has already been set out. There is no material difference between it and the terms of the appellant's applications for stock and the terms of the certificates of title issued to the appellant, so it is unnecessary to consider what the position would be if there were any material differences between these documents. Arguments were submitted that, in construing the entry in the register, other matters should be taken into account, such as the facts that the lender resided in Australia and that the money lent came from Australia, but their Lordships do not find it necessary to consider whether, as a matter of law, any such extrinsic circumstances can be considered, because they do not find in the agreed facts anything which could materially affect the construction of the obligation. It is necessary to determine what was the substance of the obligation—whether it was an obligation to pay the face value of the stock in Australian pounds, or an obligation to pay the face value in New Zealand pounds, or their equivalent at the date of payment. If it is not sufficiently plain from the terms of the entry in the register that the obligation was an obligation to pay the face value of the stock in Australian pounds, then, in their Lordships' judgment, any inference which could be drawn from the agreed facts would be quite insufficient to overcome the presumption which has to be overcome if the respondent is to succeed. And, if the terms of the obligation are sufficiently plain to overcome the presumption, then extrinsic evidence is unnecessary. Their Lordships would, however, draw attention to the fact that this stock was transferable, and that the stock issued to the appellant was only a part of the £1,644,500 issued to Australian investors subject to the condition that principal and interest should be payable in Australia free of

exchange. If extrinsic evidence were admitted to control the meaning of this condition, the result might be that, by reason of different circumstances attending investment by different investors, this condition would have one meaning as regards stock issued to one investor and a different meaning as regards stock issued to another investor. So a transferee might have different rights if he bought apparently identical stock from different holders. That would be a strong argument against the admissibility of evidence of the circumstances in which the stock was issued to a particular stockholder.

The arguments for the appellant were based to a large extent on their Lordships' decision in *Bonython v. Commonwealth of Australia* (1), so it is necessary to examine that case. The holders of inscribed stock of the Commonwealth had an option to be paid the principal sums due on Jan. 1, 1945, in Brisbane, Sydney, Melbourne or London, and a stockholder, exercising his option to be paid in London, claimed to be paid the face value of his stock in British currency. His claim failed, and he was held only entitled to receive in British currency the equivalent of the face value of the stock in Australian currency. The Commonwealth stock had replaced debentures issued by the Queensland government, and it was admitted that it was necessary to determine the rights of the old debenture-holders. In their Lordships' judgment, it was said ([1951] A.C. at p. 219):

"Necessarily the question is a somewhat artificial one; for it is safe to assume that a divergence in the value of the Queensland pound and the English pound was in the contemplation of nobody. But this at least seems clear, that, if no such divergence was thought of, it cannot have been intended that the debenture-holder should obtain a different measure of value, or the Queensland government be placed under a different liability, according to the place of payment; in other words, it is clear that the same substantial obligation was imposed on the Queensland government whatever the place chosen for payment, the choice being given to the debenture-holder purely as a matter of convenience."

That reason does not apply to the present case, where there is no option as to the place of payment, but their Lordships did deal with cases where there was no such option. In dealing with *Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.* (2) ([1934] A.C. 122), after criticism of some of the reasoning in the House of Lords it was said ([1951] A.C. at p. 220):

"But the decision itself can be fairly rested on the fact that under the altered articles of the Adelaide company payment of dividends on its stock was to be made in Australia only. It was therefore easy to conclude that on the true construction of the contract the place of performance determined the substance of the obligation, i.e., the currency by which the obligation was to be measured . . . In the present case it is clear that, if it had been provided that payment would be made in London only, that would have been an important factor in determining the substance of the obligation, though other features not present in the *Adelaide* case (2) could not be ignored."

Their Lordships accept this as recognising that, if there is only one place of payment, that is an important, but not a decisive factor, in determining whether the currency of the government which issued the stock or the currency of the place of payment is the measure of the obligation. Nor is the measure of the obligation conclusively determined by finding what is the proper law of the contract. It is possible for parties contracting under the law of New Zealand to make the Australian pound the measure of the obligation.

Their Lordships must also examine *National Bank of Australasia, Ltd. v. Scottish Union & National Insurance Co., Ltd.* (3) ([1952] A.C. 493), although that case is not so directly in point. There were registers of the bank's stock in Australia and in London, and a stockholder could, at any time, have his stock transferred from one register to the other, and it was held that the measure of

A the obligation was not the currency of the place where the stock happened to be registered and where, therefore, payment had to be made, but was the currency of Australia in all cases. Their Lordships quoted with approval from the judgment of Dixon, J., in the High Court of Australia ([1952] A.C. at p. 511):

B “ ‘ great care must be exercised in using the place of payment as a consideration supporting an inference that the substance of the obligation is to be measured in the money of the same place ’ . ”

That is undoubtedly true, and particularly where there are alternative places of payment.

C It was argued for the respondent that the mere fact that the only place of payment is in Australia is sufficient to overcome any inference arising from the fact that the borrower is the government of another country. That is a question which their Lordships do not find it necessary to decide in this case, because the condition attaching to this stock is not merely that payments shall be made at Melbourne: it is “ Principal and interest payable at Melbourne free of exchange.” It is, therefore, necessary to find what are the possible meanings of this condition. No doubt the New Zealand government might happen always to have sufficient funds available in Melbourne, but it was at least reasonable to suppose that that government would, or might, have to send funds to Melbourne to effect payment there.

D The appellant argued, first, that the obligation was to hand over New Zealand pounds to the stockholder in Melbourne, either in the form of New Zealand legal tender or in the form of a cheque or draft on the government’s bank in New Zealand expressed in New Zealand pounds. But that can hardly be reconciled with “ free of exchange ”, because the first thing the recipient in Melbourne would have to do would be to exchange the notes or cheque for Australian currency, and nothing in the nature of exchange would have been done by the government; it would simply have posted or otherwise sent to its agent in Melbourne, or to the stockholder direct, the necessary notes or cheque.

F Their Lordships, therefore, reject this argument.

Then the appellant argued that the substance of the obligation was to pay New Zealand pounds, that this condition related only to the mode of performance and that it meant that there should be paid in Melbourne such a sum in Australian currency as was at the time of payment of the same value as the New Zealand pounds comprised in the obligation. “ Free of exchange ” on this view would mean only that any bankers’ charges were to be borne by the government.

G The third meaning is that for which the respondent contends; that the obligation was to pay in Australian pounds the face value of the interest or stock, and that “ free of exchange ” was inserted to show that no question of exchange was to be brought into the matter. The New Zealand government was not to be entitled to say that the transmission of funds to Melbourne had cost it a certain sum, or that its currency had depreciated, and that by reason of exchange it could not pay in Australian pounds the face value of its obligation.

H Their Lordships must choose between the latter two interpretations of this condition. There is no evidence that “ free of exchange ” had any technical meaning in 1925, nor is there any evidence as to how exchange was operated then, or is operated now. There is only the agreed fact already quoted that, in 1948, I the official exchange rates diverged, and thereafter, subject to banking fluctuations, £125 Australian currency has been the equivalent of £100 New Zealand currency. There is before their Lordships a document which shows that, in exchange for an interest warrant for £100 in New Zealand currency, there would have been paid in Australian currency by a bank in Melbourne in 1926 £99 12s. 6d., in 1929 £99 15s., in 1934 £100 10s. and in 1938 £100 5s. These appear to be dates at which the two pounds were equivalent in value, and the reasons for these differences are not explained, but it would seem that, at a time when the pounds

were of equal value, a customer presenting to a bank in Melbourne a sum in New Zealand currency or a draft on New Zealand did not simply get that sum less a charge for the bank's services, but that there had to be taken into account an element of exchange between the two currencies, and that the rate of exchange might vary from time to time. Even if this is not the correct interpretation of the facts set out in this document, their Lordships are of opinion that it must be assumed that it was known in 1925 that there could be a rate of exchange other than at par between the two currencies of New Zealand and Australia, even at a time when the two currencies were equivalent in value. Their Lordships have already stated that, in their judgment, all payments which had to be made in Melbourne must be made in Australian currency; and, in their judgment, the stipulation that the payments were to be made there "free of exchange" must have meant from the beginning that the rate of exchange between the two currencies at the time when any payment became due was to be disregarded in determining the amount of Australian currency payable. So a stockholder owning, say, £1,000 of the 5½ per cent. Inscribed Stock to which this stipulation applied was entitled to be paid in Melbourne as interest in 1926 and each subsequent year £55 in Australian currency, because that is the necessary result if the rate of exchange had to be disregarded.

During the period when the two currencies remained equivalent in value, the rate of exchange could not depart far from parity, and the effect of the stipulation that payments must be made free of exchange must have been small. But the meaning of the stipulation could not change when the values of the currencies diverged, and it applied to repayment of principal as well as to payment of interest. Their Lordships must, therefore, hold that the obligation of the New Zealand government is to repay in Melbourne in Australian currency a number of pounds equal to the face value of the stock.

It was argued that "free of exchange" is an appropriate expression if the stockholder is being protected against some deduction, but is not an appropriate expression to deprive him of an advantage—in the present case the advantage of getting more than the face value of his security by reason of the exchange rate between Australia and New Zealand. But, in their Lordships' view, "free of" can well mean "independent of". It may be that the primary purpose of this condition was to protect Australian stockholders in the event of the New Zealand pound being worth less in Australia than the Australian pound, but the condition cannot be interpreted so as to be in favour of Australian stockholders in that event and also to be in their favour when the New Zealand pound is worth more than the Australian pound. If they were entitled to be paid in Australian pounds in the one event, they could not be entitled to be paid in the equivalent of New Zealand pounds in the other event. In their Lordships' judgment, they were entitled in either event to be paid the face value of the obligation in Australian pounds.

Their Lordships must also deal with the view expressed by GRESSON, J. ([1954] N.Z.L.R. at p. 798):

"The phrase 'free of exchange' negatives the adoption of Australian currency as the money of account for if the debt was a stated number of Australian pounds there could be no question of exchange . . . If Australian currency was to be the money of account as well as the money of payment, no exchange operation could arise."

Their Lordships recognise that there is force in this argument, but are of opinion that the purpose and meaning of the phrase is that no exchange operation is to be performed in determining the number of pounds to be paid, and that any payment must be in Australian pounds. Without the words "free of exchange", it might have been said that an exchange operation was necessary if the New Zealand government was to pay in Australian pounds, but these words indicate that, if the New Zealand government have to perform an exchange operation

A in order to make payment at Melbourne, that operation shall not be taken into account in determining the amount of Australian currency which has to be paid.

For the reasons given, their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

B Solicitors: *Markby, Stewart & Wadesons* (for the appellant); *Mackrell, Maton & Co.* (for the respondent).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

BAGETTES, LTD. v. G. P. ESTATES CO., LTD.

C [COURT OF APPEAL (Lord Evershed, M.R., Jenkins and Birkett, L.JJ.), February 6, 7, March 5, 1956.]

Landlord and Tenant—New tenancy—Tenants' occupation for business purposes—Business of sub-letting part of premises as flats—Occupation by landlord of ancillary parts of premises—Application of the Landlord and Tenant Act, 1954, Part 2—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 23 (1) (2) (3), s. 32 (1).

D *Practice—Procedure afforded by statute—Alternative procedure—Application under R.S.C., Ord. 54A, r. 1A—Competence.*

The tenants acquired the residue of a lease with a view to deriving profit from the sub-letting of flats of which there were thirteen in the demised premises. The premises comprised, besides the flats, rooms for a resident caretaker, boiler rooms, storerooms, fuel stores and the common parts, viz., halls, passages and staircases. On Mar. 25, 1955, the lease expired, when three of the flats were already or became vacant, and the caretaker's rooms became vacant on that date. The tenants claimed a new tenancy of the whole premises under Part 2 of the Landlord and Tenant Act, 1954.

E **Held:** although the entire premises were used by the tenants for the purposes of a business carried on by them within s. 23 (1)* of the Landlord and Tenant Act, 1954, viz., the business of sub-letting the premises in flats, yet the tenants were not entitled to a new tenancy because (i) the holding, in respect of which alone the Act contemplated a new tenancy being granted, excluded by s. 23 (3) the flats sub-let (as they were not in the tenants' occupation) and (ii) if, accordingly, the flats were left out of consideration no business purpose remained for which the tenants could maintain that they were occupying the holding, that is to say, the rest of the premises.

G Decision of WYNN-PARRY, J. ([1955] 3 All E.R. 451) affirmed.

H Per JENKINS, L.J.: there may be cases in which mesne landlords of flat properties retain and occupy parts of their premises for business purposes of kinds capable of surviving the cesser of their interest in the flats themselves. Again, there, no doubt, are cases where property companies occupy offices for the purpose of carrying on the business of managing the various properties from time to time held by them. To cases such as these different considerations apply. (See post, p. 735, letter E.)

I **Quaere** whether, having regard to the fact that provision is made by the Landlord and Tenant Act, 1954†, for procedure whereby questions in dispute under the Act may be determined, the court ought to entertain an application under R.S.C., Ord. 54A, r. 1A, for the determination of such questions. (See post, p. 730, letters F and G.)

[For the Landlord and Tenant Act, 1954, s. 23 and s. 32, see 34 HALSBURY'S STATUTES (2nd Edn.) 408, 417.]

* Section 23 of the Landlord and Tenant Act, 1954, is printed at pp. 732, 733, post.

† See s. 63 for the jurisdiction of the court.

Case referred to:

- (1) *Barton v. Reed*, [1932] 1 Ch. 362, 375; 101 L.J.Ch. 219; 146 L.T. 501; 31 Digest (Repl.) 171, 3049.

Appeal.

This was an appeal by the tenants from an order of WYNN-PARRY J., dated Oct. 26, 1955, and reported [1955] 3 All E.R. 451, whereby it was declared that on the true construction of the Landlord and Tenant Act, 1954, the tenants had not a tenancy of the property known as Nos. 99, 101 and 103, Gloucester Place, London, W.1, to which Part 2 of that Act applied.

The facts appear in the judgment of JENKINS, L.J.

D. J. C. Ackner for the tenants.

L. A. Blundell for the landlords.

Cur. adv. vult.

Mar. 5. **LORD EVERSHED, M.R.:** I have had the advantage of reading in advance the judgment prepared by JENKINS, L.J. I agree with his reasons for thinking that the phrase in the Landlord and Tenant Act, 1954, s. 23 (1), "occupied by the tenant . . . for the purposes of a business carried on by him", when properly construed in its context, cannot sensibly have been intended by Parliament to apply to those parts of the premises in the present case now occupied by the tenants (viz., the two or three vacant flats, the storerooms and other basement accommodation and the halls, staircases and other parts of the structure not comprehended in any of the lettings to sub-tenants), which, whatever may have been the case before, cannot in the tenants' hands from the moment of commencement of any new tenancy which the tenants can ask the court to direct, possibly serve the purposes of the tenants' business. Without, therefore, adding any reasons of my own, I agree with JENKINS, L.J., that the appeal must fail.

During the course of the argument I expressed some doubt whether the application by originating summons under R.S.C., Ord. 54A, r. 1A, was one which the court ought properly to entertain, having regard particularly to the fact that, by the terms of the Act, Parliament had made special provision for the procedure whereby questions in dispute under the Act might be determined by the courts, and to the further fact that in some cases, as it seems to me at present, questions might arise of the proper dates on which for the purpose of the Act such matters as the true extent of "the holding", as therein defined, should be ascertained. I am, however, satisfied, having regard to our conclusion in the present case, that the terms of s. 64 (1) of the Act could not be invoked for the purpose of extending the tenants' tenancy beyond its expiry in March, 1955, and that no other question of dates could properly here arise. And since, further, both counsel were content that we should give our answer to the question raised by the originating summons, I do not find it necessary to refer further to the doubts which I had expressed.

JENKINS, L.J., read the following judgment: This case raises a curious and not altogether easy question under the Landlord and Tenant Act, 1954. The tenants, who are now the appellants, carry on business as holders, managers and landlords of real property. In the course of such business, they acquired by an assignment dated Mar. 25, 1949, the leasehold interest in premises comprising Nos. 99, 101 and 103, Gloucester Place, London, W.1, under a lease dated Sept. 19, 1921, whereby the premises were demised for a term of 33½ years from Sept. 29, 1921, which expired, or apart from any relevant provisions of the Landlord and Tenant Act, 1954, would have expired, on Mar. 25, 1955, by effluxion of time. The freehold reversion in the premises immediately expectant on the determination of this term is and has at all material times been vested in the respondents, the landlords. The premises consist of (a) thirteen self-contained residential flats, one of which is in the basement, (b) other

- A accommodation in the basement comprising rooms for a resident caretaker, boiler rooms, storerooms, and fuel stores, and (c) the common parts of the premises in the shape of halls, passages, landings and stairs. The tenants acquired the premises with a view to the profit to be derived from the sub-letting of the flats, and ten of them are and have at all material times been sub-let to various tenants. Of the remaining three flats, two are now in the vacant
- B possession of the tenants, one of these having been left by a sub-tenant on Mar. 25, 1955, and the other having been unlet since a date prior to Feb. 22, 1955, while possession of the third was (wrongfully, as the tenants submit) obtained by the landlords from an outgoing sub-tenant on Mar. 24, 1955. The caretaker's rooms in the basement were in fact occupied by a caretaker down to Mar. 25, 1955, and have since been vacant. The storerooms are used for the storage of
- C cleaning materials, surplus articles of furniture, brushes, vacuum cleaners and other such articles. The evidence does not account for the presence of surplus articles of furniture, but as the flats were let unfurnished it seems probable that these were articles belonging to sub-tenants stored away by the tenants for their sub-tenants' convenience. The cleaning materials, brushes, vacuum cleaners, and so forth, stored in the basement are used for cleaning the common parts
- D of the premises. The boiler rooms contain boilers which provide hot water for the flats. The fuel stores, no doubt, contain the fuel required for the boilers, and perhaps also fuel belonging to tenants of the flats, though there is no evidence as to this. The common parts of the premises are not included in any of the sub-lettings, but the tenancy agreements give the occupants of the flats rights of user over them in common with the tenants and their other sub-tenants. The
- E tenants are not obliged to provide their sub-tenants with hot water or to clean the common parts of the premises, but, to quote the affidavit of Mr. T. W. Pinnock, a director of the tenants,

“the defendants [the tenants] however for the purpose of the better running of their business provide hot water and clean the common parts of the premises so as to make the premises more attractive to their existing

F and prospective tenants.”

- In the circumstances above described, the tenants claim that their tenancy of the premises is a tenancy to which Part 2 of the Landlord and Tenant Act, 1954, applies, i.e., a tenancy of property which includes premises occupied by a tenant for the purposes of a business carried on by him or for those and other purposes
- G within the meaning of s. 23 of the Act. In furtherance of this claim, the tenants on Feb. 23, 1955, served on the landlords a notice dated Feb. 22, 1955, of the tenants' request for a new tenancy pursuant to s. 26 of the Act. On June 21, 1955 (which was in fact nearly the last day of the maximum period of four months from the making of their request for a new tenancy allowed for this purpose by s. 29 (3) of the Act) the tenants made an application to the court for a
- H new tenancy pursuant to s. 24 (1) of the Act. If the tenants are right in their contention that the tenancy is one to which Part 2 of the Act applies, the present position is that by the joint effect of s. 24, s. 26 and s. 64 of the Act the steps taken by the tenants have secured them an extension of their tenancy from Mar. 25, 1955, when it would in the ordinary course have come to an end, until the expiration of the period of three months beginning with the date on which the
- I application to the court is finally disposed of.

The landlords, ever since the tenants' request for a new tenancy, have consistently contended that the tenancy is not one to which Part 2 of the Act applies, and accordingly that the tenants' continuance in possession of the premises after the expiration of the contractual term is wholly unwarranted. They naturally wished that their objection, which if upheld would dispose summarily of the tenants' claim, should be dealt with as soon as possible. Accordingly, on Apr. 22, 1955, they applied by originating summons in the Chancery Division for the determination of the question whether, on the true construction of the

Act, the tenancy of the premises was a tenancy to which Part 2 of the Act applied. A
 The matter came before WYNN-PARRY, J., who, by his judgment dated Oct. 26, 1955, answered the question raised in favour of the landlords, and from that decision the tenants now appeal to this court.

The case turns largely on the true construction of s. 23 (1) (2) and (3) of the Act, which is in these terms:

“(1) Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes. (2) In this Part of this Act the expression ‘business’ includes a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate. (3) In the following provisions of this Part of this Act the expression ‘the holding’, in relation to a tenancy to which this Part of this Act applies, means the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business by reason of which the tenancy is one to which this Part of this Act applies.” B C D

Reference should also be made to s. 32, which provides as follows:

“(1) Subject to the next following sub-section, an order under s. 29 of this Act for the grant of a new tenancy shall be an order for the grant of a new tenancy of the holding; and in the absence of agreement between the landlord and the tenant as to the property which constitutes the holding the court shall in the order designate that property by reference to the circumstances existing at the date of the order. (2) The foregoing provisions of this section shall not apply in a case where the property comprised in the current tenancy includes other property besides the holding and the landlord requires any new tenancy ordered to be granted under s. 29 of this Act to be a tenancy of the whole of the property comprised in the current tenancy; but in any such case—(a) any order under the said s. 29 for the grant of a new tenancy shall be an order for the grant of a new tenancy of the whole of the property comprised in the current tenancy, and (b) references in the following provisions of this Part of this Act to the holding shall be construed as references to the whole of that property. (3) Where the current tenancy includes rights enjoyed by the tenant in connection with the holding, those rights shall be included in a tenancy ordered to be granted under s. 29 of this Act.” E F G

It is right further to notice the wide discretion given to the court by s. 33, s. 34 and s. 35 as regards the duration, terms and conditions of any new tenancy ordered.

The argument for the tenants based on these statutory provisions is short and simple. It is said, first, that the sub-letting of unfurnished residential flats is a “business” both in the ordinary sense of that expression and also within the meaning properly attributable to it in s. 23. For this submission powerful support is found in the contrast between the definition of “business” contained in s. 23 (2) of the Act of 1954 and the language of the Landlord and Tenant Act, 1927, s. 17 (3), and in the assumption that, unless excluded by definition, the sub-letting of flats is a trade or business, implicit in the latter enactment which, by way of exception from the general rule laid down in s. 17 (1) to the effect that the holdings to which Part 1 of the Act applies are “any premises held under a lease . . . and used wholly or partly for carrying on thereat any trade or business . . .”, provides: H I

“(3) For the purposes of this section, premises shall not be deemed to be premises used for carrying on thereat a trade or business . . . (b) by reason

- A that the tenant thereof carries on the business of sub-letting the premises as residential flats, whether or not the provision of meals or any other service for the occupants of the flats is undertaken by the tenant."

This proposition (which accords with the view of LUXMOORE, J., in *Barton v. Reed* (1) ([1932] 1 Ch. 362)) I for my part accept, and it follows that the purposes for which the premises here in question (i.e., the entire premises including the flats sub-let) are used by the tenants are "the purposes of a business carried on by them" within the meaning of s. 23 (1).

- B Next, the tenants argue that, the purposes for which they use the premises being the purposes of a business carried on by them within the meaning of the Act, premises included in the property are in fact occupied by them for the purposes of that business, namely, the basement rooms (other than the flat in the basement) and also the common parts of the premises and the three flats now
- C unlet, possession of one of which was (wrongfully as they say) obtained by the landlords. Therefore, say the tenants, the property comprised in their tenancy does, within the meaning of s. 23 (1), include premises (i.e., the basement rooms other than the flat in the basement, the three unlet flats and the common parts of the premises) "which are occupied by them and are so occupied for the purposes of a business carried on by them or for those and other purposes."
- D They add (as I think with force) that the taking possession by the landlord of one of the three unlet flats should not be allowed to prejudice their position so far as it depends on occupation of any part of the premises. I agree that the words of s. 23, applied *literatim* to the facts of the present case, appear at first
- E sight to justify the tenants' contention. But s. 23 must be construed in its context and with due regard to the substance and manifest intention of the enactment. Considered from this point of view, the tenants' argument becomes less convincing. I would observe that the manifest intention of Part 2 of the Act (headed "Security of tenure for business, professional and other tenants") is, so far as business tenants are concerned, to protect such tenants in their
- F occupation of premises for business purposes. The relevant object, as expressed in the long title, is

"... to enable tenants occupying property for business . . . purposes to obtain new tenancies in certain cases . . ."

- I note also that, while a tenant occupying premises partly for business and partly for other purposes may, by the joint effect of s. 23 and s. 24, apply for a new
- G tenancy in respect of the whole of the property comprised in the tenancy so far as it is occupied either by the tenant himself or by a person employed by the tenant and so employed for the purposes of the relevant business, any part of such property not so occupied is excluded by s. 23 (3) from the definition of "the holding" for the purposes of Part 2 of the Act; and that (save by agreement
- H between the parties or on a requisition by the landlord that the whole of the property should be included in the new tenancy) the power of the court to grant a new tenancy is limited by s. 32 to the holding as so defined and nothing more. I think that the absence from s. 23 (2) of the Act of 1954 of any exclusion of the sub-letting of flats from the category of trade or business such as appears in s. 17 (3) of the Act of 1927 may be accounted for by the consideration that,
- I whereas the criterion for protection under Part 1 of the Act of 1927 was use for business purposes, the criterion of protection under Part 2 of the Act of 1954 is occupation for business purposes. A building wholly sub-let in flats from top to bottom could not qualify for protection under Part 1 of the Act of 1927 because such sub-letting would not be a use of the premises for carrying on a trade or business within the meaning of the Act, by reason of its exclusion by s. 17 (3). A building similarly dealt with could not qualify for protection under Part 2 of the Act of 1954, not because the sub-letting of the premises in flats would not be a business within the meaning of s. 23 of that Act, but because the

tenant would ex hypothesi not be in occupation of any part of the premises. In a case in which the tenant of premises sub-let part of them in flats and retained the remainder in his own occupation for the purpose of providing services for the tenants of the part comprised in the sub-lettings (which is in effect this case) the tenant could not have claimed protection under Part 1 of the Act of 1927 because of the exclusion of the sub-letting of flats from the definition of use for carrying on a trade or business in s. 17. In a like case under the Act of 1954, the tenant can claim, rightly as I think, that the sub-letting of the flats is a business within the meaning of s. 23 and can also claim, again rightly as I think, that the purposes for which he occupies the remainder of the premises, i.e., the provision of services for the tenants of the flats sub-let, are purposes of a business carried on by him within the meaning of the same section. So far, then, he satisfies s. 23 both as regards the occupation of part of the premises by him, and as regards the purposes of such occupation, which are purposes of his business of sub-letting the flats into which the part of the premises not in his occupation is divided. But these claims can surely be maintained only so long as the tenant continues as tenant of the entirety of the premises, whether occupied by him or sub-let. Once the flats which it is his business to sub-let are excluded from his tenancy, the remaining parts of the premises, though still in his occupation, are no longer occupied by him for the purposes of any business. Once the flats are gone, the business for the purposes of which he formerly occupied the remainder of the premises, i.e., the provision of services for the tenants of the flats sub-let, as part of the entire business of letting and managing those flats, is gone also, and is incapable of continuance or revival.

What is the bearing of Part 2 of the Act of 1954 on such a case? I repeat that its manifest intention is (to quote once more the language of the long title appropriate to this case) "to enable tenants occupying property for business . . . purposes to obtain new tenancies in certain cases". That intention is, as I think, faithfully carried out by the provisions of Part 2 of the Act on a fair and reasonable construction of those provisions. I think that it is implicit in those provisions, and in particular s. 23 and s. 32, that the business for the purposes of which a tenant occupies premises of which he claims a new tenancy must not be of such a character that it is necessarily brought to an end by the very process of the ascertainment of the holding and the ordering and granting of a new tenancy of the holding as ascertained, with the result that the tenant is presented with a holding which, though occupied by him, is not so occupied for the purposes of any business whatever.

Applying this principle to the present case, I find that the ascertainment of the holding must involve the subtraction from the property comprised in the tenancy of the ten sub-let flats, for these are occupied neither by the tenant nor by any person employed by him. There thus remain as the potential subject-matter of the new tenancy the caretaker's rooms, storerooms, and boiler rooms in the basement, the common parts of the premises, and the three unlet flats. Divorced from the ten sub-let flats, can any part of these premises be said to be occupied by the tenant for the purposes of any business carried on by him? That question must, I think, be answered in the negative. There can be no business carried on by the tenant of providing hot water for the sub-let flats, or of cleaning the common parts of the premises for the benefit of the tenants of those flats, or of providing those tenants with means of access to and from those flats, once the sub-let flats are ruled out of consideration as disqualified from inclusion in the holding to which any new tenancy granted must be confined. Nor, in my view, can there be any business carried on by the tenant of serving in any of the ways above mentioned the three unlet flats so long as they remain unlet, while if let at any time before the ordering of a new tenancy they would be subject to the same disqualification as the ten flats now let. Finally, I do not think that the three unlet flats (all of which I treat for the present purpose as in the occupation

A of the tenants) can properly be treated as occupied by the tenants for the purposes of any business carried on by them. The tenants no doubt hope in due course to turn these three flats to account in their business by sub-letting them to tenants. But this, in my view, is not occupation of these three flats by the tenants for the purposes of a business carried on by them. On the contrary, it is occupation
 B until such time as the tenants may be able, for reward in the shape of rent, to exclude themselves from occupation by sub-letting. Furthermore, I repeat that if these three flats were in fact sub-let at any time before the order for a new tenancy, they would be disqualified from inclusion in the holding in the same way as the ten now sub-let.

C For the reasons I have endeavoured to state, I conclude that the tenancy here in question is not a tenancy to which Part 2 of the Act of 1954 applies. I would emphasise that my view of this case is closely related to its own particular facts, and especially to the fact that the purposes for which the tenants have been occupying the parts of the premises other than the flats themselves are purposes ancillary, and indeed wholly and exclusively related, to the sub-letting of these particular flats, so that they must necessarily come to an end with the cesser of the tenants' interest in these flats.

D As to the exclusive relation of such purposes to these particular premises, I may perhaps quote a further passage from the affidavit of Mr. Pinnock, a director of the tenants, in which he said :

E "The defendants are further in occupation of the basement premises (other than the two rooms let as a flat) and the common parts of the premises. The defendants further submit that they so occupy these premises for the purpose of their business of letting, managing, controlling and running the said premises within the meaning of s. 23 of the said Act."

F There may be cases in which mesne landlords of flat properties retain and occupy parts of their premises for business purposes of kinds capable of surviving the cesser of their interest in the flats themselves. Again, there, no doubt, are cases where property companies occupy offices for the purpose of carrying on the business of managing the various properties from time to time held by them. To cases such as these different considerations apply, and I say nothing about them.

G I am fortified in the conclusion to which I have come by the absurdity of the situation which would arise in the present case if the contrary view were accepted, but need add nothing to what was said by WYNN-PARRY, J., on this aspect of the matter, by which his decision was largely influenced. I agree with him that this criticism is not adequately met by the right given to the landlords by s. 32 of insisting on a new tenancy of the whole of the property comprised in the current tenancy, or by the wide discretionary powers conferred on the court by other sections to which I have referred. In the result, I am of opinion that WYNN-PARRY, J., came to a right conclusion in this matter, and I would dismiss this
 H appeal.

BIRKETT, L.J.: I agree entirely with the judgment of JENKINS, L.J., which he has just read, and feel it quite unnecessary to add anything to it.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Clarke, Square & Co.* (for the tenants); *Harris, Chetham & Co.* (for the landlords).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

SIMMONS v. BOVIS, LTD. AND ANOTHER.

[CHESTER ASSIZES (Barry, J.), February 7, 8, 9, 1956.]

Factory—Building operation—Building under construction—Installation of lift—“Construction . . . of a building”—Statutory duty of contractor and sub-contractor—Erection or alteration of scaffold by sub-contractor, although building contractor contractually responsible for scaffolding—Boards of working platform of inadequate length—Workman employed by building contractor injured by falling from platform into well of lift shaft—Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145), reg. 2 (1), reg. 4.

Master and Servant—Liability of master—Negligence of fellow servant—Workman employed by building contractor injured by fall from dangerous scaffold platform—Platform created or altered by sub-contractor—Contractor responsible for scaffolding—Failure to warn workman—Contributory negligence.

Negligence—Liability of sub-contractor to servant of contractor—Dangerous scaffolding erected or altered by sub-contractor—Contractor responsible for scaffolding—Contributory negligence.

The plaintiff, a foreman bricklayer, was employed by building contractors on the construction of a building designed to contain a lift, which was to be installed by sub-contractors. When the brickwork of the lift shaft was completed A., a lift erector employed by the sub-contractors, went to the site to mark with chalk the positions on the walls of the shaft where holes for the lift runners should be bored. Under the contract between the building contractors and the sub-contractors the former had undertaken to provide the scaffolding for the installation of the lift. Before a working platform in the lift shaft had been provided, however, A., wishing to get on with his work, constructed a temporary platform by placing loose planks across some tubular scaffolding which was already in the shaft. This platform was highly dangerous in that four of the five planks which were used caused “trap ends”, as the planks were too short to reach the tubular scaffolding on the right side of the shaft. The foreman in charge of scaffolding, P., passing the platform on his way to the top of the building to lower a ladder into the shaft, noticed the “trap ends” and warned A., who was standing near the platform. Shortly afterwards the plaintiff, who had not heard the warning and had not been warned himself either by P. or by A., approached the entrance to the lift shaft on the first floor in order to receive the ladder which P. intended to lower down the shaft to the platform. The plaintiff stepped on to the platform without looking carefully at the place on which he proposed to stand, one of the boards tipped up and he fell into the well of the shaft and was seriously injured. In an action by the plaintiff against the building contractors and the sub-contractors for damages for negligence and breach of statutory duty under the Building (Safety, Health and Welfare) Regulations, 1948, it was contended that the regulations did not apply to the installation of the lift and, on behalf of the sub-contractors, that alternatively the regulations imposed no duty on them in relation to scaffolding; but it was not contended that the platform complied with the requirements of the regulations if they applied to it.

Held: (i) the work on which the sub-contractors were engaged at the time of the accident, viz., the preparation of the lift shaft for the fixing of the lift runners, formed part of the construction of the building within reg. 2 (1) of the Building (Safety, Health and Welfare) Regulations, 1948, and, therefore, the regulations applied.

Elms v. Foster Wheeler, Ltd. ([1954] 2 All E.R. 714) applied.

(ii) the sub-contractors were in breach of statutory duty to the plaintiff,

A viz., of the duty imposed by reg. 4 of the Building (Safety, Health and Welfare) Regulations, 1948, on "every contractor and employer of workmen who erects or alters any scaffold to comply with" the requirements of the regulations regarding scaffolds, since the sub-contractors had, through their employee, A., erected or altered a scaffold.

B (iii) the building contractors were liable to the plaintiff at common law for the negligence of P. in failing to foresee that some other employee of the contractors might step on to the platform while the ladder was being lowered and in failing to provide a safe platform before the ladder was lowered.

C (iv) the sub-contractors were liable to the plaintiff at common law for the negligence of A., who should have foreseen that some person in the position of the plaintiff might step on to the platform unless he was expressly warned not to do so.

M'Alister (or Donoghue) v. Stevenson ([1932] A.C. 562) applied.

D (v) the plaintiff was guilty of contributory negligence in not looking at the platform before he stepped on to it, and, his share of the responsibility for the accident being assessed at ten per cent., the damages for which the defendants were liable would be reduced accordingly.

[As to the extent of a master's duty to a servant, see 22 HALSBURY'S LAWS (2nd Edn.) 187-189, paras. 313, 314; and for cases on the subject, see 34 DIGEST 194, 195, 1583-1590.

E As to failure to exercise the care required by the circumstances, see 23 HALSBURY'S LAWS (2nd Edn.) 568, para. 823; and for cases on the subject, see 36 DIGEST (Repl.) 5-8, 1-19.

As to the degree of negligence amounting to contributory negligence, see 23 HALSBURY'S LAWS (2nd Edn.) 680, para. 964; and for cases on the subject, see 36 DIGEST (Repl.) 170-173, 912-937; and as to the effect of contributory negligence between master and servant, see 22 HALSBURY'S LAWS (2nd Edn.) 190, para. 319.

F For the Building (Safety, Health and Welfare) Regulations, 1948, reg. 2 (1) and reg. 4, see 8 HALSBURY'S STATUTORY INSTRUMENTS 210, 212.]

Cases referred to:

(1) *Elms v. Foster Wheeler, Ltd.*, [1954] 2 All E.R. 714; 3rd Digest Supp.

G (2) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; 36 Digest (Repl.) 85, 458.

Action.

The plaintiff, William Leslie Simmons, claimed damages for personal injuries and consequential losses and expenses occasioned to him by an accident caused by the negligence and breaches of statutory duty of the first defendants, Bovis, Ltd., or the second defendants, Pickerings, Ltd., or both of them.

H The plaintiff was employed as a foreman bricklayer by the first defendants, who were building contractors, on the construction of a building at Wallasey in the county of Chester. The building was designed to contain a lift, for the erection and installation of which the second defendants were responsible under a contract made between them and the first defendants. The first defendants undertook to provide scaffolding for the use of the second defendants. On I May 4, 1954, the date of the accident, the building was still under construction, but the brickwork of the lift shaft had been completed and the shaft was ready for the second defendants to commence their operations in it. The tubular steel scaffolding which had been erected by the first defendants for the use of their bricklayers still remained in the shaft up to the first-floor level, but the boards which had formed the platform at that level had been removed for use at the top of the shaft and there were no planks across the lift shaft and no working platform of any kind at the first-floor level. The second defendants' first task was to erect the main lift runners which had to be attached by bolts to the walls

of the shaft throughout its whole height, and this entailed some alteration to the brickwork, including the boring of holes at specified intervals throughout the height of the shaft in positions marked with chalk by the second defendants' men. On the morning of May 4, 1954, two of the second defendants' workmen, namely, Mr. Allan, a lift erector, and Mr. Brotherdale, who was acting as Mr. Allan's mate, were sent to the site to indicate to the first defendants' bricklayers the positions where the holes were to be bored, and, to enable them to do so, the plaintiff asked Mr. Payne, the first defendants' foreman scaffolder, to help to provide a working platform at the level of the first floor and two ladders, one at the base of the shaft and the other at the first-floor level. After Mr. Payne, with the plaintiff's assistance, had taken a ladder into the base of the shaft, he was called to another part of the site and was away for about ten minutes. In the meanwhile Mr. Allan, assisted by Mr. Brotherdale, erected a temporary platform in the shaft at the first-floor level, using as scaffold boards some planks which were at hand and which they placed on the tubular scaffolding which was already in the shaft. Only one of the five planks used for this platform was of adequate length and the other four formed "trap ends", the platform being so constructed that, although it was safe to stand on the part left of the central tubular pole supporting the boards, if anyone stepped on to the platform to the right of the central pole the four short boards would tip up and the person would be thrown to the bottom of the shaft. Mr. Allan and Mr. Brotherdale realised this danger, but they intended to work, and did in fact work for a short while, on the left side of the platform. As Mr. Payne was on his way to the top of the building to provide the second ladder, he saw the temporary platform and, noticing the "trap ends", shouted out a warning to Mr. Allan and Mr. Brotherdale, who were then standing near the platform, having already used it. The plaintiff, who had not yet reached the first floor, did not hear Mr. Payne's warning. On reaching the first floor the plaintiff had a short conversation with Mr. Allan and then approached the shaft to receive the ladder which Mr. Payne was lowering into the shaft to the platform through the manhole at the top of the shaft, without having first replaced the boards of the platform. Having received no warning of the danger from the "trap ends", the plaintiff stepped on to the platform to the right of the central tubular pole without paying attention to the security of the place on which he would stand, the defective boards tipped up and then collapsed, and the plaintiff fell into the well of the shaft and was seriously injured.

Elwyn Jones, Q.C., and W. L. Mars-Jones for the plaintiff.

H. Edmund Davies, Q.C., W. D. T. Hodgson and P. L. W. Owen for the first defendants, Bovis, Ltd., the building contractors.

H. V. Lloyd-Jones, Q.C., and R. Geraint Rees for the second defendants, Pickering, Ltd., the sub-contractors.

BARRY, J., stated the facts, and said: Counsel for the first defendants admitted that the first defendants could not seek to escape all responsibility. Counsel for the second defendants, on the other hand, contended that no part of the blame for what occurred rested on the second defendants, although their men did, in fact, erect a platform in such a way as to infringe almost every relevant provision of the Building (Safety, Health and Welfare) Regulations, 1948. I need not occupy time in dealing in any detail with the regulations, which were clearly broken. The plaintiff relies on breaches of regs. 4, 5, 6, 7 (1) and (2), 9 and 22 (a) in relation to both defendants, and on regs. 21, 23 (2) and 24 (1) in relation to the first defendants alone. Regulation 24 (1) is, I think, immaterial in so far as the present case is concerned, although, no doubt, it also was, in fact, infringed. I am not satisfied that, in the circumstances of this case, reg. 21 has any real application even as against the first defendants. However, no one has contended that this platform complied with any of these regulations, and the only real question is whether the regulations applied to this operation. That, of course, depends on whether the work which was going on on that day, or which was being undertaken

A by the second defendants' men, can be described as a "building operation". This point has not been argued at length by counsel for the first defendants. No doubt, he adopted, in spirit at least, the contention submitted by counsel for the second defendants as to the inapplicability of the regulations as a whole to anything that was going on in this particular building on this particular day.

If the regulations do, in fact, apply, it is quite clear that the first defendants, B as the plaintiff's employers, are responsible to him in damages for the undoubted breaches of the regulations which have been established. They are, I think, clearly liable to the plaintiff in respect of what I am bound to find was the negligence of their scaffolder, Mr. Payne, who was otherwise an extremely careful and competent scaffolder. Mr. Payne placed too great a reliance on his hope that C Mr. Allan and Mr. Brotherdale would prevent anyone stepping on to the platform, and he took an unjustifiable risk in carrying out the work in this way. He could have moved the proper scaffold boards from the top of the building to construct a proper working platform at the first floor level, but he decided to lower the ladder on to the temporary and unsafe structure erected by the second defendants' men before he did so. That was, I think, a grave error of judgment. D He ought to have anticipated that some other employee of the first defendants might step on to that platform while the ladder was being lowered, and in particular, knowing that the plaintiff was assisting in placing the ladder in the lift shaft, he ought to have been aware that the plaintiff was on the first floor awaiting the ladder, and might at any moment step on to the platform to receive it. What he should have done was to postpone the lowering of the ladder until he had provided a safe working platform at the first-floor level. No one suggests E any moral blame on his part. He was doing what he thought was his best, and he was trying to kill two birds with one stone, to lower the ladder, and then, while he was up there, to collect the scaffold boards and erect a safe platform after the ladder had been lowered. If he had exercised proper care and had envisaged the prospect of anyone, in the lowering of the ladder, stepping on the platform, as I think a reasonably careful person ought to have envisaged it, F then I am sure he would have adopted a different method of carrying out this work, and this accident would have been avoided. In those circumstances I am satisfied that there was negligence on the part of Mr. Payne, and for that negligence the first defendants are quite clearly responsible. Therefore, on two grounds, on the ground of the breach of the building regulations, if they be applicable to this work, and on account of their vicarious liability for Mr. Payne's G negligence, it is clear in my mind, as counsel for the first defendants admitted, that the first defendants are, in part at least, responsible for this disaster.

I now turn to the submissions made on behalf of the second defendants. Counsel for the second defendants contended that the building regulations were in no way applicable to the second defendants while they were carrying on the work of erecting the lift, and he further submitted that there was no negligence H of any kind on the part of either Mr. Allan or Mr. Brotherdale. The submission that the building regulations were inapplicable to the work which the second defendants were undertaking in the building was based on a number of separate grounds. Under reg. 4 the duty of complying with the regulations is imposed only on contractors or employers of workmen who are undertaking any of the operations to which the regulations apply. Regulation 2 (1), in so far as it I is relevant to the present case, provides that the regulations shall apply to the construction or structural alteration of a building.

The first submission of counsel for the second defendants was that the installation of a lift did not form any part of the construction or structural alteration of a building. He contended that, even if it could be said that the second defendants were erecting the lift and installing it on May 4, 1954, they were engaged, not on any building operation, but merely on the installation of plant in the building. He referred me to certain authorities on this point, and, in particular, to *Elms v.*

Foster Wheeler, Ltd. (1) ([1954] 2 All E.R. 714). What, I think, emerges from the judgments of the Court of Appeal in that case is this: the mere fact that an operation can, in one sense, be properly and accurately described as the installation of plant does not necessarily prevent it from being a part of a building operation. I refer, in particular, to a short passage in the judgment of SOMERVELL, L.J., where he said (*ibid.*, at p. 715):

“Leading counsel for the defendants based his argument on a contrast between installation of plant and construction of a building. It was not based on any words in the regulation or in any Act of Parliament and I do not myself find it a helpful or satisfactory contrast, because I think that the installation of plant may involve the operation of the construction of a building.”

SOMERVELL, L.J., then cited a passage from the judgment in the court below and expressed his approval of the way in which the learned judge had described the law. To summarise the judgment of ROMER, L.J. (*ibid.*, at p. 717), the appropriate test is this. One has to ask oneself: Was a building being constructed at the time of the accident, and, if so, were the defendants contributing to the construction of that building?

There is no hard and fast line in cases of this kind. The facts of each particular case must be considered on their own merits. Here certain considerations bear strongly, as I think, in favour of the view that the second defendants were engaged in the construction of a building. It is quite clear that a building was being constructed at the time when they commenced their work. The first defendants' men, bricklayers and others, were still at work, and the building was by no means complete. Secondly, the building was designed and constructed in such a way as to enable a lift to be provided, and it was clearly, as I think, an essential part of the building, as designed, that a lift should be installed. The lift was, I think, an integral part of the building, or certainly the lift runners were an integral part of the building, just as much as were the walls of the lift shaft. For those runners to be attached to the wall, the wall had to be altered in that holes had to be made into it in order to enable the runners to be bolted, and I am satisfied that those persons engaged in the attachment of the runners to the wall were as much engaged on a building operation and construction of a building as the bricklayers who were responsible for the laying of the bricks which formed the walls of the shaft itself. By the test suggested by ROMER, L.J., in *Elms v. Foster Wheeler, Ltd.* (1), I think the finding clearly is, on the facts of this case, that a building was being constructed and that the second defendants, as lift engineers, were contributing towards its construction.

Counsel for the second defendants contended that, even though the erection of the lift, or the attachment of the lift runners to the wall of the lift shaft was a building operation, that operation had not yet been begun on the day when the accident occurred; all that was being done on that day was the making of chalk marks on the walls of the lift shaft, and no reasonable person could contend that chalking on a wall was, in fact, a building operation. I think that that contention is unsound. The work, I think, must be taken as a whole. I do not think it can be said that, because on one particular day a workman is not engaged on something which is obviously a building operation, that prevents the regulations from applying to the work as a whole. In the present case the second defendants had, undoubtedly, commenced to carry out their contract to instal a lift in the building. The placing of the chalk marks on the walls of the lift shaft necessitated the use of ladders and scaffolding, and I am satisfied that, once this work of erection had started, the regulations applied, and they applied throughout the work, including its inception, which was the marking of the walls or the tapping of the walls for the runners.

Counsel for the second defendants submitted that, even though this was an operation to which the regulations applied, neither reg. 4 (i) nor reg. 4 (ii) had

A any application to the second defendants. Regulation 4 (i) requires contractors and employers of workmen who are undertaking any of the operations to which the regulations apply to comply with the requirements of certain of the regulations, including all those regulations relied on by the plaintiff in the present case, and as they affect any workman employed by them. The plaintiff was not employed by the second defendants, although counsel for the plaintiff sought
B to keep the point open. Similarly, reg. 4 (ii) has no application, as none of the regulations there referred to are relied on by the plaintiff in the present action.

Therefore, I must turn to the second portion of reg. 4, which commences with the words:

C ". . . it shall be the duty of every contractor and employer of workmen who erects or alters any scaffold to comply with such of the requirements of regs. 5-30 as relate to the erection or alteration of scaffolds having regard to the purpose or purposes for which the scaffold is designed at the time of erection or alteration . . ."

D Counsel for the second defendants submitted that that portion of reg. 4 applies only to sub-contractors or employers of workmen whose work entails the erection of scaffolding. That means, I assume, an employer who is under some contractual duty to a head contractor or building owner to perform certain work in respect of which he is under an obligation to erect the necessary scaffolding. It has been pointed out that in the present case the second defendants, under their contract with the first defendants, did not undertake any responsibility for the scaffolding required for installing and erecting the lift; the first defendants
E were required to provide all the necessary scaffolding for that purpose. Therefore, said counsel, these provisions have no application to the second defendants.

I am not satisfied that that is the true position. The second defendants' workmen did erect scaffolding on this occasion, and they erected it in the course of their employment with the second defendants. I am not satisfied that they acted in any way improperly in so doing. The fault lay in the working platform, which infringed almost every known building regulation. If the second defendants had been asked by their workmen whether the men should stand about until the first defendants' men had got everything ready for them, or whether they should do all that they could to get on with their work with the least possible delay, I have little doubt as to what the answer would have been. I think that the second defendants' men acted perfectly properly in getting on as quickly as they could with their work, and for that purpose using the planks which were available to provide a platform from which their work could be carried out.
F The fact that the second defendants were not under a contractual obligation to provide that platform seems to me to be immaterial. I find that, through their workmen, Mr. Allan and Mr. Brotherdale, the second defendants did erect or alter a scaffold in this building. I think that the second part of reg. 4 was
G designed to ensure that no one, whether under a contractual obligation to do so or not, shall erect a scaffold in any building under construction which does not comply with the regulations, that is to say, to ensure that there shall be no unsafe scaffolding in any building which is being constructed.

H The second defendants, having erected, through their workmen, this working platform, which is a part of the scaffolding in the building and which falls within the regulations dealing with scaffolding in the Building (Safety, Health and Welfare) Regulations, 1948, are bound by the provisions of the regulations and are liable to anyone employed on the premises—whether that person is employed by them or by someone else—for any damage which may arise through a breach of the regulations.
I

Counsel for the second defendants further submitted that the second defendants' workmen were not erecting or altering scaffolding, but were merely engaged on what he called "a temporary placing of a few planks in a position to serve an immediate purpose". The distinction between that operation and

the erecting or alteration of a scaffold escapes me. I think that the regulations apply, however temporary and however fortuitous the erection of the scaffolding may be. The second defendants' men erected a working platform on which they actually worked before this accident happened. I think that the second defendants are bound by the regulations and must pay damages if those regulations are infringed. A

I can deal very shortly with the case made by the plaintiff against the second defendants at common law. Again, only a vicarious liability can rest on them, because it is right to say that no finding of fact in this case casts a reflection on the management of either of the defendant companies. However, it is said by the plaintiff that the second defendants are vicariously responsible for the negligence of Mr. Allan and Mr. Brotherdale. As was pointed out, and I think quite rightly, any liability on the part of those two men must be founded on the doctrine enunciated in *M'Alister (or Donoghue) v. Stevenson* (2) ([1932] A.C. 562). I think that their duty, if any, to the plaintiff depends on the answer to one simple question: As reasonable people ought Mr. Allan or Mr. Brotherdale, or both, to have foreseen that there was a reasonable probability that some person in the position of the plaintiff, namely, some employee of the first defendants, might step on to the platform if he were not expressly warned against so doing? B C D

I think that there can be only one real answer to that question. These two men had used the platform themselves. They knew that the first defendants' bricklayers were interested in their work. They knew that the bricklayers would have to see where the chalk marks had been made, and, in order to see the chalk marks above the first-floor level, they would have to step on to the platform. They also knew that bricklayers and scaffolders employed by the first defendants were supplying a ladder, which was to be erected from the first floor up to the top of the shaft. It is true that neither Mr. Allan nor Mr. Brotherdale knew how the ladder was coming or how it was going to be inserted in the shaft, but, however it was inserted, it seems to me highly probable that one of the first defendants' men, and particularly the plaintiff, who was helping Mr. Payne in the erection of the ladders, would step on the platform the moment that the ladder came into sight in order to play his part in placing it in its proper position. That is exactly what happened, and I think that such a happening ought to have been foreseen. Both the lift erectors, Mr. Allan and Mr. Brotherdale, were well aware of the highly dangerous condition of the platform on the whole right-hand side of the lift shaft. I think that they ought either to have refrained from erecting a platform of that kind, which clearly was not a safe piece of scaffolding, or, if they decided to erect it, they should have made quite certain that no one failed to have a clear warning that a step on to the right-hand side of that platform must inevitably result in either death or serious injury through a fall of over eighteen feet down the shaft. In those circumstances I think that there was also negligence on the part of Mr. Allan, and, to a lesser extent, on the part of Mr. Brotherdale, and that for that negligence the second defendants are responsible, that responsibility being in addition to the responsibility which rests on them as a result of their breaches of the building regulations. E F G H

It was strenuously contended by both the defendants that a grave share of the responsibility for the accident rested on the plaintiff himself, there being gross contributory negligence on his part in that he wholly failed to take reasonable and proper care to provide for his own safety. It is said that, if he had looked before he had stepped on to the platform, he must inevitably have seen that at least four of the boards were not resting on the third tubular pole on the right of the shaft, that in those circumstances there were obvious trap ends to four of the scaffold planks, and that to step on to one of those trap ends must result in disaster. The plaintiff said: "If I had looked down carefully at the planks which formed the platform, I would have been able to see that there were trap ends." His case is that he was convinced that the platform had been erected by I

- A Mr. Payne, and his long experience at his work justified him in his view that Mr. Payne did not erect platforms which contained trap ends and that Mr. Payne's scaffolding was invariably constructed so that it was safe for a bricklayer or any other workman to work on it, and, therefore, he did not think it necessary to look at the planks. He has only constructed, as best he can, his thoughts at the time, because his memory of these incidents has gone. The plaintiff appreciated
- B that the proper planks, that is to say, the planks cut specifically for the purpose of providing a platform in the lift shaft, were at the top of the shaft, but none the less, when he reached the first floor, I think that he did form the view that Mr. Payne had erected the platform, and it never occurred to him that it had been erected by Mr. Allan or Mr. Brotherdale, who had no responsibility in connection with the scaffolding.
- C I think that the only respect in which the plaintiff can be regarded as having failed in any way to take proper steps to ensure his own safety was that perhaps he formed the view too lightly that Mr. Payne had erected this platform, that Mr. Payne's work had been completed and the platform rendered wholly secure before the ladder was lowered from the top of the shaft. On the other hand, he was aware of the building regulations, and I am not prepared to say
- D that a large share, or anything more than a very small share, of the blame rests on him. I think that, knowing the regulations, he was normally entitled to treat a platform obviously constructed for working on as a properly constructed platform. I think, however, that a slight degree of blame rests on him for reaching the conclusion that within the very short time covered by the events of this case a really secure platform had been constructed. I think he was to
- E a slight extent to blame in not looking at the platform and observing the trap ends before he stepped on it. The degree of blame which is attributable to him is, I think, affected by the view which I take, namely, that this was, not perhaps wholly, but very nearly, a casual act of inadvertence. A workman is not brooding over his own safety when scaffolding is erected throughout the whole working day. The plaintiff had been standing close to the shaft, discussing the
- F future of the lift-erection job. He saw a ladder being lowered, and, without really having time to direct his mind specifically to the sort of questions which he might have asked himself in other circumstances, he ducked under the guard-rail and trod on this platform. The instinctive, or semi-instinctive, nature of the act also weighs with me in coming to the conclusion that the degree of blame which rests on the plaintiff is very small indeed. I assess at a figure of ten per
- G cent. the plaintiff's slight failure to take that care which he ought to have taken to guard against an accident of this kind.

[His LORDSHIP assessed the damages at £15,557 8s., which included the agreed sum of £557 8s. as special damages, and, after deducting ten per cent. in respect of the plaintiff's contributory negligence, gave judgment for £14,002 against both defendants.]

Judgment for the plaintiff against both defendants.

Solicitors: *O. H. Parsons* (for the plaintiff); *James Chapman & Co.*, Manchester (for the first defendants); *Laces & Co.*, Liverpool (for the second defendants).

[*Reported by SEYS LLEWELLYN, Esq., Barrister-at-Law.*]

LYNCH v. THORNE.

[COURT OF APPEAL (Lord Evershed, M.R., Birkett and Parker, L.JJ.), February 27, 28, 1956.]

Sale of Land—Warranty—Sale by builder of house in course of erection—Express terms as to the way in which the house was to be completed—Whether warranty of fitness implied.

By an agreement in writing a builder agreed to sell to a purchaser a plot of land together with a dwelling-house in course of erection thereon and to complete the building in accordance with a plan and a specification attached to the agreement. According to the plan, the southern wall of the house was to be a nine-inch solid brick wall. The building was completed precisely in accordance with the agreement, with good materials and good workmanship, but, after the house had been conveyed to the purchaser, rain penetrated through part of the southern wall and made one room uninhabitable. The purchaser claimed damages against the builder for breach of an implied warranty that the house should be completed in such a way that it was fit for human habitation. According to the expert evidence on both sides, a nine-inch solid brick wall, in that particular position, would not be completely weather-proof.

Held: a warranty that the house, when completed, would be fit for human habitation should not be implied, since there was an express contract between the parties as to the way in which the building was to be completed and the provisions of the contract had been exactly complied with; the purchaser's claim, therefore, failed.

Dictum of ROMER, L.J., in *Perry v. Sharon Development Co., Ltd.* ([1937] 4 All E.R. at p. 394) applied.

Appeal allowed.

[As to implied warranty in a contract for sale of a house to be erected, see 3 HALSBURY'S LAWS (3rd Edn.) 435, para. 818, text and note (i).]

As to the implication of terms into a contract, generally, see 8 HALSBURY'S LAWS (3rd Edn.) 122, para. 213; and for cases on the subject, see 7 DIGEST 339, 36 and SUPPLEMENTS; 12 DIGEST (Repl.) 683-685, 5257-5268.]

Cases referred to:

- (1) *Hart v. Windsor*, (1844), 12 M. & W. 68; 13 L.J.Ex. 129; 2 L.T.O.S. 440; 8 J.P. 233; 152 E.R. 1114; 31 Digest (Repl.) 133, 2716.
- (2) *Smith v. Marrable*, (1843), 11 M. & W. 5; Car. & M. 479; 12 L.J.Ex. 223; 152 E.R. 693; 31 Digest (Repl.) 195, 3266.
- (3) *Perry v. Sharon Development Co., Ltd.*, [1937] 4 All E.R. 390; Digest Supp.
- (4) *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108; 110 L.J.K.B. 131; 164 L.T. 313; 2nd Digest Supp.
- (5) *Reigate v. Union Manufacturing Co. (Ramsbottom), Ltd.*, [1918] 1 K.B. 592; 87 L.J.K.B. 724; 118 L.T. 479; 12 Digest (Repl.) 686, 5278.

Appeal.

The defendant, a builder, appealed from so much of a judgment of His Honour JUDGE GLAZEBROOK, given at Bromley County Court on Nov. 16, 1955, as adjudged that the plaintiff should recover from the defendant £80 damages in respect of defects in the walls of a dwelling-house which the defendant had sold to the plaintiff.

By an agreement in writing, dated May 28, 1953, and made between the parties, the plaintiff agreed to purchase the house, which was then in the course of erection, and the defendant covenanted to complete the building in accordance with a plan and specification attached to the agreement. On Sept. 30, 1954, the building having been completed, the house was conveyed to the plaintiff, who went into occupation on Oct. 8. Within two or three weeks rain came in through some of

A the windows and a damp patch appeared in the south wall of a room on the first floor. The plaintiff alleged that it was an implied term of the agreement that the house should be completed in a workmanlike manner, with proper materials, and should, when completed, be reasonably fit for human habitation. It was not disputed that the house had been built exactly in accordance with the plan and specifications, but the precise way in which the windows were to be made

B was not set out, and the learned county court judge found that they had not been completed in a workmanlike manner. In regard to the wall, the judge found that it had been built in accordance with the express provisions of the agreement and was of good material and good workmanship, but he was satisfied that, in the circumstances of the case, the plaintiff had relied on the skill of the defendant. He held, accordingly, that there was an implied warranty that the house would be

C habitable, and that the defendant was in breach of the warranty, and he awarded to the plaintiff damages amounting to £95, of which £80 was in respect of the wall and £15 in respect of the windows. The defendant did not appeal from that part of the judgment which related to the windows.

C. H. Duveen, Q.C., and L. J. Davies for the defendant.

D *H. G. Garland* for the plaintiff.

LORD EVERSHED, M.R.: The question in this case is whether the defendant, who was the builder of the house now belonging to the plaintiff, is liable on an implied covenant for the loss or damage suffered by the plaintiff because one of the rooms on the first floor, as it turns out, is not weather-proof; it has admitted damp to such an extent that the plaintiff has been unable to use

E it as his son's bedroom. The plaintiff, therefore, may say (and for the purposes of this judgment I will say) that quoad that room the house has turned out to be uninhabitable or not fit for human habitation.

The law of England has been, for many generations, well settled that, *prima facie*, on a contract for sale of a piece of land with a house on it, and similarly on a contract for the demise of land with a house on it, there is no warranty as to the habitability of the house. The law, so settled, is illustrated in *Hart v. Windsor* (1) (1844) (12 M. & W. 68), and by the judgment in that case of PARKE, B. The rule is, or has been said sometimes to be, a hard one for the purchaser or lessee who has to console himself with the Latin maxim *caveat emptor*. To the

F general rule, however, there are, undoubtedly, exceptions: for example, when the subject-matter of a contract of letting is a furnished flat or house, then there is implied a covenant or warranty that the subject-matter is fit for

G habitation: see the judgment of PARKE, B., in *Smith v. Marrable* (2) (1843) (11 M. & W. 5). Another exception arises where the contract is not merely a contract for the sale of a piece of land with a house on it, but is a contract for the sale of a piece of land with a house, plus a covenant or obligation on the part of the vendor to build or complete the house. That last mentioned exception

H has been illustrated in several cases which have been cited to us, and it will suffice if I refer to one of them, namely, *Perry v. Sharon Development Co., Ltd.* (3) ([1937] 4 All E.R. 390). In the course of his judgment in that case MACKINNON, L.J., put the matter thus (*ibid.*, at p. 395):

I “There is obviously a difference in kind between a contract for the sale of a house which is an existing and complete structure and a contract for the sale of an uncompleted house which has to be completed by the vendor. In the former case, quite clearly there is no implied undertaking by the vendor as to the fitness of the house or its condition. In such circumstances, the maxim *caveat emptor* clearly applies to the full when the purchaser inspects the house by himself, or by his surveyor, and makes up his mind as to its condition and fitness for occupation. The other type of house, a house only partly erected, or to be completed, is different in two respects. In the first place, the maxim *caveat emptor* cannot apply, and the buyer,

insofar as the house is not yet completed, cannot inspect it, either by himself or by his surveyor, and, in the second place, from the point of view of the vendor, the contract is not merely a contract to sell, but also a contract to do building work, and, insofar as it is a contract to do building work, it is only natural and proper that there should be an implied undertaking that the building work should be done properly."

Where there is a written contract expressly setting forth the bargain between the parties, it is, as a general rule, also well established that terms are to be implied only under the compulsion of some necessity. It was thus that LORD RUSSELL of KILLOWEN expressed himself in *Luxor (Eastbourne), Ltd. v. Cooper* (4) ([1941] 1 All E.R. 33 at p. 44), and, similarly, SCRUTTON, L.J., in *Reigate v. Union Manufacturing Co. (Ramsbottom), Ltd.* (5) ([1918] 1 K.B. 592 at p. 605). I am, however, prepared to assume for the purposes of this judgment that, whether or not it can be said that any necessity so compels in the case where a vendor contracts to sell the land and also to complete the building, in such a case *prima facie* there is an implied covenant on the vendor builder's part that he will complete the house so as to make it habitable. Nevertheless, although such a term is *prima facie* to be implied, it must, according to well-established principle, always yield to the express letter of the bargain. I need do no more than refer to the judgment of ROMER, L.J., in *Perry v. Sharon Development Co., Ltd.* (3), when he said ([1937] 4 All E.R. at p. 394):

"It is well-established by numerous authorities, to some of which Serjeant Sullivan [counsel for the builders] has called our attention, that, in the case of the sale of a completed house, there is to be implied on the part of the vendor no warranty as to the house being in any particular condition. The same rule would apply in the case of an uncompleted house, which is the subject-matter of a sale, where the structure stands at the time of the sale. Where, however, the contract is for the sale of a house when completed, there is an implied contract on the part of the vendor, in the absence of there being any express contract as to the way in which the house is to be completed, that the house shall be completed in such a way that it is fit for human habitation."

The facts of the present case have been set out fully in the careful judgment of the learned county court judge. Clause 1 of the contract between the parties provides that the vendor, the defendant, should sell the plot of land specified, together with the house intended then to be erected on it. There follow certain clauses, common in contracts for the sale of land, as to reservations and the like. Clause 4 provides:

"The vendor will complete the building in course of erection on the said plot of land in accordance with the block plan and specification attached to this agreement."

It was conceded before the county court judge, or, at least, clearly found by him, that by the term "block plan" was meant a scale plan (the scale being one-eighth of an inch to a foot), which is also before us. I, therefore, look to see what is the meaning and extent of the express obligation which cl. 4 of the contract states. The specification provides for the manner in which the work is to be done, that is to say, it specifies, *inter alia*, the material to be used. Clause 5 of the specification reads:

"Brickwork to be laid in cement mortar, facing bricks to be Ockley double diamond dark multi red facings pointed in cement to special colour. Damp proof course to be as approved, with a cement rendered plinth to all elevations . . ."

The scale plan discloses plainly—and on this the learned judge's finding is precise—that the southern wall with which we are here concerned was to be, and was

A shown and specified as intended to be, a nine-inch solid brick wall, the brickwork to be of the character which I have already read from the specification.

No one has sought to quarrel with the learned judge's findings of fact, and, so far as I can see, no one could quarrel with them. The judge, after referring to the plan and to the specification, said: "It is not disputed that the house has been built exactly in accordance with the drawings and specification." Earlier

B in his judgment he said:

"Three architects, all of whom have inspected the house, have given evidence about the cause of this penetration. The south and west walls are rather exposed for a London house, and Mr. Woodward [the architect called by the plaintiff] said that in that situation a nine-inch solid brick wall (which is what these walls are) will not prevent penetration; they should be cavity walls, or solid walls tile-hung. Mr. Tachell [one of the architects called by the defendant] said that in such a situation a nine-inch wall was bound to admit a certain amount of damp. He said that in due course, perhaps two or three years, the bricks might 'weather' and, if they did, that would reduce the penetration. Mr. Woodward agreed with this, but neither of them could say that weathering was likely to stop penetration altogether. The third architect, Mr. Pipe [also called by the defendant], thought that the rain probably came through minute cracks in the cement mortar rather than through the bricks themselves (which were a hard type) and he gave some interesting reasons for preferring the old type lime mortar. All three architects agreed that the bricks and mortar were of good quality and that the bricklayers' workmanship was excellent. I think it would be fair to summarise their evidence by saying that one of them would expect a nine-inch solid wall in that position to allow driving rain to penetrate and the other two would not be at all surprised if it did."

The effect of that evidence and those findings seems to me to be that, the contract having provided that the house should be built and completed in a particular way by the use of particular materials of particular characteristics, the defendant precisely and exactly complied with his obligation. He is also found to have shown, through his servants, a high standard of workmanship. Prima facie, that finding seems to me, on the language of ROMER, L.J., in *Perry v. Sharon Development Co., Ltd.* (3) ([1937] 4 All E.R. at p. 394) necessarily to exclude the operation of any implied contract. May I repeat the language of the lord justice:

"Where, however, the contract is for the sale of a house when completed, there is an implied contract on the part of the vendor, in the absence of there being any express contract as to the way in which the house is to be completed, that the house shall be completed in such a way that it is fit for human habitation."

Here there was an express contract as to the way in which the house was to be completed. The express provisions were exactly complied with, and any variation from them which would have rendered this wall waterproof would (as PARKER, L.J., observed during the course of the argument) have been a deviation from the express language of the contract.

Counsel for the plaintiff sought to avoid that result in one of two ways. He submitted, first, that, even though there was an express contract precisely prescribing the way in which the work was to be done, there was an overriding promise or warranty that the edifice, when built in strict accordance with those terms, would be a habitable house. That seems to me to involve an extension of the principle of implied terms for which I can find no authority, and which, indeed, seems to me to be in direct conflict with the authorities to which I have already referred. Secondly, counsel said, using this submission rather to emphasise and support his main contention which I have already stated, that

the plaintiff, being no expert in the mysteries of architecture and house building, A
 relies, and the judge found that he relied, on the skill and the judgment of the
 defendant, the builder. I am unable to derive from that fact the conclusion
 which commended itself to the judge. If a skilled person promises to do a job,
 that is, to produce a particular thing, whether a house or a motor car or a piece B
 of machinery, and he makes no provision, as a matter of bargain, as to the precise
 structure or article which he will create, then it may well be that the buyer of
 the structure or article relies on the judgment and skill of the other party to
 produce that which he says he will produce. That, however, is only another way
 of formulating the existence in such circumstances of an implied warranty.
 On the other hand, if two parties elect to make a bargain which specifies in precise
 detail what one of them will do, then, in the absence of some other express pro-
 vision, it would appear to me to follow that the bargain is that which they C
 have made; and so long as the party doing the work does that which he has
 contracted to do, that is the extent of his obligation. One cannot help feeling
 a great deal of sympathy for the plaintiff, but an adult is, presumably, capable
 of taking competent skilled advice if he wants to, and, if he elects not to do so
 but to make a bargain in precise terms with someone else, then, although he
 does rely no doubt on the skill of the other party in a sense, he does so only in D
 the sense that he assumes that the other party will do competently the job
 which the other party has promised to do (as was the fact in this case), and, at
 best, that he believes that the house which the other party is going to build
 will be a habitable house. That, however, is far short of importing into the trans-
 action any such overriding condition or warranty as that for which counsel
 for the plaintiff contended. Counsel's contention would appear almost to involve E
 the result that, because the plaintiff elected not to take advice himself, there
 was some duty of care thrust on the defendant which should more properly have
 been borne by someone engaged by the plaintiff. These considerations seem to
 me to find no place in the authorities, as I have understood them, and since
 there was here what ROMER, L.J., in *Perry v. Sharon Development Co., Ltd.* (3),
 called an express contract as to the way in which the house was to be completed, F
 I can find no room for an implied warranty, the only effect of the operation of
 which would, so far as I can see, be to create an inconsistency with the express
 language of the bargain made.

Sympathising as I do, with the plaintiff (and also with the defendant, who
 appears to be a conscientious builder who performed his task with the utmost
 skill), I think, with all respect to the learned judge, that the plaintiff cannot G
 recover damages from the defendant in respect of this claim. There was another
 claim relating to a window, and it is not now in dispute that the terms of the
 specification plus the plan did not so precisely identify the nature of the work to
 be done as to exclude the operation of an implied obligation to do the job in
 regard to the window effectively. On that matter we are not asked to express
 an opinion. So far as this claim is concerned, I think that the learned judge H
 should have dismissed it, and that the appeal, accordingly, ought to be allowed.

BIRKETT, L.J.: I am entirely of the same opinion, but, as we are differing
 from the learned county court judge who gave the greatest care and consideration
 to the case, I would like to state my reasons for agreeing with the judgment which
 has just been delivered.

As the argument proceeded, I found myself in sympathy with much that
 counsel for the plaintiff said. The purchaser of a house obviously wants to buy
 a house in which he can live, in which the rain will not enter, and which will be a
 habitable dwelling. The area of disagreement in this case is really extremely
 small, although, of course, it is extremely important. For example, the learned
 county court judge said:

"It is not disputed that the house has been built exactly in accordance

- A with the drawing and specification. I hold that the materials used in the house were sound materials in themselves; that is to say, there was nothing wrong with the bricks as bricks, nor with the mortar as mortar, nor with the wood as wood. And I also hold that the bricklaying and the joinery were sound work."
- B The learned judge is there saying, in effect: "The written express contract into which the parties entered was fulfilled to the letter". At the end of the judgment he said:
- "I think it only fair to the defendant to add that there is no suggestion that this house was jerry-built or skimped of workmanship or materials. The evidence is quite the contrary."
- C This is, therefore, a remarkable case in that a contract, which expressly stated the manner in which the house was to be completed, was fulfilled to the letter, the workmanship and the materials being of the best. Nevertheless, there is no doubt about the finding that this particular nine-inch wall allowed driving rain to penetrate.
- D The only question, therefore, is the legal question. Counsel for the plaintiff submitted that, underlying all the terms of the written contract, there was an unwritten implied warranty and term that, when all the written terms were carried out, the completed house would be a house fit for human habitation. He said that the plaintiff, who obviously knew nothing about technical matters, relied on the skill and judgment of the defendant, who manifestly did. That was the argument which the learned county court judge accepted. In his judgment
- E he said:
- "... if the builder says: 'I will build you a house according to this plan which I have made', there is, I think, an implied term that the plan will result in a habitable house, provided the customer relied on the builder's skill in drawing the plan. Applying the same reasoning to a contract for the sale of a house to be erected or completed according to an agreed plan, the issue seems to me to depend, first, on whether the plan was the builder's own or was merely the instructions he received from the purchaser; and, if the former, whether the purchaser relied on it or exercised his own judgment ... The gist of the matter is the buyer's reliance on the seller's skill. If, though the seller provide the plan and specification of a house to be built, it appears that the buyer did not rely on his skill (for instance, that he consulted his own architect), no term or warranty is implied. I am satisfied that in the present case the plaintiff regarded the defendant as an expert and relied entirely on his plan and specification; and, therefore, I hold there was an implied warranty that the house would be reasonably fit for habitation."
- H The contention of counsel for the defendant, in the court below and here, was that, as there was a contract in express terms and those express terms had been fulfilled to the letter, there was no room for the application of the implied warranty, as suggested by counsel for the plaintiff and as found by the judge. In *Perry v. Sharon Development Co., Ltd.* (3), ROMER, L.J., said ([1937] 4 All E.R. at p. 394):
- I "Where, however, the contract is for the sale of a house when completed, there is an implied contract on the part of the vendor, in the absence of there being any express contract as to the way in which the house is to be completed, that the house shall be completed in such a way that it is fit for human habitation."

In the present case there was an express contract as to the way in which the house should be completed, and the learned judge found that the house was completed in accordance with the contract. I think, therefore, that there was no

room for the application of the implied term that the house would be reasonably fit for habitation, and that the county court judge in applying it, was wrong. For these reasons I agree with the judgment of LORD EVERSHED, M.R., and I think that the appeal ought to be allowed. A

PARKER, L.J.: I have come to the same conclusion, and can state my reasons very shortly. This contract was, at any rate, partly a contract for work and labour. The plaintiff clearly desired the house for habitation, and to some extent relied on the skill and judgment of the defendant, who was a builder of houses. Those facts must be taken to have been known by the defendant. In those circumstances I think that *prima facie* there is an implied condition that the house, when built, shall be fit for human habitation. I say "*prima facie*", because, of course, the express terms of the contract may be such as to show that they are wholly or partly inconsistent with any such implied condition. If they are wholly inconsistent, that will quite clearly negative any reliance which, otherwise, it could be said, the buyer placed on the skill and judgment of the seller. If, on the other hand, the express terms are only partly inconsistent, there will be room for the implied condition to operate in the area not covered by the express condition. B C

Applying that to the facts of this case, there was, as it seems to me, by reference to the specification and the plan, an express condition that the walls should be nine-inch solid walls made of a particular kind of facing brick and laid in and pointed with cement. The learned county court judge found that that work was precisely carried out by the defendant and carried out with good workmanship. Despite that, the south bedroom was clearly not fit for habitation by reason of rain driving through the brickwork. How could this have been avoided? Only, as it seems to me, by doing something such as making cavity walls, rendering the brickwork, hanging tiles on the brickwork—all of which, plainly, are inconsistent with the express terms of the contract deducible from the specification and the plan. Accordingly, so far as concerns the failure in this case to make the house fit for habitation, there was no room for the operation of any such term. Counsel for the plaintiff was, therefore, driven to putting the case in this way; he submitted that throughout there was an overriding condition, warranty, or guarantee (whatever one liked to call it) that the house would be fit for habitation. In other words, he was forced to imply a term which, in effect, overrode the express terms of the contract. It seems to me that that is a very bold proposition, because an implied term, by its very nature, can operate only in so far as it is permitted by the express terms of the contract so to do. For these reasons and the reasons given by my Lords, I would allow the appeal. D E F G

Appeal allowed.

Solicitors: *Franks, Charlesly & Leighton* (for the defendant); *A. R. Kirk & Partners* (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A

NOTE.

R. v. COTTRELL (No. 2).

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Byrne, JJ.), March 12, 1956.]

B

Street Traffic—Disqualification for holding licence—Disqualification for driving motor vehicles of all classes for five years—Whether disqualification removable in part on subsequent good behaviour—Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 6 (1), s. 7 (3).

C

[For the Road Traffic Act, 1930, s. 6 and s. 7, see 24 HALSBURY'S STATUTES (2nd Edn.) 579, 580.]

Application for leave to appeal against sentence.

The applicant, Haydn Cottrell, having pleaded guilty at the Summer Assizes for Glamorganshire in July, 1954, to a charge of dangerous driving was sentenced to a fine of £50 and was disqualified for driving motor vehicles of all classes for a period of five years. In imposing the disqualification, the trial judge intimated that to vary the disqualification after one year so as to permit the applicant to drive a motor cycle would, if the court were satisfied with his behaviour, not be out of keeping with the sentence. After twelve months had elapsed, the applicant, who had been of good behaviour since the time of his sentence, applied under the Road Traffic Act, 1930, s. 7 (3), to McNAIR, J., at the Autumn Assizes for Glamorganshire to have the disqualification imposed on him varied so as to permit him to drive a motor cycle. McNAIR, J.*, held that he had no power, under s. 7 (3) of the Act, to vary the disqualification by removing it in part, and dismissed the application. The applicant applied for an extension of time in which to appeal and for leave to appeal against the sentence imposed in July, 1954.

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No counsel appeared.

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LORD GODDARD, C.J., delivered the judgment of the court in which he stated the facts and continued: McNAIR, J., held, as this court thinks quite rightly, that he had no power to vary the order. I will deal first with the position as it stands under the Road Traffic Act, 1930, and then say why we are giving the applicant an extension of time to appeal. By s. 6 (1) of the Act it is provided:

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"Any court before which a person is convicted of any criminal offence in connection with the driving of a motor vehicle (not being an offence under Part 4 of this Act)—(a) may in any case, except where otherwise expressly provided by this Part of this Act, and shall where so required by this Part of this Act, order him to be disqualified for holding or obtaining a licence for such period as the court thinks fit . . ."

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I need not read the next clause, but there is a proviso:

"Provided that, if the court thinks fit, any disqualification imposed under this section may be limited to the driving of a motor vehicle of the same class or description as the vehicle in relation to which the offence was committed."

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So where a person is convicted of an offence which either carries or enables the court to impose disqualification, the court can do one of three things. It may, except in cases where the disqualification is directed, refuse to disqualify; secondly, it may disqualify entirely a person for holding a licence to drive; or thirdly, it can say: "We disqualify you from driving the particular class of vehicle which you were driving at the time of the accident."

Then there is this provision in s. 7 (3):

"A person who by virtue of a conviction or order under this Part of this

Act is disqualified for holding or obtaining a licence, may, at any time after the expiration of six months from the date of the conviction or order, and from time to time apply to the court before which he was convicted or by which the order was made to remove the disqualification, and on any such application the court may, as it thinks proper, having regard to the character of the person disqualified and his conduct subsequent to the conviction or order, the nature of the offence, and any other circumstances of the case, either by order remove the disqualification as from such date as may be specified in the order or refuse the application."

The applicant applied to McNAIR, J., at the Autumn Assizes under that subsection to have the applicant's disqualification altered so that he would be permitted to ride a motor cycle. McNAIR, J., said that s. 7 did not enable him to do this. It enabled him to remove the disqualification but it did not enable him to vary the disqualification. I think that this is a point to which the Minister's attention might be drawn, as we all know that there is a Road Traffic Bill before Parliament at the present time, and it might be a useful thing to make a provision that a court may not only remove disqualification but vary a disqualification.

The first question is whether we should give the applicant leave to appeal against his original sentence, that is, the sentence imposed in 1954.

[HIS LORDSHIP, after considering the intention of the sentence imposed, and after saying that the learned judge who had imposed the disqualification had explained to him that if he had realised what the consequences would have been he probably would have limited the disqualification to driving motor lorries and would not have disqualified the applicant for driving motor cycles, concluded that through an error a more serious punishment had been imposed on the applicant than was intended, and that the applicant ought to have an extension of time in which to appeal. HIS LORDSHIP continued:] We give the applicant leave to appeal against his sentence, and we treat this application as the hearing of the appeal. We have decided to alter the sentence which was originally passed, leaving the disqualification as it stands for five years but limiting it under the proviso to s. 6 (1) to driving motor lorries, which will enable the applicant now to drive a motor cycle.

Sentence varied.

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A

NOTE.

R. v. STAFF SUB-COMMITTEE OF LONDON COUNTY COUNCIL'S EDUCATION COMMITTEE AND ANOTHER,

Ex parte SCHONFELD AND OTHERS.

B

[COURT OF APPEAL (Denning, Morris and Romer, L.JJ.), February 22, 23, 24, 27, 28, 1956.]

Court of Appeal—Audience—Prerogative orders—Appeal from refusal of certiorari—Right of appellants to be heard in person.

C

[As to applications which only counsel may make, see 3 HALSBURY'S LAWS (3rd Edn.) 18, para. 22.]

Case referred to:

(1) *Practice Note*, [1947] W.N. 218; 2nd Digest Supp.**Appeal.**

D

The foundation governors, viz., eight of the twelve governors of the Avigdor Secondary School, Stoke Newington, appeared in person on their appeal from the dismissal by the Divisional Court (LORD GODDARD, C.J., ORMEROD and BARRY, JJ.) of their application for an order of certiorari to quash the decision of the staff sub-committee of the London County Council's Education Committee, by which the sub-committee refused their consent to the dismissal of Mr. J. D. Crystal, the headmaster. When the appeal came on, counsel for the

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second respondent submitted that the foundation governors could not appear except by counsel on an appeal against refusal of an application for a prerogative order.

The appellants, the foundation governors of the school, appeared in person. Geoffrey Lawrence, Q.C., and H. E. Francis for the respondents, the staff sub-committee.

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Viscount Hailsham, Q.C., A. L. J. Lincoln and Quintin J. Iwi for the respondent, Mr. J. D. Crystal.

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DENNING, L.J.: The appellant foundation governors did not instruct counsel to appear before us, but appeared individually in person. The only one of them who put forward sustained arguments was Dr. Schonfeld, who, of course, could speak only for himself and not for the others. Mr. Weil, the vice-chairman, also addressed us for a few minutes. It was submitted by counsel for the second respondent that the foundation governors could not appear in person but only by counsel on such an application as this; and he referred to the observations of SCRUTTON, L.J., on Nov. 22, 1929, in which he said ("The Times", Nov. 23, 1929, p. 9, paragraph headed "Colonel Kynaston's Appeal"):

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"... [the] court had made it a rule, and had acted on it for a hundred years, that persons coming to apply for the prerogative of mandamus must do so by counsel, and must be represented by counsel."

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Counsel told us, however, that the Divisional Court in 1947 had departed from that rule. LORD GODDARD, C.J., said that the judges had decided that prerogative orders might be moved for by litigants in person (*Practice Note* (1) [1947] W.N. 218). I think we should do the same. Much as we value the help of the Bar, we must never go so far as to refuse an applicant simply because he is in person.

MORRIS, L.J.: The application is brought by eight of the twelve governors, viz., the eight foundation governors. Those eight have appealed. There are often reasons why it is helpful from the point of view of the court that there should be appearance by counsel in cases of this kind. The eight appellants, however, appeared personally. Their interest in this case is a joint one, and we

have heard two of the appellants. In fact none of the other appellants wished to address us. I see no reason for not allowing Dr. Schonfeld and his colleagues to appear in person, though, the interest being a joint one, we would not have arguments from each one separately.

ROMER, L.J.: I quite agree. On the preliminary point which was taken by counsel for the second respondent, I have nothing to add to what my Lords have said. Having regard to the established practice of the court, it is quite plain that Dr. Schonfeld could not appear on behalf of the other governors as well as on behalf of himself; but he was entitled to address us on his own behalf, and he did so. The substance of his arguments and submissions was adopted in effect by his fellow governors.

Solicitors: *Solicitor of London County Council* (for the respondents, the staff sub-committee); *Edward F. Iwi* (for the respondent, Mr. J. D. Crystal).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

WISEBURGH v. DOMVILLE (INSPECTOR OF TAXES).

[COURT OF APPEAL (Lord Evershed, M.R., Birkett, L.J., and Roxburgh, J.), February 15, 16, 1956.]

Income Tax—Income—Damages—Loss of capital asset or profit—Agency agreement—Wrongful determination—Settlement of action—Claim for arrears of commission abandoned—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), Sch. D, para. 1 (a) (ii).

The taxpayer, a manufacturers' agent, held agencies for twenty manufacturers altogether for widely varying periods between 1939 and 1951. In 1948 he had two such agencies of which one was an agency under a written agreement terminable by twelve months' notice but likely to go on indefinitely. On July 1 of that year that agency was determined by the principals without due notice and the taxpayer thereby suffered a very serious reduction in his earnings. He brought an action for damages for breach of the contract and for commission due up to the breach. The action was settled, and in an agreed order of Apr. 20, 1950, the taxpayer recovered £4,000, which was expressed to be damages for breach of agreement and costs, the claim for commission having been abandoned. The taxpayer was assessed to income tax on the £4,000 for 1949-50 on the basis that it related to arrears of commission, and alternatively for 1951-52. The General Commissioners of Income Tax found that the £4,000 took the place of commission which the taxpayer would have earned if the employment had continued until Oct. 20, 1949 (when a notice given on July 1, 1948, would have expired) and that it was therefore taxable profits in his hands. On appeal,

Held: the sum was properly assessed to tax as being profits or gains of the taxpayer's trade as sales agent, because

(i) the loss of the agency was one of the incidents of the taxpayer's business, did not partially destroy that business and thus was not the loss of an enduring capital asset, and

(ii) the commissioners were justified in their finding, which was reached without misdirection of law.

Kelsall Parsons & Co. v. Inland Revenue (1938) (21 Tax Cas. 608) adopted and applied. *Barr, Crombie & Co. v. Inland Revenue* (1945) (26 Tax Cas. 406) distinguished.

Per LORD EVERSLED, M.R.: (a) the Income Tax Acts apply indifferently on either side of the border and I feel we should follow the line of the Scottish decisions and the principle which can be extracted from them (see p. 758, letter A, post).

A (b) I can well conceive that the taxpayer would have had a strong case for saying that damages would not be taxable, in so far as they were claimed because his goodwill as a sales agent had been impaired (see p. 757, letter C, post):

Decision of HARMAN, J. ([1955] 3 All E.R. 548) affirmed.

B [As to whether damages constitute trade receipts for income tax purposes, see 17 HALSBURY'S LAWS (2nd Edn.) 125, para. 235; and for cases on the subject, see DIGEST Supp.]

Cases referred to:

- (1) *Kelsall Parsons & Co. v. Inland Revenue*, 1938 S.C. 238; 21 Tax Cas. 608; Digest Supp.
- (2) *Barr, Crombie & Co. v. Inland Revenue*, 1945 S.C. 271; 26 Tax Cas. 406; Digest Supp.
- (3) *Inland Revenue v. Fleming & Co. (Machinery), Ltd.*, 1952 S.C. 120; 33 Tax Cas. 57; 3rd Digest Supp.
- (4) *Van den Berghs, Ltd. v. Clark*, [1935] A.C. 431; 104 L.J.K.B. 345; 153 L.T. 171; 19 Tax Cas. 390; Digest Supp.

D Appeal.

The taxpayer appealed to the General Commissioners of Income Tax for Manchester against assessments to income tax made on him in the sums of £12,000 for 1949-50 and £10,000 for 1951-52 under Sch. D to the Income Tax Act, 1918, in respect of his profits as an agent. The sums were estimated amounts to protect the interests of the Inland Revenue and they were alternative assessments.

E The questions for determination were whether £4,000 received by the taxpayer in respect of the ending of an agreement with a company, Gordon Mills, Ltd., was wholly or partly taxable and, if so, for which year of assessment.

The taxpayer was appointed sole agent of the company under an agreement made on Apr. 2, 1942. It established one of the two principal agencies out of twenty agencies which he held for varying periods between 1939 and 1951.

F Following determination of the agreement in alleged breach of its terms by the company on July 1, 1948 (it could have been lawfully determined by due notice given on that date expiring on Oct. 20, 1949), the taxpayer instituted proceedings claiming damages for breach of contract, the taking of an account of the commission and expenses due to him under the agreement prior to the breach, and payment of the amount found due on the taking of the account. The company filed a

G defence to the claim in which they said, inter alia, that the taxpayer was not entitled to any commission or expenses or to damages, but they paid £4,000 into court. After negotiations the action was settled, without an account being taken, on agreed terms embodied in an order of the Manchester district registrar dated Apr. 20, 1950. Under the order the taxpayer was to be at liberty to enter judgment against the company for £4,000 as damages for breach of agreement and costs but was to recover nothing in respect of his claim for commission and expenses. The £4,000 paid into court was to be paid out in satisfaction of this sum. The taxpayer acted on the advice of leading counsel that the claim to commission would have to be abandoned.

H The taxpayer submitted that the agreement was the principal source of his earnings, was one of the only two sources he had at the time of the dispute and was one of the three permanent agencies he had possessed. He contended that the £4,000 constituted damages for breach of contract in respect of damage to his business structure, that it could not be related to any fiscal year or years and that it was a capital receipt of his business and so not taxable. He submitted further that, if it was paid in respect of commission, it was to the extent of £3,935 a receipt of his business for the accounting period ended Mar. 31, 1949, and the remaining £65 was not a revenue receipt at all. The Crown contended that the taxpayer received the £4,000, not in respect of the loss of an enduring asset, since the agency was not fundamental to the taxpayer's business organisation, but as

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damages for loss of commission which would have been earned by Oct. 20, 1949, which loss was a normal incident of the business carried on by the taxpayer, and the £4,000 was a receipt on revenue account for the year ended Mar. 31, 1951 (the basis year for 1951-52). Alternatively the Crown submitted that the £4,000 was in respect of commission of £3,935, plus expenses, due in respect of the period up to July 1, 1948, and should be assessed as having been earned in the year ending Mar. 31, 1949. The commissioners held that the terms of the agreed judgment had no bearing on whether the amount awarded was capital or income, but that the amount awarded took the place of commission which the taxpayer would have earned if the employment had continued to Oct. 20, 1949, and that the £4,000 was, therefore, taxable profits for the year in which it was received (1950-51). On Oct. 26, 1955, HARMAN, J., dismissed the taxpayer's appeal by Case Stated against that decision ([1955] 3 All E.R. 548). The taxpayer appealed to the Court of Appeal.

N. E. Mustoe, Q.C., and G. B. Graham for the taxpayer.

Sir Lynn Ungood-Thomas, Q.C., and Sir Reginald Hills for the Crown.

LORD EVERSHERD, M.R.: In this case I have come to the same conclusion as HARMAN, J., and I think, therefore, that this appeal fails. It involved £4,000 paid to the taxpayer by way of settlement of an action which he had brought against a company, Gordon Mills, Ltd. The action was based on an alleged breach by Gordon Mills, Ltd., by repudiation of a contract of agency which the taxpayer had with them. The question is whether this is properly chargeable to tax as being in respect of "the annual profits or gains arising or accruing" to the taxpayer from a trade within the language of the Income Tax Act, 1918, Sch. D, para. 1 (a) (ii). The taxpayer's trade, in respect of which he admittedly is taxable, is that of a sales agent, an agent for selling articles of women's clothing manufactured by various companies.

Appendix D to the Case Stated shows that from 1939 to 1951 the taxpayer had agencies of this character for twenty manufacturers, though at no one time did he hold agencies for anything like twenty such firms. In July, 1948, when the company terminated the agency, he had two such agencies, one with Green Hearne & Co., and the other with this company. However, the importance of this appendix lies in the circumstance that the taxpayer's agencies varied in their nature and number during the business life of thirteen years which it covers. Some were held for a very short time: some, by the look of the figures, may have represented little more than isolated transactions conducted on a commission basis: others lasted longer. The Green Hearne agency had continued for twelve years by 1951, and the Gordon Mills agency had lasted for seven years or more at the relevant date. But it was in the nature of an agency business of this kind that there might be changes in the actual agencies held from time to time by the substitution of one for another, and so forth.

The terms of the agency were comprehended in a written agreement, under one clause of which it was terminable on either side by twelve months' notice ending on Oct. 20 in any year. It is therefore an incident of importance that its quality as an asset, if so regarded, must be judged by its legal character, and it was an asset liable to determination on relatively short notice. On the other hand, as Mr. Graham emphasised in his short but forceful speech, it was obviously in the ordinary expectation of the parties (and the Case so finds) that the contract as a business matter would be likely to go on indefinitely, if all went well. Unfortunately, in 1948, the taxpayer engaged himself as manager for a business, K. Wiseburgh, Ltd., of which his wife was substantially the proprietor, which manufactured and merchanted garments to some extent of the same character as those made by Gordon Mills, Ltd. Because of that enterprise Gordon Mills, Ltd. said he was neglecting his proper obligation to them and had accordingly treated the contract as at an end.

- A The taxpayer issued his writ and by his statement of claim he asked for damages for breach of contract and also for an account of commission due and unpaid in respect of past work. The damage for breach of contract alleged in the pleadings was "damage in that he had lost commission which he would otherwise have earned". He says that the real damage lay not so much in the loss of the commission which would otherwise have been earned as in the loss of the particular contract. But to my mind there is no valid distinction between the two.

- B The taxpayer might have alleged that, apart from the loss of commission, the damage to him lay in the fact that, if the determination was wrongful, his goodwill as sales agent in this line of business was seriously impaired thereby. A reference to that matter is found in the commissioners' statement of facts. I can well conceive that the taxpayer would have had a strong case for saying that damages would not be taxable, in so far as they were claimed because his goodwill as a sales agent had been impaired.

- C Apparently after a considerable period of negotiation, an order was made by consent in April, 1950. In their conclusions, the commissioners state that the terms of the judgment had no bearing on whether the amount awarded was taxable or not. That conclusion was criticised by counsel for the taxpayer and also to some extent by HARMAN, J. If by it the commissioners meant that the judgment and its language were for all purposes irrelevant, I should have agreed with the criticism; but I think it may be less than just to the commissioners. The order reads:

- E "Pursuant to the order of [the registrar] . . . whereby it was ordered: That the [taxpayer] be at liberty to enter judgment against the [company] for the sum of £4,000 as damages for breach of agreement of service and for costs of the action . . . That the [taxpayer] do recover nothing from the [company] in respect of his claim for commission and expenses [a reference to the second head of the claim—'pre-breach commission']. That the sum of £4,000 paid into court by the [company] . . . be forthwith paid out to the [taxpayer's] solicitors . . . in satisfaction of the said sum of £4,000 damages: That the action be withdrawn from the list. It is this day adjudged that the [taxpayer] recover against the said [company] £4,000 and costs of the action throughout to be taxed . . ."

- G The judgment is at least relevant to this extent. The parties could compromise their action in such terms as they chose, and it shows that no sum was to be paid for pre-breach commission. Had it been the other way round, counsel for the taxpayer conceded that he would have had difficulty in saying that unpaid commission paid as a result of a law suit to recover it was not taxable. But, once it is conceded, as the judgment makes clear, that this was an agreed sum of damages for breach of the agreement by repudiation, it seems to me that the usefulness of this order is exhausted for our purposes. It still remains for the court to say whether in this case a general sum of damages for breach of the agreement was "profits or gains arising or accruing" to the taxpayer from his trade.

- H I think one other inference must be drawn from the form of the judgment read in the light of the pleadings—I do not forget that this is a consent order under a settlement in which no doubt both parties considered all their alleged rights and defences. On the face of it, it is impossible for the court to infer that this £4,000 or any part of it represented damages for the loss of the taxpayer's goodwill. I think the form of the pleadings and the amount of the damages really make that impossible.

Was this sum paid by way of damages in respect of this agency contract "profits or gains" arising from the trade of the taxpayer as a sales agent? The argument of counsel for the taxpayer had the attraction of simplicity. He said the £4,000 was paid to the taxpayer in exchange for a profit-earning asset which he had lost owing to the breach of the contract by the company, and it

followed that it was a capital item. If the question were *res integra* that argument would be more attractive still, but it clearly will not stand as a test in the light of the authorities. For the most part these authorities are decisions of the Inner House of the Court of Session in Scotland which do not bind this court. But the Income Tax Acts apply indifferently on either side of the border, and I should be slow to adopt a new approach to the incidence of taxation in England from that established in Scotland. In other words, I feel we should follow the line of the Scottish decisions and the principle which can be extracted from them.

In *Kelsall Parsons & Co. v. Inland Revenue* (1) (1938) (21 Tax Cas. 608), LORD NORMAND (Lord President), said (*ibid.*, at p. 619):

“ . . . no infallible criterion emerges from a consideration of the case law.

Each case depends upon its own facts . . . ”

That case is perhaps very much at one end of the line and *Barr, Crombie & Co. v. Inland Revenue* (2) (1945) (26 Tax Cas. 406), very much at the other. In the former the business of the taxpayer company was that of agents for manufacturers. At the relevant date they had far more agency contracts than the taxpayer here, however, and the sum under consideration by the Inner House was paid for cancellation of a contract which would have determined in any event in a relatively short time and in regard to which, as LORD NORMAND says, the taxpayer had no reasonable expectation of its further continuance.

However, junior counsel for the taxpayer points out that the present case is really distinguishable in a significant degree on its facts. First, the taxpayer here held but two agencies. Secondly, although the present agency was expressed to be determinable at relatively short notice, there would have been no reason to suppose that it would have been if all had gone well. And thirdly, as the commissioners pointed out, the effect of the loss of this contract, quoad the taxpayer's agency business, was very substantially to depreciate his earnings: whereas in *Kelsall Parsons & Co. v. Inland Revenue* (1), the court pointed out that the taxpayer's earnings out of the agency business were not much different from what they had been before the cancellation of the material contract. I agree that this case differs in these respects from *Kelsall Parsons & Co. v. Inland Revenue* (1). But I am unable to agree that those differences are of such significance as to bring it from the territory, so to speak, of *Kelsall Parsons & Co. v. Inland Revenue* (1) into that of *Barr, Crombie & Co. v. Inland Revenue* (2). On its facts, the present case more closely resembles *Inland Revenue v. Fleming & Co. (Machinery), Ltd.* (3) (1951) (33 Tax Cas. 57), and, as already indicated, I must resist counsel's invitation to refuse to follow the Scottish line of authority.

To bring the case within the *Barr, Crombie* territory the taxpayer must be shown to have parted in truth and in substance, not merely with his rights and expectations under a contract entered into in the ordinary course of his trade, but with one of his enduring capital assets, as it is called. On that sort of consideration this case might well have been different if the £4,000 had been paid because the taxpayer's goodwill had been damaged. In *Barr, Crombie & Co. v. Inland Revenue* (2) the agency cancelled amounted to the substance of the whole business of the taxpaying company. Its receipts accounted for nearly nine-tenths of the total earnings and its loss necessitated the complete reorganisation of the company's business, a reduction in their staff, and the taking of new and smaller premises. In effect, a substantial part of the business undertaking had gone. Here, the taxpayer has been carrying on a business which for thirteen years has shown variations in the actual agreements which it has comprehended. The business has suffered something perhaps of a disaster by reason of this quarrel with a valuable customer. But, beyond that, it seems to me it is not right to say that the taxpayer had his undertaking as a sales agent partially destroyed or taken away.

But, the matter being largely one of degree and so of fact, as LORD NORMAND said, I think the question is one of fact for the commissioners to find. On the

A facts of this case it seems to me that they were justified in finding, without any misdirection of law, that the amount awarded to the taxpayer was a taxable profit, i.e., a part of the profits or gains arising from the business for the year in question. HARMAN, J., said ([1955] 3 All E.R. at p. 551):

B "The taxpayer was a manufacturers' agent. He had other agencies from time to time and carried on business as an agent, and one of the incidents of such businesses is that one agency may be stopped and another begun. The fact that an agency was a key agency, and was therefore important to him and represented half of his income, seems to me to be irrelevant."

With the possible exception of substituting "inconclusive" for "irrelevant", I agree entirely with that statement; and I agree with what the judge said later C (ibid.):

"... it was a normal incident in this kind of business that an agency should come to an end, and it seems to me that the compensation paid is quite clearly income."

D I agree with HARMAN, J., and I agree with him on the ground that this was a legitimate conclusion which the commissioners on the facts of the case were entitled to find. For these reasons, I think that this appeal fails.

E BIRKETT, L.J.: I am of the same opinion. Junior counsel for the taxpayer invited us to consider the nature of the £4,000, with which we are concerned and submitted that he could distinguish the facts from those in *Kelsall Parsons & Co. v. Inland Revenue* (1). He said that the damages were in the nature of a surrogatum or quid pro quo for the loss of this contract. He also asked us to consider the nature of the business. In all the cases cited, the courts have found great difficulty in laying down a precise line that could be applied to the facts of any given case. I think the most helpful passage was in LORD RUSSELL's speech in *Inland Revenue v. Fleming & Co. (Machinery), Ltd.* (3) (33 Tax Cas. at p. 63):

F "The sum received by a commercial firm as compensation for the loss sustained by the cancellation of a trading contract or the premature termination of an agency agreement may in the recipient's hands be regarded either as a capital receipt or as a trading receipt forming part of the trading profit. It may be difficult to formulate a general principle by reference to which in all cases the correct decision will be arrived at since in each case the question comes to be one of circumstance and degree. When the rights and advantages surrendered on cancellation are such as to destroy or materially to cripple the whole structure of the recipient's profit-making apparatus, involving the serious dislocation of the normal commercial organisation and resulting perhaps in the cutting down of the staff previously required, the recipient of the compensation may properly affirm that the compensation represents the price paid for the loss or sterilisation of a capital asset and is therefore a capital and not a revenue receipt."

H Then he cites the cases of *Van den Berghs, Ltd. v. Clark* (4) (1935) (19 Tax Cas. 390) and *Barr, Crombie & Co. v. Inland Revenue* (2) and on the other side of *Kelsall Parsons & Co. v. Inland Revenue* (1). There is thus no precise rule or standard by which one can lay it down that "You have come within it or without it". It is a matter of degree and all the facts of the case must be considered. I

The difficulty in this case is that nobody quite knows for what the £4,000 was in fact paid. It appears to me that the very clearest issues were raised on the pleadings. In the defence the company admitted the letter of July 1, 1948, which put an end to the contract. They said: "Certainly we wrote it but we were entirely justified in so doing". In the particulars (a matter of importance) they say:

"Though the [taxpayer] was bound in accordance with the terms of

cl. 1 of the agreement of service with the [company] to act as the [company's] sole agent for the export market, the [taxpayer] during the currency of the said agreement exported articles of a similar nature to those manufactured by the [company] under the name of two firms known as K. Wiseburgh, Ltd., and K. Wiseburgh Export, Ltd. of each of which said companies the [taxpayer] had control. Such conduct constituted a breach of his contract with and a dereliction of his duty to the [company]."

They go on to say that he persistently neglected the agency. Then the gravest allegations are made:

"The [taxpayer's] conduct towards the [company] who were at all material times his employers was such as completely to frustrate the purpose of the contract and to indicate complete lack of faith in and desire to co-operate with them."

They refer to certain letters, and continue:

"the [taxpayer] in terms refused to speak on the telephone upon a matter concerning business affairs with . . . the managing director of the [company]: the [taxpayer] gave express instructions to his staff . . . that they were not to have any communication by telephone with the [company]", communication was to be by correspondence only. Then comes this:

"At a time when the [company's] selling season was at its height, the [taxpayer] refused in a letter dated May 19, 1948, to canvass further sales on behalf of the [company]."

That was pleaded but it was never fought out in the courts. If it were true, the company were saying with reference to this selling agreement: "You yourself declined to go on with it and at the height of the season for selling these goods you refused to canvass further—in other words, you dropped the agreement altogether."

Equally important and serious things are said in the reply:

"By the letters set out above and by the general tone of hostility displayed by the [company] in other correspondence between themselves and the [taxpayer] . . . and by their refusal to discuss prices with the [taxpayer] contrary to cl. 11 . . . and by their failure to keep the [taxpayer] fully informed as to stocks . . . and by failure to keep the [taxpayer] informed as to their cloth position, the [company] created a situation in which maintenance of the contractual relationship between the parties was impossible."

On the pleadings there were the gravest allegations by both sides. Secondly, we know the action was compromised by this payment of £4,000 but it is quite impossible to determine the basis on which the sum of £4,000 was arrived at. One never knows in these matters. One has heard that settlements are sometimes made a little easier outside court because the presence of one leader was urgently required in another court. But it is impossible to speculate why the £4,000 was paid in this case. That in the year ending Mar. 31, 1948, the commissions were £8,223 and yet £4,000 only was paid for the ending of the contract, shows how impossible it is to arrive with any certainty at the nature of the payment of £4,000.

The taxpayer says through his counsel that it was a payment "for injury to the goodwill of my business". I agree with what the Master of the Rolls has said about that. The whole of this statement of claim, detailed as all the complaints are, contains no breath of a suggestion of that kind. It is confined wholly to the loss of commission. All the details in the pleadings, the defence and reply, really go to that purpose.

The Crown say that, looking at the decided cases, applying them to the facts in this case, the reasonable inference which we ought to draw is that this was merely a profit from the trade within Sch. D, para. 1 (a) (ii) of the Act of 1918 and

- A was not a sale of a capital asset as the taxpayer contends. I have been troubled throughout by the two Wiseburgh companies. I can understand its being said: "I had two contracts which comprised the whole of my business. You took one away and you left me with only the one contract and so injured my profit-making apparatus. You have taken away a capital asset of value". But one must remember the facts. The contention was raised by the company
- B in the pleadings: "that, so far as that asset is concerned, you yourself would not go on with it, and that was the ground on which we say we were entitled to write our letter of July 1. You had declined at the height of our season to comply with the agency agreement and we were therefore justified in doing what we did. We do not know the extent of the K. Wiseburgh business." There were limited companies of which the taxpayer was the manager. It was not an agency in
- C the ordinary sense. If the taxpayer in effect said: "I have a profitable agency, but I can do much better for myself by having two companies of my own under my own control and I will do it at the expense of this agreement", it is difficult for him to say: "I want damages for the injury which you have done to my profit-making apparatus" when the profit-making apparatus may well have been changed by his own free will. I have been troubled by that consideration, because
- D we do not know what the extent of the Wiseburgh trade was. We have only the allegations that, so far as the export trade was concerned, goods which in the ordinary way might have gone through the agency with the company (so that their goods were sold) went from the taxpayer, and that the taxpayer had declined by letter to go on with the agreement. These issues were not tried but they must be taken into consideration when it is said on one side: "This is the sale of a capital
- E asset", and on the other: "This is a trade arising in the ordinary way from your profits under Sch. D."

HARMAN, J., came to the conclusion that the commissioners were perfectly justified in their findings and he upheld them. Nothing that I have heard leads me to suppose that either they or HARMAN, J., fell into error. I would dismiss the appeal.

- F ROXBURGH, J.: I agree that this appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Garland-Wells, Riches & Co.* (for the taxpayer); *Solicitor of Inland Revenue.*

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

ANGLO-FRENCH EXPLORATION CO., LTD. *v.* CLAYSON
(INSPECTOR OF TAXES).

[COURT OF APPEAL (Lord Evershed, M.R., Jenkins and Birkett, L.JJ.), February 13, 14, 15, 29, 1956.]

Income Tax—Income—Payment of lump sum for relinquishing contract of services—Payment by third party—Simultaneous relinquishing of contract and of control in contracting company—Inflated sum paid in respect of contract—Making of service contracts part of taxpayers' trade—Whether sum taxable—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), Sch. D, Case I.

The taxpayers were a mining finance company incorporated in the United Kingdom in 1889, whose business included among other activities the making of agency and secretarial contracts and the performance of the duties of agents and secretaries, although the making or cancellation of such contracts was not frequent. The taxpayers held eight agency and secretarial contracts and had done so for some years. The taxpayers and friendly shareholders, the F. trustees, held a majority of the shares of K. Co. and had nominees on the board of K. Co. The taxpayers had a contract with K. Co. to act as its agents and secretaries for an annual fee of £1,500; this contract was terminable by six months' notice, but owing to the majority shareholding and representation on the board could not in practice be determined without the consent of the taxpayers or the F. trustees. The taxpayers and the F. trustees entered into an agreement with a third party under which they both sold their shares in K. Co. to the third party at a fair price; their nominees resigned their directorships of the K. Co. and the taxpayers relinquished their contract with the K. Co. for agency and secretarial duties in return for a payment by the third party of £20,000, which was shared between the taxpayers and the F. trustees, £16,138 4s. 2d. being retained by the taxpayers. It was conceded that the £20,000 was not part of the consideration for the sale of the shares. The taxpayers were assessed to income tax in respect of their portion of the £20,000 as profits of their trade under Case I of Sch. D to the Income Tax Act, 1918.

Held: the £16,138 4s. 2d. was taxable as annual profits or gains arising to the taxpayers from trade because

(i) the taxpayers' business included the making of agency and secretarial contracts and cancellation of one agency and secretaryship, viz., that for the K. Co., should be regarded as a normal trading risk compensation for which was a gain from trading, and the loss of the agency and secretaryship was not so serious a loss as would, by crippling the taxpayers' business, cause the payment of the £16,138 4s. 2d. to be payment of compensation for loss of a capital asset (*Kelsall Parsons & Co. v. Inland Revenue* (1938), 21 Tax Cas. 608; *Inland Revenue v. Fleming & Co. (Machinery), Ltd.* (1951), 33 Tax Cas. 57; *Wiseburgh v. Domville (Inspector of Taxes)*, ante p. 754, applied).

(ii) in the circumstances the compensation was a gain from the taxpayers' trade, viz., the sale of shares, for it was earned by reason of the holding of shares by the taxpayers and the F. trustees and as an inducement to part with them.

Decision of **HARMAN, J.** ([1955] 3 All E.R. 779) affirmed.

[As to whether compensation is a trade receipt, see 17 **HALSBURY'S LAWS** (2nd Edn.) 125, para. 235; and for cases on the subject, see Supplements to 28 **DIGEST** 19, 20, 98.

For the **Income Tax Act, 1918**, Sch. D, para. 1, see 12 **HALSBURY'S STATUTES** (2nd Edn.) 151; and for the corresponding provisions of the **Income Tax Act, 1952**, viz., s. 122, see 31 **HALSBURY'S STATUTES** (2nd Edn.) 112.]

A Cases referred to:

(1) *Inland Revenue Comrs. v. Newcastle Breweries, Ltd.*, (1927), 12 Tax Cas. 927; sub nom. *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.*, 96 L.J.K.B. 735; 137 L.T. 426; Digest Supp.

(2) *Short Bros., Ltd. v. Inland Revenue Comrs.*, (1927), 136 L.T. 689; 12 Tax Cas. 955.

B (3) *Inland Revenue Comrs. v. Northfleet Coal & Ballast Co., Ltd.*, (1927), 12 Tax Cas. 1102.

(4) *Barr, Crombie & Co. v. Inland Revenue*, 1945 S.C. 271; 26 Tax Cas. 406; 2nd Digest Supp.

(5) *Wiseburgh v. Domville (Inspector of Taxes)*, ante p. 754.

(6) *Kelsall Parsons & Co. v. Inland Revenue*, 1938 S.C. 238; 21 Tax Cas. 608; Digest Supp.

C (7) *Inland Revenue v. Fleming & Co. (Machinery), Ltd.*, 1952 S.C. 120; 33 Tax Cas. 57; 3rd Digest Supp.

(8) *Van den Berghs, Ltd. v. Clark*, [1935] A.C. 431; 104 L.J.K.B. 345; 153 L.T. 171; 19 Tax Cas. 390; Digest Supp.

D Appeal.

The taxpayers appealed to the General Commissioners of Income Tax for the City of London against an estimated assessment to income tax made on them under Sch. D to the Income Tax Act, 1918, in the sum of £50,000 less capital allowances, £100, in respect of the profits of their trade or business for the year ended Apr. 5, 1951. The question for determination was whether a sum of £16,138 (part of a total of £20,000) received from Philip Hill Securities Corpn., Ltd., was a trading receipt which should be included in the computation of the taxpayers' profits for income tax purposes.

E The taxpayer company carried on business as a mining finance company the profits from which were assessed to tax under Case I of Sch. D. They had also for many years provided agency, secretarial and other similar services in London and Johannesburg for several companies, the receipts and outgoings from which were included in their Case I assessment. In 1949 they were providing such services for three companies in both South Africa and London and for a further five companies in London only. In some of these companies they held shares and in some they did not; they also held shares in companies for which they did not provide such services. Apart from three additions to the companies for which they acted there had been no change for over fifteen years. Fees and rents were received from the companies for the provision of secretarial services and office accommodation. Since 1931 the taxpayers had provided secretarial services in Johannesburg to Kleinfontein Estates and Township, Ltd., a public company incorporated and carrying on business in South Africa, under a formal agreement of 1931, modified in 1941, which was to continue in force from year to year until determined by either party by six months' notice, and under which they received remuneration at the annual rate of £1,200 subsequently increased by agreement to £1,500 and £60 office rental per annum. They also provided similar services to the company in London for which they received £60 per annum. The total issued share capital of Kleinfontein Estates and Township, Ltd. (eighty-five thousand 5s. shares fully paid, all of one class and carrying equal rights) was held as follows:

F by the taxpayers and their nominees 25,689; by the estate of the late Sir George Farrar and its nominees 27,930; by the estate of the late S. H. Farrar 16,872; by other shareholders 14,509. Following abortive negotiations in 1942 with one company, for the sale of the taxpayers' shareholding in Kleinfontein Estates and Township, Ltd., for which 35s. a share was offered to all shareholders (considered by the taxpayers' Johannesburg manager to be a fair price) and payment to the taxpayers of a lump sum in compensation for their relinquishing their office as secretary and agent of that company, the taxpayers in 1949

accepted an offer from Philip Hill Securities Corpn., Ltd., to purchase the taxpayers' shares in the company and other shares totalling not less than seventy thousand altogether at 35s. a share and to pay the taxpayers £20,000 on their tendering their resignation as secretary of the company. The trustees of the estate of the late Sir George Farrar and the late S. H. Farrar agreed to participate by selling their shares at 35s. a share. By arrangement the sum of £20,000, which was paid by Philip Hill Securities Corpn., Ltd., was apportioned between the trustees and the taxpayers, who retained £16,138 4s. 2d. of it. Directors representing the taxpayers and the trustees of the estate of the late Sir George Farrar resigned and representatives of Philip Hill Securities Corpn., Ltd., were appointed directors. Some other shareholders also sold their shares to Philip Hill Securities Corpn., Ltd., at 35s. a share. The taxpayers credited the £16,138 4s. 2d. to reserve account as "compensation for loss of office." Evidence was given by the chairman and managing director of the taxpayer company of the close connection of the taxpayers with the late Sir George Farrar's estate and that there was no likelihood of the trustees of the estate accepting a third party's offer to purchase their shares without first consulting the taxpayers. It was agreed between the parties and accepted by the commissioners that the £20,000 was not part of the consideration for the shares.

The taxpayers contended that the £16,138 4s. 2d. was part of the price paid by a third party to the taxpayers as consideration for their agreeing to give up an agency contract and the case was accordingly distinguishable from that of a payment received by an agent from his principal; that the agency contract with the right to exercise the duties thereunder was a capital asset of the taxpayers and its surrender was analogous to the sale of a capital asset; and that the sum was therefore a capital and not a trading receipt. The Crown contended that the £16,138 4s. 2d. was received by the taxpayers as compensation for the loss of one of their agencies in the ordinary course of their business and not in consideration of a sale or any analogous transaction; that the agency contract and the right to perform the duties thereunder was not an asset which the taxpayers could or did sell and the payment of compensation for its loss by a third party was immaterial; that if any such sale or analogous transaction did take place, the proceeds were profits of a financial transaction of a mining finance company; and that in either event the sum was a revenue receipt and a taxable profit. The commissioners held that the sum was a trading receipt of the taxpayers and therefore taxable. On Nov. 23, 1955, HARMAN, J., dismissed the taxpayers' appeal against that decision ([1955] 3 All E.R. 779). The taxpayers appealed to the Court of Appeal.

H. H. Monroe for the taxpayers.

Roy Borneman, Q.C., and Sir Reginald Hills for the Crown.

LORD EVERSHED, M.R.: The present case relates to a sum of £16,138 4s. 2d. received by the taxpayers in 1949. Schedule D to the Income Tax Act, 1918, under which the taxpayers' claim is made, provides:

"Tax under this Schedule shall be charged in respect of—(a) The annual profits or gains arising or accruing . . . (iii) to any person . . . from any trade, profession, employment, or vocation exercised within the United Kingdom."

Counsel for the Crown, in my judgment correctly, reminded us that the cases of individual persons charged under Sch. E to the Act, where the charge is "in respect of every employment of profit", do not form a safe guide to cases under Sch. D, at least as a general proposition. The correctness of the assessment here made must be considered in the light of the language of Sch. D. The

A question involved is: Does this £16,000 represent profits or gains of the taxpayers arising from their trade: i.e., was it received by them in the ordinary course of their trading operations?

The taxpayers company were formed as an English company at the end of last century, their business being that of a mining and finance company particularly concerned with seeking scope for the investment of capital in South Africa.

B Among the South African companies in which the taxpayers for many years held a substantial shareholding was Kleinfontein Estates and Township, Ltd. (which I will henceforth call "Kleinfontein"). The taxpayers held rather less than one-third of the share capital of that company which consisted of shares of 5s. denomination. A similar but slightly larger shareholding was held by the trustees of the late Sir George Farrar. The taxpayers and the Farrar

C trustees each had two nominee directors on the board of Kleinfontein; the fees paid to the taxpayers' directors were paid over by them to the taxpayers.

The taxpayers also for many years acted as agents and secretaries of Kleinfontein for the annual fee of £1,500 sterling under the terms of a written agreement and certain correspondence. The substance of their obligation as agents

D and secretaries was to provide office accommodation and office staff for Kleinfontein in Johannesburg. The agreement was determinable by six months' notice on either side; but in practice, and so long as the taxpayers and the Farrar trustees co-operated, Kleinfontein would not be able to determine the agreement against the wishes of the taxpayers. In May, 1949, Philip Hill Securities Corp., Ltd., another English company, made an offer for the shares of Kleinfontein at a price of 35s. per share. It was also part of that offer that,

E when more than fifty per cent. of the issued shares of Kleinfontein had been acquired, the Philip Hill company would pay £20,000 in consideration of the resignation by the taxpayers of their office as agents and secretaries.

As counsel for the taxpayers rightly said, the true transaction must be carefully analysed. I will read part of the paragraph in the offer which related to that last-mentioned matter.

F "Subject to your company's acceptance of this offer and upon delivery to our company of 43,000 of the said shares [just over fifty per cent.] with transfer forms as aforesaid attached thereto, your company will tender its resignation as agents and secretaries to the Kleinfontein company, acceptance of which we undertake to procure forthwith upon its being tendered,

G and upon the tender of such resignation we shall pay to your company in cash the sum of £20,000."

Those offers, the offer to buy the shares at 35s. each, and the offer of resignation by the taxpayers, were accepted by the taxpayers. In due course, and in accordance with the terms of the arrangement, the £20,000 having been received, part of it was paid over by the taxpayers to the Farrar trustees, the figure of

H £16,138 4s. 2d. representing the balance of the £20,000 retained by the taxpayers.

I observe two things: (i) The £20,000 was not part of the purchase price of the shares, as was indeed conceded in the courts below, and as has been here conceded on the part of the Crown. Had it been part of the purchase price, either the taxpayers would have got more than the other shareholders for their shares (which would have been inconsistent with the Philip Hill company's offer) or, to avoid that result, they would have had to distribute £20,000 rateably among all the shareholders: (ii) the agency agreement being on the face of it determinable by six months' notice, it was quite plainly only worth a sum like £20,000 so long as the taxpayers and their friends, the Farrar trustees, could control the Kleinfontein company. That plain fact is recognised by the terms of the offer, and by the distribution by the taxpayers of the £20,000 when they received it.

The argument of counsel for the taxpayers before us, which was presented with cogency and lucidity, was to this effect: (i) The £20,000 was paid as consideration for the giving up or destruction as distinct from the mere discharge of the agency, that being, he said, the legal effect of the true analysis of the bargain as recorded in the document; (ii) it is nihil ad rem that £20,000 was far in excess of the true value of the agreement, since the parties to the arrangement could put any price they liked on it; (iii) it is also nihil ad rem that the £20,000 was, so to say, tied up with the trading transaction, the sale of the shares, for it was a separate bargain and constituted a capital payment; (iv) it is nihil ad rem likewise that the taxpayers chose to divide the £20,000 between themselves and the Farrar trustees, as they did; (v) it therefore follows from the first proposition that the sum received was a capital payment in the hands of the taxpayers, because it was in truth paid to, and received by, them for the destruction, the assigning, the giving up, or whatever phrase you like to use, of a source of income, viz., a capital asset.

The commissioners rejected this argument. They found that the sum in question was a trading receipt, meaning thereby, as I understand, a receipt by the taxpayers in the ordinary course of their trade. In my judgment the commissioners were entitled so to find on the facts and in so finding they made no error in law. If the matter were *res integra*, I think there is much to be said for the simple view that a sum of money received in consideration for the giving up or destruction of an agreement under which one looks to earn an annual sum is capital and not income; for in such case the sum received might be fairly described as the capitalised equivalent at the present time of income prospects. The question remains, however, not whether that sum in some senses or in some contexts might sensibly be called a capital payment, but whether it is a profit or gain arising from the trade of the recipient within the terms of Sch. D.

The matter is not in any case *res integra*. The line of cases starting from the well known trilogy in 12 *Tax Cas.*, of *Inland Revenue Comrs. v. Newcastle Breweries, Ltd.* (1) (at p. 927), *Short Bros, Ltd. v. Inland Revenue Comrs.* (2) (at p. 955) and *Inland Revenue Comrs. v. Northfleet Coal & Ballast Co., Ltd.* (3) (at p. 1102), in 1927, seem to me to emphasise that sums received for the cancellation of an agency or of other similar agreement which has been entered into by the recipient in the ordinary course of its trade will themselves, *prima facie*, be regarded as received in the ordinary course of trade *unless* the transaction involves a parting by the recipient with a substantial part of its business undertaking. *Barr, Crombie & Co. v. Inland Revenue* (4) (1945) (26 *Tax Cas.* 406), was a case of that exceptional character.

On the other hand, there are the cases to which we were referred in the present case and to which we referred recently in *Wiseburgh v. Domville (Inspector of Taxes)* (5) (ante, p. 754), of *Kelsall Parsons & Co. v. Inland Revenue* (6) (1938) (21 *Tax Cas.* 608), and *Inland Revenue v. Fleming & Co. (Machinery), Ltd.* (7) (1951) (33 *Tax Cas.* 57). In *Wiseburgh v. Domville (Inspector of Taxes)* (5), in which we gave judgment after the first hearing of this case, I said that we had not thought it right to express a different view from that which has been persistently entertained in the Court of Session in Scotland, where the majority of these cases seem to have arisen. In *Kelsall Parsons & Co. v. Inland Revenue* (6) LORD NORMAND (Lord President) said (21 *Tax Cas.* at p. 621):

"It is not necessary that I should review all the authorities which were cited to us, but I must advert to the contentions ably urged by the appellants' counsel that the determination of the commissioners is contrary to principles recognised in some of these authorities. Counsel maintained that a payment for loss of a 'profit-making apparatus' was necessarily a capital payment in the hands of the recipient who received it as compensation for such loss. This proposition is, I think, too vague and too wide. I find it impossible to reconcile with some of the decided cases . . ."

A The Lord President referred to *Short Bros., Ltd. v. Inland Revenue Comrs.* (2), and continued:

B "These . . . cases were referred to by LORD MACMILLAN in his speech in *Van den Berghs, Ltd. v. Clark* (8) ([1935] A.C. 431) and I think they can be treated as of high authority since they passed the scrutiny of the House of Lords without adverse comment. Then it was urged that the whole structure of the appellants' business was affected by the cancellation and that on the authority of *Van den Berghs, Ltd. v. Clark* (8) the payment should therefore be treated as a capital payment. I have already given reasons for thinking that the structure of the business carried on by the appellants was in fact, as the nature of the business required, so designed as to absorb such shocks as the cancellation of a single, albeit an important, agency contract."

C In *Inland Revenue v. Fleming & Co. (Machinery), Ltd.* (7) a contract had been cancelled and a restrictive covenant had also been entered into. LORD COOPER (Lord President) said (33 Tax Cas. at p. 62):

D "It is conceded by the Inland Revenue that the £590 and the £800 [the values paid in respect of the restrictive covenants] are not revenue payments and I imagine that this concession would equally have been made even if the proportions allocated to those parts of the agreement had been far larger. It is against the £5,320 alone that the challenge is directed, and taking the agreement at its face value the Inland Revenue maintain that cl. 1 specifically records simply the loss by a selling agency of one agency (out of eight which they held in 1948) and that such a loss is or must be treated as a normal trading risk. I can see no satisfactory answer to this contention unless we can impart a special meaning to cl. 1 by reading along with it the rest of the agreement."

LORD RUSSELL said (*ibid.*, at p. 63):

F "It may be difficult to formulate a general principle by reference to which in all cases the correct decision will be arrived at since in each case the question comes to be one of circumstance and degree. When the rights and advantages surrendered on cancellation are such as to destroy or materially to cripple the whole structure of the recipient's profit-making apparatus, involving the serious dislocation of the normal commercial organisation and resulting perhaps in the cutting down of the staff previously required, the recipient of the compensation may properly affirm that the compensation represents the price paid for the loss or sterilisation of a capital asset and is therefore a capital and not a revenue receipt."

G Finally, LORD KERRH concluded his speech thus (*ibid.*, at p. 65):

H "I think accordingly that the sum of £5,320 must be regarded as compensation for loss of profits and not for loss of a profit-earning asset. This may seem a large sum for loss of profits to an agency terminable at will: but it may reflect the long period during which the agency had continued and a desire on the part of Imperial Chemical Industries, Ltd. to act generously. Also reasonable notice would have been required to terminate the agency and there might have been contentious questions as to what notice was required. Compensation in lieu of notice would in my opinion quite clearly be a revenue receipt."

I Accepting the law applicable as being that which may be derived from these cases, counsel for the taxpayers was in effect compelled to say one of two things, either (i) that the agency contract in this case was a capital asset, and, therefore, that the proceeds of sale of that asset must be capital unless the business of the company involved trading or dealing in that kind of asset; or (ii) that the agency contract here was so long-standing and so important to the company as to

distinguish the present case on the facts or as a matter of degree from such cases as *Kelsall Parsons & Co. v. Inland Revenue* (6) and *Inland Revenue v. Fleming & Co. (Machinery), Ltd.* (7). The taxpayers held some eight agency and secretarial contracts and had done so for a considerable time with little variation. Nevertheless, the making of such contracts was part of the business of the taxpayers and the cancellation of this one contract in no sense affected the "profit-making apparatus" of the company, which retained their offices and staff, etc., in Johannesburg exactly as before. In my judgment, counsel's first alternative proposition is inconsistent with the cases. The taxpayers in *Kelsall Parsons & Co. v. Inland Revenue* (6) and *Inland Revenue v. Fleming & Co. (Machinery), Ltd.* (7) were not dealers in agency contracts. Counsel's second alternative answer is a question of fact and degree, and the commissioners were fully entitled to find the conclusion of fact which they found.

I should add that the fact that the £20,000 was paid, not by the Kleinfontein company, but by a stranger to the agency contract, the Philip Hill company, in my judgment is immaterial. It has been clearly established that a question of this sort must be determined by having regard to the nature of the payment in the recipient's hands. I think, therefore, that HARMAN, J., arrived at a correct conclusion in this case. He said at the end of his judgment ([1955] 3 All E.R. at p. 784):

"Apart from the holding of the shares, the secretaryship was worth little or nothing. It was only the taxpayers' special position that enabled it to obtain this money. It was in fact a sum earned in the course of the company's trade, viz., the sale of shares, and, even though not part of the purchase price, was earned only because of the holding of the shares and by way of inducement to part with them. On this analysis, as it seems to me, this was money earned by the company in the course of its trade and therefore a trading receipt and must be charged to tax accordingly."

I agree with that conclusion, and I think that this appeal fails and must be dismissed.

JENKINS, L.J.: I agree, and I have nothing I can usefully add.

BIRKETT, L.J.: I am of the same opinion, and also have nothing to add.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: Coward, Chance & Co. (for the taxpayers); Solicitor of Inland Revenue.

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A R. v. BOARD OF CONTROL AND OTHERS, *Ex parte* RUTTY.
[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Devlin, JJ.),
February 6, 21, March 9, 1956.]

*Habeas Corpus—Return to writ—Inquiry into truth of facts set forth in return—
Habeas Corpus Act, 1816 (56 Geo. 3 c. 100), s. 3, s. 4.*

B *Mental Defective—Reception order on ground of being found neglected—Meaning
of “found neglected”—Mental Deficiency Act, 1913 (3 & 4 Geo. 5 c. 28),
s. 2 (1) (b) (i), as amended by Mental Deficiency Act, 1927 (17 & 18 Geo. 5
c. 33), s. 2.*

C The applicant, when three months old, had been placed by her mother
in a poor law institution. She had been brought up by the poor law
authorities being fed, housed and clothed in institutions. In June, 1948,
she was seventeen years of age and there was no longer power to detain her
in the institution in which she then was and from which it was feared that she
would remove herself. She was a “border-line high grade mental defective”
and as such she needed, it seemed, special care which the institution where
she was could not provide. In December, 1948, a magistrate as the judicial
D authority under the Mental Deficiency Acts, 1913 to 1938, made a reception
order in respect of the applicant under s. 2 (1) (b) (i)* of the Act of 1913 on the
petition of the supervising officer of the local authority. The ground on which
this order was made was that, in addition to being a mental defective, the
applicant was a person who was “found neglected” within the meaning of
the enactment. The judicial authority had before him by way of evidence not
E only a statutory declaration stating that the applicant was subject to the Acts
because she was “found neglected”, but also such facts concerning her as
the petitioner put before the judicial authority to substantiate the allegation
on the occasion when the order was made. The reception order was con-
tinued from time to time and was current at the time of the present applica-
F tion. In February, 1956, the applicant obtained a writ of habeas corpus, and
the return thereto showed that, though on residential licence, she was subject
to detention under the reception order. On motion on the return to the
writ it was contended for the first and second respondents that, as the
institution could not have provided the special care and education that a
mental defective such as the applicant required, she was “found neglected”.

G **Held:** (i) the court could receive evidence on affidavit to enable it to
decide whether there had been any evidence before the judicial authority
which would justify his finding.

Re Authers (1889) (22 Q.B.D. 345) and *R. v. Judge Radcliffe, Ex p. Oxfordshire County Council* ([1915] 3 K.B. 418) followed.

H (ii) section 2 (1) (b) (i) of the Mental Deficiency Act, 1913, did not enable
a reception order to be made on the application of the local authority on
the ground that a mental defective needed care and training; accordingly
there had been no evidence before the judicial authority on which he could
properly have decided that the applicant was “found neglected”, and her
discharge would be ordered.

I **Semble:** on the true construction of s. 2 (1) (b) (i) of the Mental Deficiency
Act, 1913, the word “neglected” imported physical suffering through want
of reasonable care and applied only to a condition which was in existence as
distinct from a condition which might come about in the future (see p. 774,
letter G, post, p. 775, letter B, post).

Per LORD GODDARD, C.J., and DEVLIN, J.: on the hearing of a petition
for the making of a reception order it is for the judicial authority to apply
such tests and to call for such evidence as he may require in order to determine
whether the person brought before him is a person in respect of whom a

* For the terms of this enactment see p. 772, letter C, post.

reception order should be made. It is not enough that he should rely on the two medical certificates which are required to give him jurisdiction (see p. 776, letter B, and p. 775, letter G, post).

Observations on the power of the court to examine into the truth of facts set forth in the return to a writ of habeas corpus (see p. 775, letters D and E, post).

[**Editorial Note.** The position would not be the same as in this case if the parent or guardian of a mental defective represented to a local health authority that the mental defective was in need of care or training which could not be provided in his home (see s. 2 (1) (b) (i) of the Mental Deficiency Act, 1913, as amended by the Mental Deficiency Act, 1927, s. 2, and p. 774, letter I, post).]

As to evidence to controvert a return to a writ of habeas corpus, see 11 HALSBURY'S LAWS (3rd Edn.) 45, para. 89.

For the Habeas Corpus Act, 1816, s. 3, s. 4, see 6 HALSBURY'S STATUTES (2nd Edn.) 99.

For the Mental Deficiency Act, 1913, s. 1, s. 2 (1) (b), s. 5 (2) and s. 19 (1), see 17 HALSBURY'S STATUTES (2nd Edn.) 1186, 1187, 1191, 1201.]

Cases referred to:

- (1) *Re Bailey, Re Collier*, (1854), 3 E. & B. 607; 23 L.J.M.C. 161; 118 E.R. 1269; sub nom. *R. v. Collier*, 23 L.T.O.S. 111; 18 J.P. 630; 16 Digest 254, 557.
- (2) *Re Baker*, (1857), 2 H. & N. 219; 26 L.J.M.C. 155; 29 L.T.O.S. 218; 21 J.P. 486; 157 E.R. 92; 16 Digest 254, 558.
- (3) *Re Authers*, (1889), 22 Q.B.D. 345; 60 L.T. 454; 53 J.P. 116; sub nom. *Ex p. Anthers*, 58 L.J.M.C. 62; 16 Digest 254, 559.
- (4) *R. v. Radcliffe (Judge), Ex p. Oxfordshire County Council*, [1915] 3 K.B. 418; 84 L.J.K.B. 2196; 113 L.T. 991; 79 J.P. 546; 33 Digest 272, 1897.
- (5) *Wilmot's Opinions*, (1758), Wilm. 77; 97 E.R. 29.

Motion for Habeas Corpus.

On Dec. 9, 1948, Christopher John Jolly, a justice for the Borough of Colchester and a justice specially appointed under the Lunacy Act, 1890, and a judicial authority under the Mental Deficiency Act, 1913*, heard a petition by the supervising officer of the Essex County Council alleging that the applicant, Kathleen Rutty, was a mental defective. The magistrate considered the petition, two medical certificates,† the statutory declaration‡ made by the petitioner and one of the doctors, and the consent of the applicant's mother and found that the applicant was a defective within the meaning of the Mental Deficiency Acts, 1913 to 1927,‡ being a feeble-minded person and that she was subject to be dealt with under the Acts by reason of the circumstance that she was found neglected. He ordered her to be sent to the Royal Eastern Counties Institution at Colchester to be detained there or in any other institution to which she might be transferred in accordance with the regulations under the Acts. In accordance with the order, which was renewed from time to time, the applicant came under the care and control of the first two respondents, the Board of Control and Ralph Marshall Bates, the medical superintendent of the Royal Eastern Counties Institution. She was subsequently allowed out on a residential licence granted on Oct. 11, 1955, to her half-brother, Alfred John Bradman, the third respondent.

* Section 19 (1) of the Mental Deficiency Act, 1913, provides that a police or stipendiary magistrate or specially appointed justice who is a judicial authority for the purposes of the Lunacy Acts, 1890 to 1911, shall be a judicial authority for the purposes of the Mental Deficiency Act, 1913 (see 17 HALSBURY'S STATUTES (2nd Edn.) 1201).

† The two medical certificates and the statutory declaration are required by s. 5 (2) of the Mental Deficiency Act, 1913 (see 17 HALSBURY'S STATUTES (2nd Edn.) 1191).

‡ The collective title of the Mental Deficiency Acts at the relevant date was the Mental Deficiency Acts, 1913 to 1938, but the relevant form of order refers only to the Acts of 1913 to 1927.

- A On Feb. 6, 1956, she applied for and was granted a writ of habeas corpus directed to the three respondents. A return to the writ was made by the first two respondents. The applicant was also granted leave to move for certiorari against the judicial authority, viz., the magistrate who had made the reception order. The circumstances in which the reception order of Dec. 9, 1948, was made and the contentions of the first two respondents in their return to the writ
- B are set out in the judgment of HILBERY, J., at p. 773, letter E, to p. 774, letter A, post, and are summarised in the headnote.

J. F. F. Platts-Mills and D. J. Turner-Samuels for the applicant.

E. Underhill for Mr. John Bradman, the third respondent.

- Rodger Winn* for the Board of Control and Dr. Bates, the medical superintendent
- C of the Royal Eastern Counties Institution, the first and second respondents.
- V. G. Hines* for the judicial authority.

Cur. adv. vult.

Mar. 9. **LORD GODDARD, C.J.:** I will ask **HILBERY, J.**, to read the first judgment.

- D **HILBERY, J.:** On Dec. 9, 1948, a magistrate duly appointed and acting as the judicial authority under the Mental Deficiency Acts, 1913 to 1927, heard a petition by the supervising officer of the Essex County Council alleging that the present applicant was a mental defective and was subject to be dealt with under the Act and asking for a reception order to be made and that she should be ordered to be detained in an institution for defectives.

- E On the hearing of this petition the magistrate found that the applicant was a defective within the meaning of the Mental Deficiency Acts, 1913 to 1927, being a feeble-minded person and also found that she was subject to be dealt with under the Acts by reason of her being found neglected. He ordered the applicant to be sent to the Royal Eastern Counties Institution, Colchester, to be detained there or in any other institution to which she might be transferred in accordance
- F with the regulations for the time being in force under the said Acts.

Since Dec. 9, 1948, the applicant has been in institutions in the care and under the control of the Essex County Council and the Board of Control. After a period of stabilisation and training she was given leave of absence on licence, first to an aunt, then to a private nursing home and the Ryland Hospital and finally to her half-brother with whom she was still on licence at the time of the hearing of this application.

- G The applicant applied for a writ of habeas corpus alleging that the order made on the hearing of the petition on Dec. 9, 1948, was ultra vires the Mental Deficiency Act, 1913, inasmuch as she was not then a person subject to the Act who could be dealt with on such a petition and there was not, on the facts of her case, any evidence before the magistrate on which the magistrate could properly
- H find that she was a person subject to be dealt with under the Act on such a petition. We ordered the writ to issue.

- I The return to the writ which has to be considered is that made by Ralph Marshall Bates, the physician superintendent of the Royal Eastern Counties Hospital and the Board of Control returning that the applicant was detained in the custody of Dr. Bates "by virtue of a reception order dated Dec. 9, 1948" a copy of which was annexed to the return, which it was said contained the grounds for the making of the order and was on its face a valid order for the detention. The order set out the second order I have alluded to at the opening of this judgment made by a magistrate, one Christopher John Jolly, acting as the judicial authority under the Mental Deficiency Acts, 1913 to 1927.

It is important in the first place, to observe that the Mental Deficiency Act, 1913, does not empower the authorities designated by the Act to obtain reception orders resulting in detention and deprivation of liberty in the case of all mental defectives however circumstanced. Only such mental defectives as come within

the classes defined by the Act can be dealt with in the exercise of the powers given by the Act. It is necessary, therefore, to see who are the persons who can be dealt with under the Act and made subject to an order on such a petition.

Section 2 (1) states:

"A person who is a defective may be dealt with under this Act by being sent to or placed in an institution for defectives or placed under guardianship . . ."

and sub-s. (1) (b) of s. 2 enacts that a person who is a defective may be dealt with under the Act by being sent to or placed in an institution for defectives or placed under guardianship

"if in addition to being a defective he is a person—(i) who is found neglected, abandoned, or without visible means of support, or cruelly treated . . ."

The magistrate based his decision on the question whether the applicant was subject to be dealt with under the Act as a defective on a finding by him that she was a person "found neglected". If there was no evidence on which he could properly so find there was no power to order her detention however mentally defective she might be. Whether there was such evidence depended in this case on whether on the facts of her case it could be adjudged that the applicant had been "found neglected" within the meaning of those words as used in the Act and properly construed. Unless, on the correct interpretation of those words "found neglected" as they are used in the statute the applicant could be held, on the evidence before the magistrate, to be a person "found neglected", she was not amenable to the jurisdiction conferred by the Act although she might be a mental defective.

On an application for a writ of habeas corpus this court does not sit as a court of appeal. It will not re-hear the matters which were to be decided by the judicial authority. The court will, however, admit affidavit evidence in order to decide whether there was any evidence before the judicial authority such as would justify his finding that he had jurisdiction to deal with the applicant and to make an order.

In *Re Bailey* (1) (1854) (3 E. & B. 607) where the return to a writ of habeas corpus was that the detention of the applicant was on a conviction and warrant for an offence against the statute 4 Geo. 4 c. 34, namely, that the prisoner being employed on a contract of service had unlawfully absented himself from that service contrary to the statute, the court held that affidavit evidence was admissible to show that there was not evidence before the justice on which the justice could properly decide that there was such a contract of service, since if there was no contract of service the justice had no jurisdiction.

In *Re Baker* (2) (1857) (2 H. & N. 219) where there had been a second conviction for absenting himself when under a contract of service, it was held by POLLOCK, C.B., and WATSON, B., that affidavits might be used for the purpose of showing that the absenting in respect of which a second conviction took place was the not returning to the service after the expiration of the imprisonment under the first conviction, for in that case the justice had no jurisdiction.

In *Re Authers* (3) (1889) (22 Q.B.D. 345), where the return showed that the prisoner had been convicted and was imprisoned as for a second offence under s. 3 of the Licensing Act, 1872, affidavit evidence was apparently admitted to show that the first conviction taken into consideration by the justice had been a conviction under an earlier and different statute and could not therefore be taken into account by the justice as entitling him to treat the conviction before him under the Licensing Act, 1872, as a second conviction. The court held that it could receive affidavits to show that the magistrate had "found a previous conviction when, in point of fact, there was none" (see 22 Q.B.D. at p. 350).

A Lastly, in *R. v. Judge Radcliffe, Ex p. Oxfordshire County Council* (4) ([1915] 3 K.B. 418), which it is true was an application for a writ of certiorari to quash two orders made by the county court judge acting as the judicial authority under the Mental Deficiency Act, 1913, affidavits were admitted to show that there were no proper grounds for making the orders admissible by the statute. One of the orders in question was a reception order made on the ground that the subject had no means of her own and was incapable of earning her own living and was not legally maintainable in their home by her parents, and was without visible means of support within sub-s. (1) (b) (i) of s. 2 of the Mental Deficiency Act, 1913. The court in terms there stated that on the application before it the court had to see ([1915] 3 K.B. at p. 421):

C "... whether the learned county court judge had any sufficient and proper materials before him to justify him in making these orders and whether in making them he acted on proper grounds contemplated by the statute "

and held that he had not.

D We therefore examined the return in the light of the affidavits to ascertain whether it was true that the applicant was a mental defective who was amenable to the procedure by way of petition under the Mental Deficiency Act, 1913. That inquiry involves the question whether on a proper construction of the Act there was any evidence on which the judicial authority could properly, that is as a matter of law, find that she was a person " found neglected " who could therefore be made the subject of the order which was made.

E The magistrate who heard the petition on Dec. 9, 1948, by his affidavit says that he decided that the applicant was a person subject to be dealt with under the Act by reason of her being " found neglected ". He had before him a statutory declaration by the petitioning officer of the Essex County Council that the applicant was subject to be dealt with under the Acts, that is to say, the Mental Deficiency Acts, 1913 to 1927, because she was " found neglected ". Such a declaration in support of the petition was necessary under s. 5 of the F Mental Deficiency Act, 1913. By itself that statement by the petitioning officer is no more than an assertion that the subject of the petition was in fact " found neglected ". The inquiry by the judicial authority was a judicial inquiry and involved the duty to decide whether the circumstances of the person who was the subject of the petition were such that on a proper construction of the words in the statute she ought to be found to come within them. The magistrate, G indeed, informs us that normally he would consider the petition and the documents required by s. 5 of the Mental Deficiency Act, 1913, and the petitioning officer would give him the facts on which it was represented the alleged defective was a person liable to be dealt with under the Act, together with other relevant matters concerning the family of the alleged defective, her home conditions and educational attainments.

H It was in June, 1948, that the petitioning officer had caused the applicant to be removed from the poor law institution where she was to a place of safety on the ground that she was at that date " found neglected ". The fair and reasonable inference is, therefore, that the magistrate did not decide that the applicant was subject to be dealt with under the Act as a defective " found neglected " on the mere statement in the affidavit supporting the petition, but in addition I had before him the facts concerning the applicant on which the petitioning officer alleged that this applicant was " found neglected " in June, 1948.

The relevant facts as they existed in June can be summarised as follows: When three months old the applicant had been placed by her mother in a poor law institution in Essex. She had been cared for and brought up by the poor law authorities. She had been sent to council schools. After leaving school at the age of fifteen she had been employed in various ways but had not given satisfaction. By June, 1948, she was seventeen years of age and there was no power to detain her in the poor law institution. She had £19 saved from her

wages standing to her credit in the Post Office Savings Bank. As an inmate of the poor law institution brought up from childhood by the poor law authorities, she had been clothed, fed and housed and in addition sent to school. She was still an inmate in the institution but it was feared that she was about to remove herself from the institution. There was evidence that she was a border-line high grade mental defective.

Counsel for the respondents argued that although in June those were the circumstances she could then properly be said to be "found neglected" because there was evidence that she was a mental defective and as such she required the special care appropriate for a mental defective, and being in an institution that could provide no more than the primary wants of an ordinary human being, such as food, clothing and shelter she was rightly to be regarded as "found neglected". Counsel further argued that if a mental defective is not being provided with the special care and special education which such a defective can and will receive if a reception order is made, that defective is neglected within the meaning of the Mental Deficiency Act, 1913, and that that interpretation has been put on the Act in a large number of cases.

I am quite unable to agree with this interpretation of the words "found neglected" as they are used in the Act in the context in which they are used [s. 2 (1) (b) (i)]. The Act is not designed to give power to local authorities to take under their control all mental defectives. The powers given are carefully limited by the Act and are only exercisable over persons coming within one or other of the categories enumerated in s. 2. The side-note of that section reads: "Circumstances rendering defectives subject to be dealt with". The words in s. 2 "found neglected" are followed by the words "abandoned, or without visible means of support, or cruelly treated". In that context they strongly suggest that the defective must be found through neglect in some degree of distress, such that a reasonable and humane authority having power under the Act ought to exercise the powers given by the Act and remove such a person to a place of safety and cause a petition to be presented.

"Abandoned" is a word which connotes a positive act on the part of someone who is responsible for the defective whereby that person has relinquished all care and control and forsaken the defective, thus leaving the defective wholly unprovided for and unprotected. It envisages, as do the words "cruelly treated", a physical condition brought about by positive and wrongful acts done to the defective which could properly be said to require the intervention of the authority by the exercise of the powers given to it by the Act. True the expression "found neglected" connotes a sin or sins of omission rather than of commission but when one finds that the expression "found neglected" is used and coupled with these two expressions "abandoned" and "cruelly treated" to describe the only circumstances which will render a defective person subject to be dealt with under the Act, the word "neglected" must at least be construed as meaning physically suffering from a lack of essentials through want of reasonable care.

Whether this construction which I have put on the words, "found neglected" as used in the Act is correct or not, counsel's contention appears to me to be answered by the fact that by the Mental Deficiency Act, 1927, s. 2, an amendment was specially made to s. 2 of the Mental Deficiency Act, 1913, whereby it was enacted that there should be inserted in para. (b) (i) of s. 2 (1) of the Act of 1913, after the word "treated" the words

"... or with respect to whom a representation has been made to the local authority by his parent or guardian that he is in need of care or training which cannot be provided in his home."

There in express terms Parliament has contemplated and dealt with the situation of a mental defective whose need is training which cannot be provided in his home. The local authority is not empowered to act because a mental defective needs care and training. In such a case it is only if the parent or guardian of the defective

A has made a representation to the authority that the authority can act. It would be strange, indeed, that Parliament should think it necessary to make this amendment if the local authority was already empowered by the words "found neglected" to deal with any mental defective who could not be provided in his home with the care and training needed by a defective.

B Furthermore, the words "found neglected" can only be intended to be applicable to a condition which is in existence. They are not apt to refer to a future condition which it is apprehended will or may come about.

For these reasons I am of opinion that there was no evidence before the judicial authority who made the reception order for the detention of the applicant on which that authority could properly decide that the applicant was a mental defective "found neglected".

C The applicant was, therefore, not one in respect of whom the powers given by the Mental Deficiency Act, 1913, could be exercised and we accordingly order her to be discharged.

LORD GODDARD, C.J.: I entirely agree with the judgment prepared and delivered by HILBERY, J., and desire to add very little.

D That this court has power to examine into the truth of the facts set forth in the return to a writ of habeas corpus and to examine them by means of affidavit evidence is clear from s. 3 and s. 4* of the Habeas Corpus Act, 1816. That Act effected a notable change in the law. Previously neither at common law nor by the Habeas Corpus Act, 1679, could the court do more than look at the return and decide whether on its face it showed a lawful cause of detention. The facts could only be controverted by an action for a false return. The reason for this is made clear by the opinion of WILMOT, J., delivered before the House of Lords in 1758†, which will be found in the volume in which the opinions of that great and most learned judge are collected entitled *Wilmot's Opinions* (5) (Wilm. at p. 77). It was because questions of fact were involved and it was only a jury that could decide them. If on inquiry the court finds there was no evidence by which the order or conviction can be sustained, they can release on habeas corpus or quash on certiorari. This is clear from the cases cited by HILBERY, J. But if there is evidence, whatever this court may think of it and no matter what conclusion the members of the court might have come to if they had been deciding the case which led to the conviction or order, they cannot disturb the finding, for so to do would be to act as a court of appeal in a matter in which no appeal is given. It is for this reason that it is so important to stress the duty of the judicial authority, especially in deciding whether the person brought before him is a mental defective. It is not enough that he should have two medical certificates. That they should have been given is a necessary preliminary to his having jurisdiction; but they are not conclusive in any shape or form. Had it been so intended the statute would have so provided and enabled the judicial authority to act merely on reading the certificates. Section 6 of the Mental Deficiency Act, 1913, makes it perfectly clear that there is to be a judicial inquiry and that the authority is in any case obliged to see the person concerned. In many cases, no

I * The Habeas Corpus Act, 1816, s. 3 and s. 4, provide: "3. In all cases provided for by this Act, although the return to any writ of habeas corpus shall be good and sufficient in law, it shall be lawful for the justice or baron, before whom such writ may be returnable, to proceed to examine into the truth of the facts set forth in such return by affidavit or by affirmation (in cases where an affirmation is allowed by law), and to do therein as to justice shall appertain . . .

"4. The like proceeding may be had in the court for controverting the truth of the return to any such writ of habeas corpus awarded as aforesaid, although such writ shall be awarded by the said court itself, or be returnable therein."

† On Mar. 9, 1758, WILMOT, J., and other judges gave certain opinions before the House of Lords on the law relating to the writ of habeas corpus. The particular matter to which reference is made here is the subject of the tenth question to which WILMOT, J., delivered his answers and is reported in Wilmot at p. 106 et seq.

doubt, the appearance and demeanour of the patient, to use a convenient phrase, would be enough when coupled with the certificates, but I cannot believe it would ever be sufficient in the case of one who nowadays is described as a border-line high grade mental defective, whatever that may mean. These people, I gather, are those whom no one except psychiatrists would recognise as mentally defective, and that there is room for a difference of opinion among the latter is shown by the affidavits in this case. There are plenty of idle, naughty and mischievous children and young persons who are not mental defectives within the Act. It is for the judicial authority to apply such tests and to call for such evidence as he may require, and I hope this is generally done. It is of the first importance, however, that the justice should not think that on the question whether the patient is a mental defective he is merely to act as a rubber stamp, to use a convenient colloquialism. The affidavits in this case lead me to think that Mr. Jolly did have evidence before him and that he must have made some inquiry, and I see no ground on which we could say that there was no evidence to support his finding as to mental deficiency.

On the other point, I entirely agree that there was no evidence to support the finding that the patient was found neglected within the meaning of the Mental Deficiency Act, 1913. This is clear from the context in which the words "found neglected" appear. To give it the meaning contended for by the respondents would mean that a child living in a good, perhaps luxurious home, to whom every attention and loving care is being given could be taken against the will of its parents and confined in an institution because some doctors think that some form of treatment might be beneficial, and the parents would be placed under the stigma of having neglected their child. While no doubt what was done in this case was thought and intended to be for the benefit of the girl, persons of whatever age are not to be deprived of their liberty and confined in institutions merely because doctors and officials think it would be good for them.

DEVLIN, J.: Counsel for the respondents in this case conceded that the principle which was laid down in *R. v. Judge Radcliffe, Ex p. Oxfordshire County Council* (4) ([1915] 3 K.B. 418) which principle HILBERY, J., has already quoted, was the one that applied to this case, and accordingly the only matter which it is necessary for the court to determine is the meaning of "found neglected" in s. 2 of the Mental Deficiency Act, 1913. On that point, I entirely agree with the reasoning that has been given by HILBERY, J., and I need add nothing to it. I wish, however, also to say that I entirely agree with what the Lord Chief Justice has just said about the duties of judicial authorities. I should like to point out that it is not enough under s. 1 [of the Mental Deficiency Act, 1913] that a person should be found to be a mental defective. That is only the first of the two stages in the inquiry that has to be made under s. 1, quite apart from s. 2, which we have been investigating in this case. For the purposes of s. 1, "mental defectiveness" means [see s. 1 (2)]

"a condition of arrested or incomplete development of mind existing before the age of eighteen years . . ."

That is the first thing the judicial authority has to find, and no doubt on that point the opinions of experts may be valuable to him. Having found that, he must then go on to consider whether the mental defective falls within one of the four categories, in this case the category of the feeble-minded, and for that purpose the Act requires that the mental defectiveness should be so pronounced [see s. 1 (1) (c)]

" . . . that they [that is, the mental defectives] require care, supervision and control for their own protection or for the protection of others . . ."

Although on that matter too the medical evidence may be of assistance, it seems to me to be peculiarly a matter on which the judicial authority, having made all the inquiries he thinks necessary in the best interests of the mental defective,

A should form his own view about his or her probable behaviour in the future and arrive at his own determination accordingly.

[After a discussion as to costs the court ordered that the Board of Control should pay to the applicant her party and party costs of these proceedings but did not award costs to the third respondent.]

Order that the applicant be discharged.

B Solicitors: *Robert K. George* (for the applicant and Mr. John Bradman); *The Solicitor, Ministry of Health* (for the first and second respondents); *W. J. Piper, Chelmsford* (for the judicial authority).

[*Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.*]

C QUINN v. HORSFALL & BICKHAM, LTD.

[MANCHESTER ASSIZES (Glyn-Jones, J.), December 12, 13, 14, 20, 1955.]

Factory—Dangerous machinery—Horizontal milling machine—Milling cutter used for automatic profiling—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 14 (1)—Horizontal Milling Machines Regulations, 1928 and 1934 (S.R. & O. 1928 No. 548, as amended by S.R. & O. 1934 No. 207), exemptions, para. (vii), proviso, reg. 3 (i).

Safe System of Working—Extent of master's duty—Exemption from particular fencing provision of regulations—Whether common law duty to require workman to work cutter of horizontal milling machine with hood down.

E The plaintiff, who was employed by the defendants as a fitter and miller at their factory, was injured by the cutter of a horizontal milling machine which he was operating, and which had been purchased from reputable manufacturers some two months before the accident. With the machine the manufacturers had supplied a hinged cover capable of being used as a hood or guard, but when they installed the machine in the factory they demonstrated it with the hood up, and the defendants' operators, to the knowledge of the defendants, worked with the hood up because keeping the hood down would have interfered with their work. At the time of the accident the plaintiff, who was a highly skilled and experienced workman, was engaged on the process of automatic profiling, and the accident happened because the plaintiff inadvertently failed to press in far enough the button on the switch-board which, if properly pressed, would have stopped the cutter revolving, and then, without looking to see what he was doing, and while the cutter was still revolving, he sought to make certain adjustments to the clamps holding the bar which he was profiling, with the result that the fingers of one hand were caught in the cutter. In an action by the plaintiff against the defendants for breach of their statutory duty to fence the machine and for negligence at common law, the allegations in regard to negligence were (a) that the clamping screw was set so near to the cutter that the plaintiff was likely to have his hand trapped, and (b) that it was the duty of the defendants to have instructed their operators to work with the hood down.

H **Held:** (i) there was no statutory duty on the defendants to fence the milling cutter, because (a) the Horizontal Milling Machines Regulations, 1928 and 1934, modified the absolute obligation in regard to fencing imposed by s. 14 (1) of the Factories Act, 1937, and, by para. (vii) of the exemptions* in the regulations, the process of automatic profiling was exempted from the application of reg. 3†, which provided for the fencing of horizontal milling machine cutters; and (b) the proviso‡ to the exemptions did not have the

* The relevant terms of the exemptions are set out at p. 779, letter I; post.

† The terms of reg. 3 (i) are set out at p. 779, letter F, post.

‡ The terms of the proviso are set out at p. 780, letter C, post.

effect of making the milling cutter used in an exempted process subject to the provisions of s. 14 of the Act of 1937, as the object of the proviso was merely to ensure that the requirements of s. 14 should apply in respect of any dangerous part of the machine other than a cutter.

Miller v. William Boothman & Sons, Ltd. ([1944] 1 All E.R. 333) applied.
Benn v. Kamm & Co., Ltd. ([1952] 1 All E.R. 833) distinguished.

(ii) in the circumstances, (a) the defendants were not guilty of negligence in having failed to foresee the accident and to take steps to guard against it by re-designing the machine, and (b) although the imposition by the regulations of a statutory duty did not relieve the defendants of their common law duties as employers, yet the defendants were under no duty at common law to insist on their employees working with the hood down, or to issue instructions requiring them to do so.

Principle stated by LORD DUNEDIN in *Morton v. William Dixon, Ltd.* (1909 S.C. at p. 809) applied.

[As to a master's duty to provide a safe system of work, see 22 HALSBURY'S LAWS (2nd Edn.) 187-190, paras. 313-317; and for cases on the subject, see 34 DIGEST 194-198, 1583-1623.]

For the Horizontal Milling Machines Regulations, 1928 and 1934, exemptions, reg. 3 (i), reg. 6, see 8 HALSBURY'S STATUTORY INSTRUMENTS 140, 141.]

Cases referred to:

- (1) *Miller v. Boothman (William) & Sons, Ltd.*, [1944] 1 All E.R. 333; [1944] K.B. 337; 113 L.J.K.B. 206; 170 L.T. 187; 2nd Digest Supp.
- (2) *Benn v. Kamm & Co., Ltd.*, [1952] 1 All E.R. 833; [1952] 2 Q.B. 127; 3rd Digest Supp.
- (3) *Morton v. William Dixon, Ltd.*, 1909 S.C. 807.

Action.

The plaintiff, a skilled fitter and miller, was employed by the defendants in their factory. The defendants' business included the re-conditioning of certain component parts of carding machinery used in the cotton-spinning industry, and the work on which the plaintiff was engaged was the "trueing-up" of the worn surfaces of carding bars. For this work the plaintiff used a horizontal milling machine with a revolving cutter some three or four inches in diameter. Each end of the bar to be trued was held in a clamp set on a turn-table, the two clamps being secured to the turn-table by nuts and bolts. Each clamp had an adjustable jaw, controlled by a screw, and the clamps themselves could be moved nearer to, or farther from, the centre of the turn-table. The nature of the work on which the plaintiff was engaged required frequent re-adjustment of the clamps. The movement of the cutter was controlled by two press buttons, which were in a switch-box let into the front of the machine, and also by a knob in front of the machine by the switch-box. The button on the left side of the switch-box was pressed to start the cutter revolving, and the button on the right side was pressed to stop it. When the knob was pulled out, the cutter moved slowly, or "traversed", towards the front of the machine, and the machine could be so set that the cutter rose and fell as it traversed. This movement had to be made in milling the surfaces of the carding bars, and the process was known as "profiling". On May 23, 1952, the plaintiff was engaged on this process. Finding that the bar needed re-setting, he pressed the right button in the switch-box, intending to stop the cutter revolving, and moved towards the centre of the turn-table. As he did so, he looked towards another man, to whom he wanted to give a message. As the other man was working a noisy machine, the plaintiff could not attract his attention by calling to him, but had to wait for the man to look up. After a moment or two, the plaintiff, thinking that the cutter of his own machine had stopped revolving, put both hands over the bar towards the clamps without looking to see what he was doing. The cutter, however,

A was still revolving, because the plaintiff had failed to push the press button far enough in to operate the switch, and his left hand was caught in the cutter and severely injured. The plaintiff claimed damages against the defendants for negligence and breaches of their statutory duty under the Factories Act, 1937, s. 5 (1), and s. 14 (1), and under the Electricity (Factories Act) Special Regulations, 1908 and 1944 (S.R. & O. 1908 No. 1312, as amended by S.R. & O. 1944 B No. 739).

J. R. D. Crichton, Q.C., and R. Lambert for the plaintiff.

J. D. Cantley, Q.C., and W. D. T. Hodgson for the defendants.

Cur. adv. vult.

C Dec. 20. GLYN-JONES, J., stated the facts and said: Counsel for the plaintiff contended that the revolving cutter was a dangerous part of the machine and that there was a statutory duty laid on the defendant company by s. 14 (1) of the Factories Act, 1937, to keep it securely fenced. Counsel for the defendants submitted that, the machine being a horizontal milling machine, the obligation securely to fence the cutter had been modified by the Horizontal Milling Machines Regulations, 1928, and that compliance with the regulations D relieved the defendants from any obligation imposed by s. 14 (1) of the Factories Act, 1937, in respect of the fencing or guarding of the cutter. He relied on the decision of the Court of Appeal in *Miller v. William Boothman & Sons, Ltd.* (1) ([1944] 1 All E.R. 333) which concerned a circular saw. There is a resemblance between the cutter of a horizontal milling machine and a circular saw, in that, in respect of most of the work to be done, there must be a gap in any E guard through which the component to be milled can reach the cutter, and, if the gap is large enough for the component to pass through, it will also be large enough to admit the fingers of the operator. If this is so, then it is, in practice, impossible to use a horizontal milling machine for most of the work for which it is designed without committing a breach of s. 14, and there is, therefore, as good a ground for modifying the absolute obligation imposed by statute in the case of F a cutter of a horizontal milling machine as there is in the case of a circular saw.

Regulation 3 (i) of the Horizontal Milling Machines Regulations, 1928 and 1934, reads:

G "The cutter or cutters of every horizontal milling machine shall be fenced by a strong guard, properly adjusted to the work, which shall enclose the whole cutting surface except such part as is necessarily exposed for the milling operations."

I call attention to the words, "except such part as is necessarily exposed for the milling operations". Regulation 6 provides:

H "The guards or other appliances required by these regulations shall be maintained in an efficient state and shall be constantly kept in position while the milling cutter is in motion, except when the tool setter is setting up the machine."

Immediately preceding reg. 1 there are set out certain exemptions, which read:

I "Nothing in reg. 3 shall apply to any milling cutter used on (i) a spindle which exceeds two and a half inches in diameter, or arbor which exceeds two inches in diameter at the place where the cutter is mounted: or when used for (ii) (a) making tools, jigs, or gauges for use in the factory, or (b) similarly accurate operations where, during the actual cutting process, all those parts of the machine which control the relative positions of the work and the cutter can be manipulated by the operator at his unrestricted discretion . . . (vii) automatic profiling . . ."

Automatic profiling is the process which was being carried on in this case and, therefore, is one of the processes to which exemption applies.

Counsel for the defendants submitted that the regulations, taken as a whole, defined exhaustively the duty of the occupier of a factory in respect of the fencing of the cutter, but counsel for the plaintiff contended that a horizontal milling machine used for automatic profiling, being exempted from the regulations, therefore continued to be governed by s. 14 of the Factories Act, 1937. He contended that, although reg. 3 granted to the occupier of a factory some modification of the stringency of the duty imposed by s. 14 (1), the same privilege or modification was not conceded in respect of the processes mentioned in the exemptions; and he submitted that his contention was expressly supported by a proviso to the exemption which reads:

“ Provided that these exemptions shall not prejudice the application of s. 10 of the Factory and Workshop Act, 1901 [now s. 14 of the Factories Act, 1937] in regard to fencing of such machinery.”

I was given some descriptions of most of the processes mentioned in the exemptions, and it is clear that the process described in para. (ii) (b) is one which cannot possibly be carried on if the whole of the cutter has to be securely fenced or guarded so as to satisfy the requirements of s. 14 of the Act of 1937. I think it would be odd if the effect of exempting the occupier from the requirements of reg. 3 had the effect of prohibiting the use of horizontal milling machines. If the contention of counsel for the plaintiff were correct, that is what the effect would be.

Some clue to the purpose of the regulations can be afforded if one supposes that reg. 3 and reg. 6 are intended to apply to what I might call repetition work. The machine is set, when the cutters are unguarded, by a skilled tool-setter, the guard is then put into position, and the machine operator, not necessarily highly skilled, carries on with the repetition work until the next occasion when the machine wants setting. To that end the only modification of the absolute duty imposed by s. 14 (1)—and it is the modification which makes it practical to work the machine—is that such part of the cutter as is necessarily exposed for the milling operation may be left unguarded; but the whole of the rest of the cutter must be securely and properly fenced or covered. Of the processes described in the exemptions some are obviously processes which have to be carried on by highly skilled men. We know that that is true of the processes described in para. (ii), and I think it is also true of the process that was being carried on in this case—automatic profiling. It is, I think, obvious that, in the carrying on of that process, it is necessary for the machine to be very frequently re-adjusted and re-set and for the operator to use a high degree of skill.

I think that, while there may have been other reasons why some of these exemptions were made, in respect of the processes described in para. (ii) and para. (vii)—and probably in respect of many of the other processes also—it may well be that the purpose of the exemption is to give to the skilled man a freedom which is not given to the more or less unskilled machine operator employed on repetition work. I think that the meaning to be given to the proviso to the exemptions is that it ensures that the requirements of s. 14 of the Act of 1937 are applied in respect of any dangerous part of the machine other than the cutter. That seems to me to be the conclusion reached by the Court of Appeal in *Benn v. Kamm & Co., Ltd.* (2) ([1952] 1 All E.R. 833). It is true that that case differs from the present case in that the process being carried on in that case was not one of the exempted processes. There the operator was adjusting the machine when he was injured, not by the cutter, but by another part of the machine, and the defendants in that case contended that the regulations were an exhaustive definition of the obligation imposed on the occupier of a factory to fence a machine or any part of it: in other words, if an occupier complied with the requirements of the regulation by fencing the cutter, he was under no obligation to fence anything else. The Court of Appeal did not agree with that view and held that the operation of the regulations was limited to the

A cutter of the machine, and that, for any other dangerous part, the duty of the occupier must be sought in s. 14 of the Act of 1937. It is perhaps worthy of note that the operator in that case was an apprentice nineteen years old, and not a highly skilled man, whereas the plaintiff in the present case is a man of a very high degree of skill and has been employed by the defendants as a skilled miller for over thirty years.

B Another thing which seems to me worthy of mention in regard to *Benn v. Kamm & Co., Ltd.* (2) is that the Court of Appeal reached the conclusion that the provisions of s. 14 applied to dangerous parts of the machine other than the cutter, although the regulations contain no provision expressly dealing with the matter. Therefore, one might well reach the same conclusion concerning an exempted process even if the proviso to the exemptions were not there. In a sense, therefore, to give this meaning to the proviso deprives it of much, if not all, effect, but I prefer to construe it as inserted for the removal of doubt rather than as a devious method of prohibiting such a process as that described in para. (vii). I have come to the conclusion that there was no statutory duty on the defendants to fence this cutter. I think that the effect of the regulations is to relieve them from the statutory obligation to fence the cutter.

D [HIS LORDSHIP found that the other breaches of statutory duty which had been alleged were not proved, and continued:] I have now to deal with the two allegations of negligence at common law. One is alleged in item 4 of the particulars:

“ . . . had the said clamping screw situate so near to the said cutter that the plaintiff was likely to have his hand trapped as aforesaid.”

E The substance of the second allegation (which was not originally pleaded, and which I allowed by amendment) was that the machine was supplied by the makers with a hinged cover capable of being used as a guard; that the defendants were well aware that their men were making a habit of working with the machine, especially in such a process as that which the plaintiff was performing, with the guard up, and not after putting it down; that the defendants should have observed it and seen to it that the risk to the men was diminished by making them use the guard as best they could; and that, accordingly, the defendants were guilty of a breach of the duty imposed on them by common law to take due care to diminish the risk incurred by the plaintiff in working the machine by requiring their workmen to use this cover, or guard, whenever possible.

G So far as the first of these two allegations is concerned, the reason why the accident happened is twofold: first, the plaintiff inadvertently failed to press the button in far enough to stop the cutter, and, secondly, he then sought to unscrew the screws without looking what he was doing. Those are two unusual happenings which coincided to bring about the accident. The defendants bought the machine from reputable manufacturers and it had been installed about two months before the date of the accident. It had been demonstrated by the makers and no one had ever suggested that there was a fault in the design in that the clamps were set too close to the cutter, or that the machine ought to be re-designed and the clamps put somewhere else. Is it to be said that the reasonable employer, at common law, must foresee an accident and an unusual event, and must re-design a machine in order to provide for them, if no one has suggested re-designing, and when a skilled man, and no one else, is working the machine, and when, as I have said, the machine has been obtained from reputable and competent manufacturers? I cannot hold that there was negligence on the part of the defendants in that they did not foresee this accident and took no steps by re-designing the machine to guard against it.

I The other allegation in regard to negligence is a much more difficult one. Counsel for the defendants submitted that, once Parliament had made regulations concerning the circumstances in which a particular machine must be fenced, those regulations were an exhaustive definition of the employer's duty and

superseded, as it were, the common law. I have come to the conclusion that that is not the right view. Supposing that the Factories Acts had not been passed and that the regulations had not been made, the common law would, unquestionably, have required the employer to take reasonable care to protect his servants from unnecessary danger by fencing or guarding any part of the machine at which the employee was required to work—any part that was dangerous and which it was reasonably practicable to fence. Parliament never imposed an absolute obligation, but imposed an obligation to fence where it was reasonably practicable to do so. I think the truth is that the common law obligation to fence is concealed or masked by the wider obligations imposed by statute, and, if for any reason the wider statutory obligation disappears, the common law duty once more arises, resting where it always has done—on the shoulders of the employer. I think that, notwithstanding the regulations, if a reasonable employer, in the circumstances, would have thought it was his duty, by giving directions to his workpeople, or, perhaps, merely by exhortation, to encourage the use of a guard so as to diminish the risk, then there is a breach of his duty at common law if he fails to do so.

I have, therefore, to consider whether a reasonable employer would have taken any steps beyond those actually taken by the defendants in this case to discourage the men from working with the guard up. Although, as I have said, I do not think that the existence of the regulations relieves the employer from any common law duty to fence, the fact that the regulations exist is a fact to be considered in assessing whether or not a reasonable employer would think it necessary to do so. The first thing which the defendants knew about this machine was that it was supplied with a hinged cover capable of being used as a hood or guard. This fits over the cutter, and it is not certain that, if it had been down at the time of the accident, the accident would have been prevented, because, even with the hood down, there is still left a space through which the plaintiff might have put his fingers. There is, however, a fair probability that, if the guard had been down, the plaintiff's hand might have come into contact with it before reaching the cutter, and it might certainly have been helpful.

I think that one must put oneself in the position of a reasonable employer who procures a machine from skilled and reputable manufacturers. He may observe that the machine is equipped with a cover capable of being used as a guard, and he knows that, if the machine is to be used for repetitive work, it will have to be guarded, but, under reg. 3, the fact that there is an appropriate guard is not necessarily an intimation to him that the guard ought to be used when exempted processes are being performed on the machine. It is submitted on behalf of the plaintiff that the defendants could have seen, by looking at the way in which the men were at work with the cover up, that they were running a risk. I accept the evidence of the plaintiff that it was customary for the men to work with the hood up and that the defendants knew it. In view of the facts that the regulations granted exemption so that there was not any need to use the guard and that the manufacturers demonstrated the machine when they installed it with the hood up, I have come to the conclusion, although with some hesitation, that there was no duty on the defendants in this case to insist that their employees should work, or to issue directions to their employees to work, with the hood down. To work with the hood down would, undoubtedly, seriously interfere with the operator. I think that, since the regulations plainly sanction working the machine without a guard, it would not be astute, but would be an injustice, to find the defendants unreasonable for not having caused their operators to use this guard. To apply to this case what LORD DUNEDIN said in *Morton v. William Dixon, Ltd.* (3) (1909 S.C. 807 at p. 809*), I think that, where

* Compare *Morris v. West Hartlepool Steam Navigation Co., Ltd.* (ante p. 385), where this principle was considered by the House of Lords in the light of LORD NORMAND's explanation of it in *Paris v. Stepney Borough Council* ([1951] 1 All E.R. at p. 49).

A regulations exist which prescribe a duty on the occupier of a factory in respect of a machine like this, and where the regulations themselves exempt the occupier from the obligation of providing a guard, the common law ought not to blame him for not providing a guard unless it is shown "that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it". Applying that test, I do not think I ought to convict the defendants of negligence at common law.

B If I had come to the conclusion that the defendants were guilty of any breach of duty which justified a verdict against them, I should be bound also to find that I could not acquit the plaintiff from some responsibility. Perhaps his failure to press the button in far enough and his not looking to see what he was doing were not serious acts of inadvertence, but, when all the circumstances are considered, I think that the plaintiff's responsibility for the accident could not be assessed at less than fifty per cent.

Judgment for the defendants.

Solicitors: *W. H. Thompson* (for the plaintiff); *A. W. Mawer & Co.*, Manchester (for the defendants).

[*Reported by M. DENISE CHORLTON, Barrister-at-Law.*]

D

NOTE.

E

KAI NAM (a Firm) v. MA KAM CHAN.

[PRIVY COUNCIL (Lord Oaksey, Lord Tucker, Lord Cohen, Lord Keith of Avonholm and Mr. L. M. D. de Silva), February 13, 14, March 8, 1956.]

F

Privy Council—Hong Kong—Estoppel—Estoppel in pais—Estoppel by representation—Action by landlord for possession—Notice of increase of rent given under an ordinance—Notice acted on by tenant—Whether landlord estopped from contending that the ordinance is not applicable—Landlord and Tenant Ordinance (No. 25 of 1947).

[As to the kind of representations constituting estoppels, see 13 HALSBURY'S LAWS (2nd Edn.) 471-473, paras. 539, 540.]

G

Case referred to:

- (1) *London County Territorial & Auxiliary Forces Assn. v. Nichols*, [1948] 2 All E.R. 432; [1949] 1 K.B. 35; [1948] L.J.R. 1600; 31 Digest (Repl.) 636, 7445.

Appeal.

H

The appellants appealed from orders of the Supreme Court of Hong Kong, made on July 2, 1954, allowing appeals from orders of District Judge WICKS dated Dec. 24, 1953. There were six appellants and the appeals were consolidated. The appellants were respectively tenants of premises, Nos. 1, 5, 7, 13, 15 and 17, Landale Street, Victoria, in the colony of Hong Kong, of which the respondent was the landlord. On Oct. 19, 1953, the landlord gave notice to

I

each of the tenants terminating his contractual monthly tenancy. On Dec. 16, 1953, the landlord commenced a separate action against each of the tenants claiming possession and mesne profits from Dec. 1, 1953. The actions were heard together by District Judge WICKS on Dec. 24, 1953. The tenants relied on the provisions of the Landlord and Tenant Ordinance (No. 25 of 1947), but the landlord contended that the premises were excluded from the operation of the ordinance as being "an entirely new building" within the meaning of s. 3 (1) (a) thereof. The tenants argued that the landlord was estopped from advancing this contention since he had served notices of increase of rent under the ordinance

and the tenants had acted on the notices. The district judge rejected this argument and the landlord's contention that each of the buildings was an entirely new building, and accordingly dismissed each of the actions. On appeal by the landlord to the Supreme Court of Hong Kong, the court held that each of the buildings was an entirely new building within the meaning of s. 3 (1) (a) of the ordinance and allowed the appeal. The leading judgment did not expressly deal with the issue of estoppel. The tenants appealed and on the consolidated appeal raised the issue of estoppel* on which only the case is reported. The Judicial Committee assumed that it had been raised before the Supreme Court of Hong Kong, who would be taken to have rejected the contention of the tenants.

Viscount Hailsham, Q.C., and J. G. Wilmers for the tenants.

Charles Russell, Q.C., and A. A. B. Fuller for the landlord.

LORD COHEN, having stated the facts, said: It will be convenient first to dispose of the question of estoppel. On this point their Lordships agree with the Hong Kong courts that the landlord is not estopped by having served notices of increase of rent purporting to be made under the ordinance and receiving such increased rent. It is sufficient to observe that if the documents relied on can be regarded as containing representations, such representations are representations of law, not of fact, and cannot found an estoppel: see *London County Territorial & Auxiliary Forces Assn. v. Nichols* (1) ([1948] 2 All E.R. 432).

[His LORDSHIP then considered the question whether the premises were entirely new buildings within s. 3 (1) (a) of the Landlord and Tenant Ordinance (No. 25 of 1947) and came to the conclusion that they were. The appeals were accordingly dismissed.]

Solicitors: *Reid Sharman & Co.* (for the tenants); *Gibson & Weldon* (for the landlord).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

* Recent cases have raised the question whether estoppel can be based in appropriate circumstances on representations concerning legal relations between parties or on representations of law; compare, e.g., *Lyle-Meller v. A. Lewis & Co. (Westminster), Ltd.*, [1956] 1 All E.R. 247 at p. 251, letters D-F, and see also *Langford Property Co., Ltd. v. Goldrich*, [1949] 1 All E.R. 402.

A

INGRAM v. INGRAM.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), February 15, 16, 17, March 9, 1956.]

B

Divorce—Cruelty—Criminal conduct—Wife's conviction for espionage—Husband a regular serving airman—Conduct of wife tending to strike at roots of matrimonial relationship—Inference of intention to injure.

Divorce—Desertion—Constructive desertion—Criminal conduct—Wife's conviction for espionage—Husband a regular serving airman—Inference of intention to end cohabitation.

C

Divorce—Evidence—Conviction—Inference to be drawn from indictment and conviction.

D

The parties were married in Germany in 1922, the wife being a German subject and the husband being a British regular soldier stationed in that country. In 1923 they came to England and set up home in Portsmouth, and the husband transferred on a regular engagement to the Royal Air Force. In the 1930's the wife became an ardent believer in the Nazi régime in Germany. In 1938 she joined the British Union of Fascists, a fact which she concealed from the husband because she realised that it would hurt him to know. In 1940 the wife was arrested and tried on charges of espionage. She was found guilty on two counts and sentenced to ten years' penal servitude. As a result of that conviction the husband's life in the Air Force became difficult and his health was affected. In 1945 he visited the wife in prison when she told him that she did not want anything more to do with him. The husband subsequently visited the wife in prison again, when there was discussion between them of divorce, and subsequently there was correspondence concerned mainly with financial matters, neither party evincing a desire to resume cohabitation with the other. After the wife's release from prison in 1947 the parties never came together. In March, 1954, the husband petitioned for divorce on the ground of the wife's desertion. At the trial the indictment against, and conviction of, the wife were admitted in evidence without objection and the petition was amended to allege cruelty on the part of the wife.

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Held: (i) the wife's conviction was rightly admitted in evidence and from it the court could draw such inferences as a reasonable man would normally draw from it; in the present case the inference so to be drawn was that the wife had been guilty of active and overt treasonable conduct (*Hollington v. Hewthorn & Co., Ltd.*, [1943] 2 All E.R. 35, distinguished).

H

(ii) that conduct amounted to cruelty since (a) it was of such seriousness and character that, considered against the background of the marriage, it struck at the roots of the matrimonial relationship and (b) having been pursued by the wife regardless of the hurt which might ensue to the husband was shown thereby to have been intended to injure him; accordingly, he was entitled to a decree on the ground of the wife's cruelty (*Waters v. Waters*, [1956] 1 All E.R. 432, applying the reasoning in *Lang v. Lang*, [1954] 3 All E.R. 571, to cruelty cases, followed).

I

Semble: the treasonable conduct of the wife leading to her conviction showed animus deserendi on her part since, as she knew, if her conduct had become known to her husband it would have rendered life with him impracticable (dictum of LORD PORTER in *Lang v. Lang*, [1954] 3 All E.R. at p. 580, applied).

Per CURIAM: the wife having taken the initiative and shown an unswerving intention not to live with the husband, his actions really constituted a recognition of her intentions, and such a recognition does not, it seems, result in law in such a mutual agreement as would terminate desertion (compare p. 797, letter H, post).

[As to the intention to be cruel, see 12 HALSBURY'S LAWS (3rd Edn.) 272, para. 520; and for cases on the subject, see 27 DIGEST (Repl.) 299, 2443-2447 and SUPPLEMENT.]

As to intention in relation to a charge of constructive desertion, see 12 HALSBURY'S LAWS (3rd Edn.) 248, para. 463; and for cases on the subject, see 27 DIGEST (Repl.) 350, 2899 and SUPPLEMENT.]

Cases referred to:

- (1) *Hollington v. Hewthorn & Co., Ltd.*, [1943] 2 All E.R. 35; [1943] K.B. 587; 112 L.J.K.B. 463; 169 L.T. 21; 2nd Digest Supp.
- (2) *Leyman v. Latimer*, (1878), 3 Ex.D. 15, 352; 47 L.J.Q.B. 470; 37 L.T. 819; 22 Digest (Repl.) 274, 2770.
- (3) *Castrique v. Imrie*, (1870), L.R. 4 H.L. 414; 39 L.J.C.P. 350; 23 L.T. 48; 11 Digest (Repl.) 525, 1375.
- (4) *In the Estate of Crippen*, [1911] P. 108; 80 L.J.P. 47; 104 L.T. 224; 22 Digest (Repl.) 274, 2772.
- (5) *Warburton v. Warburton*, (July 10, 1953), *The Times*.
- (6) *Woollard v. Woollard*, [1954] 3 All E.R. 351; 3rd Digest Supp.
- (7) *Cooper v. Cooper*, [1954] 3 All E.R. 415; [1955] P. 99; 119 J.P. 1; 3rd Digest Supp.
- (8) *Ivens v. Ivens*, [1954] 3 All E.R. 446; 3rd Digest Supp.
- (9) *Crawford v. Crawford*, [1955] 3 All E.R. 592; 120 J.P. 46.
- (10) *Waters v. Waters*, [1956] 1 All E.R. 432.
- (11) *Lang v. Lang*, [1954] 3 All E.R. 571; [1955] A.C. 402; 3rd Digest Supp.
- (12) *Beeken v. Beeken*, [1948] P. 302; 27 Digest (Repl.) 357, 2953.

Petition.

The husband, by a petition dated Mar. 26, 1954, prayed for a decree of divorce alleging:

"5. That the [wife] has deserted the [husband] without cause for a period of at least three years immediately preceding the presentation of this petition. Particulars of desertion: That on July 2, 1940, at the Old Bailey in the City of London the [wife] was convicted of espionage and was sentenced to a term of imprisonment for ten years. In or about the month of August, 1945, when the [husband] visited the [wife] in prison, the [wife] told the [husband] that she did not intend to live with him again and that she would give the [husband] his freedom. In or about the month of June, 1947, upon her discharge from prison the [wife] did not return to live with the [husband] thereby evincing an intention to bring cohabitation between the [husband] and the [wife] permanently to an end."

By her answer the wife denied desertion, admitted that from July, 1940, until April, 1947, she was serving a sentence of imprisonment and that since her release from prison she had lived separate and apart from the husband, but said that she, being at all times ready and willing to resume cohabitation with the husband on her release from prison, was compelled by the husband to live separate and apart from him, and cross-prayed for a divorce on the ground of the husband's desertion. By his reply the husband denied that the wife was at all times ready and willing to resume cohabitation with him or that she was compelled by him to live separate and apart from him, and alleged that alternatively by reason of the matters set out in para. 5 of the petition he had good cause for living separate and apart from the wife. At the hearing of the suit, SACHS, J., gave the husband leave to amend the petition by adding the following allegations:

"5A.—That the [wife] has since the celebration of the marriage treated the [husband] with cruelty and that the [husband] has thereby suffered injury to his health. Particulars. That on and after the outbreak of war in

A September, 1939, the [wife] caused the [husband] great distress by the expression of her anti-British and pro-German sympathies. She insisted, against the [husband's] wishes, on displaying swastika flags and a photograph of Hitler in the home, and on listening to pro-German and anti-British radio broadcasts.

B "The [husband], who had spent the whole of his adult life in the service of Her Majesty's Forces, was at the date of the [wife's] said conviction for espionage, serving as a sergeant in Her Majesty's Royal Air Force. By her espionage activities and her subsequent conviction in the circumstances aforesaid, the [wife] caused the [husband] to be subjected to much shame and humiliation among his fellow service-men, and the [husband] thereby suffered much mental anxiety, distress and nervous strain.

C "5B.—That in the further alternative, the [husband] will contend that by reason of the [wife's] conduct as set out above, the [wife] evinced an intention to bring cohabitation between the [husband] and the [wife] permanently to an end and that the [husband] was thereby compelled to live separate and apart from the [wife] since the date of the said conviction and has not since returned to cohabit with her."

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M. G. Polson for the husband.
J. G. K. Sheldon for the wife.

Cur. adv. vult.

Mar. 9. SACHS, J., read the following judgment: The parties in the present case married in Cologne in 1922, the husband then being a serving soldier in the Corps of Military Police and the wife being a German subject. E The following year they came to England and the husband transferred to the Royal Air Force where for the next twenty-five years or so he served under a regular engagement. There was a son born in 1923, who entered the Royal Navy in 1937. During the years prior to the outbreak of the 1939 war the parties had their permanent home in Portsmouth, though the husband's postings F were in other parts of the United Kingdom, with the result that he mainly saw the wife when he was on leave. The marriage at that stage seems to have been quite happy, subject only to some matters to which I will refer later. The husband was given considerable praise by the wife as regards marital relations, and he was in fact a very kindly disposed man. He was not, however, a man either of quick intelligence or of firm determination, and was indeed woolly G and indecisive in his general outlook on matters. Within the home, too, the wife seems to have had a good record. She was a woman who appeared to have been educated to a higher standard than the husband and to be of considerable intelligence; her character as shown in the witness-box had a quality far different from that of the husband—there was much of toughened steel about it and she was as firm and decisive as he was the opposite.

H So far as their evidence was concerned it is as well to say at the outset that I regard the husband as a witness of truth, though on many matters his memory was obviously weak. Where I have been able to make findings of fact, I have, however, no hesitation in accepting his evidence. The wife, on the other hand, showed a most unfortunate tendency to avoid giving either a direct or a frank answer on any point on which she thought her personal interests in the present I case were involved and I have had to class her as a completely unreliable witness in so far as there was any conflict as between her and the husband. Already before 1938 the wife was an ardent believer in the Nazi régime in Germany. In evidence she stated that her view then was (as indeed it still is) that the régime was doing great good in Germany and that she was an admirer of Hitler, whose photograph she placed on the inside of a cupboard door in the matrimonial home. It was also her belief that Nazism would be a good thing for England. When with the husband at home, she used to adopt a highly insulting attitude

to the Royal Family, and in addition she used to remain seated when the National Anthem was played in a cinema—matters which caused the husband distress. In 1938, the year of the Munich crisis, the wife became a member of the British Union of Fascists, a fact which she concealed from the husband because, as she stated, she realised that it would hurt him to know. At that time, and indeed for some period previously, she had been on friendly terms with two men named Swift and Watts who were respectively the district leader of the union and a member of the union, and both of whom used to visit the home. When war broke out she continued her membership of the union, kept up the photograph of Hitler, continued to think that Nazism would be a good thing for England, and believed that Hitler would set up the leader of the British Union of Fascists, Sir Oswald Mosley, in control, as the latter alone would be prepared to co-operate with him. The husband, whilst aware of the wife's general pro-Nazi views and of the fact that Hitler's photograph had not been taken down, had no knowledge at all at that time that the wife might be prepared to take any active step contrary to the interests of the country, and it is typical of the husband's indecisive attitude that he did not cause the photograph of Hitler to be taken down, as he feared his wife's reaction.

In May, 1940, the German armies were sweeping into France and it was towards the end of that month and in June that occurred the sequence of events which effectively broke up the marriage. At this time the wife was first arrested and then put on trial at the Central Criminal Court in London on charges relating to her conduct that May. At the trial which took place on June 28 and July 1 and 2, the wife, Swift and Watts were tried on charges of, in effect, conspiring to aid the enemy and of doing certain acts to assist the enemy. The wife and Swift were found guilty on the conspiracy count, and the wife was also found guilty on two other counts. Swift was also found guilty on other counts. Watts was acquitted on all counts against him. SINGLETON, J., thereupon sentenced the wife to two years' imprisonment on count one, the conspiracy count, and ten years' penal servitude on count three, to run concurrently. It is to be noted that the sentence on Swift was likewise two years on count one and fourteen years on a certain count seven. The wife sought leave to appeal to the Court of Criminal Appeal both against conviction and against sentence, but leave was refused. The counts on which the wife was sentenced read:

"Count 1.

"Conspiracy under reg. 2 (A) (1) of the Defence (General) Regulations, 1939: in that Marie Louise Augustina Ingram, William Swift and Reginald Watts, on divers dates between Apr. 1, 1940, and May 23, 1940, conspired together and with other persons unknown with intent to assist an enemy or to the prejudice of public safety, the defence of the realm or the efficient prosecution of the war.

"Count 3.

"Assisting an enemy contrary to reg. 2 (A) (1) of the Defence (General) Regulations, 1939: in that Marie Louise Augustina Ingram, on May 20, 1940, with intent to assist an enemy, committed an act likely to assist an enemy or to prejudice the public safety, the defence of the realm or the efficient prosecution of the war, namely, incited or endeavoured to persuade Joseph Baron to obtain and communicate to her, the said Marie Louise Augustina Ingram, or to William Swift, plans or information, to wit, blue-prints or designs calculated directly or indirectly to be useful to an enemy.

"Count 5.

"Inciting the commission of an offence under s. 1 (1) (c) of the Official Secrets Act, 1911, and contrary to the Official Secrets Act, 1920: in that Marie Louise Augustina Ingram on May 20, 1940, incited or endeavoured to persuade Joseph Baron to obtain and communicate to her the said Marie Louise Augustina Ingram or to William Swift, plans or information, to wit,

A blueprints or designs calculated to be directly or indirectly useful to an enemy."

It is convenient here to mention that the husband who, as previously stated, had no idea what the wife had been doing, stood loyally by her at trial and immediately afterwards, and indeed at the time, as is so often the case on the first impact of grave matters, found difficulty in believing that the wife could have been guilty. But the shock to him was a severe one in a number of ways. So far as the R.A.F. was concerned, impending promotion was held up, he was thoroughly interrogated on at any rate two separate occasions, and his life in the sergeants' mess became very difficult. From another angle the great shock, to use his own words, "unhinged his nerves" as is not unnatural when at one and the same time the bottom dropped out of his matrimonial life and everyone in the mess seemed to look at him when he came in. On more than one occasion whilst in the witness-box he referred to being in such a state that he did not know what he was doing and that the matter thus affected him for a period of years. That evidence rang true and has been accepted by me. In 1942 the husband was posted to India and remained there on active service till 1945. During that period he did not write to the wife. On his return to this country in the latter year he went back once more to live at his home town, Portsmouth. What had previously been the matrimonial home had been given up and the furniture dispersed amongst other members of his family. He himself went to live with a sister, and it is to be recorded that their mother had been killed in one of the air raids.

Having returned to England the husband on two or three occasions, I think three, visited the wife in prison, first at Aylesbury and then at Holloway. Immediately before the first interview the husband's state of mind as regards the possibility of living together again with his wife when she came out of prison was undecided. He said that he was prepared to live with her again at that stage—but his evidence on this point was given uncertainly and the true position seemed to me to be that he was simply in a state of indecision and was waiting to find out what the wife, the decisive one of the two, would say. On the first of his visits to prison it is common ground that the wife opened the conversation by mentioning how ill the husband looked. I accept the wife's evidence that he replied: "Oh yes, wouldn't you expect that? Look what you did to me". That interview was short and in it the wife, with characteristic decisiveness, told the husband that she did not want anything more to do with him—at the same time inquiring about the matrimonial furniture. That firm intimation that the marriage was at an end derived in part from her appreciation of how impossible it would be for her to go back to live with the husband in Portsmouth after the publicity of her trial and conviction, and in part from her almost fanatic determination to continue to assert her faith in Nazism. I note that in a letter after either the second or third interview there occurred the phrase:

"You are all so cowardly, everyone of you; no one has any pluck; I feel so sorry for all of you, but I do. I will not change for any of you here."

After the wife had made her declaration as to the future the husband became on terms of close association with a woman whom he had met in 1940 or 1941; and in view of that statement of the wife he became prepared to set up home with this woman and to marry her when he was free to do so, and so informed the wife on a later visit to the prison. (In thus stating the facts I reject the wife's version of events which placed the husband's close association at an earlier date, and alleged an earlier statement to her about it.) At the last of the prison interviews there was obviously some discussion between them on the matter of a divorce. Characteristically the decision on this matter, too, seems to have been left by the husband to the wife—and in particular the decision whether she herself should initiate some proceedings on a footing which was not in

evidence before me, or whether she should put in writing the determination which she had expressed orally in order that he, the husband, might take proceedings for his part. From the time of the last of the visits to the wife in prison, the husband has not seen her. When she was released she did not go to him in Portsmouth, nor did she ask to go to him. Equally in the correspondence there is no invitation by the husband to her to come and set up a home with him. In fact, the correspondence degenerated into a series of requests by the husband as to what attitude she was going to take in relation to the divorce, coupled with replies from the wife showing a determination to do nothing until she had such safeguards as seemed sufficient to her for getting hold of what she regarded as her rightful share in the furniture and so forth of the old matrimonial home. To this long-drawn-out correspondence I will return later when considering specific charges in the petition and answer.

The present proceedings were commenced by the husband swearing an affidavit in support of the petition on Mar. 26, 1954. Difficulties in finding the whereabouts of the wife led to the petition not being served till some time later. That petition as originally framed relied solely on the alleged desertion by the wife, referring in the particulars of desertion to the conviction, to the wife's statement on the first visit of the husband to her in prison in 1945, and to the fact that she did not return to him. The wife by her answer alleged that she was at all material times ready and willing to resume cohabitation with the husband and cross-charged him with desertion, relying on alleged statements by the husband to her on the occasion of one of the prison visits and of a letter of April, 1947, which she alleged had been written by the husband. The husband by his reply relied, inter alia, on the facts alleged to constitute constructive desertion as also constituting good cause for his not returning to the wife. When the trial had been in progress for some time, it became clear that the husband's allegations were not set out in the pleading in a form which enabled all the potential issues between the parties to be satisfactorily considered. Counsel for the husband thereupon applied for leave to add, inter alia, the following new paragraph:

" 5 A.—That the [wife] has since the celebration of the marriage treated the [husband] with cruelty and that the [husband] has thereby suffered injury to his health. Particulars. That on and after the outbreak of war in September, 1939, the [wife] caused the [husband] great distress by the expression of her anti-British and pro-German sympathies. She insisted, against the [husband's] wishes, on displaying swastika flags and a photograph of Hitler in the home, and on listening to pro-German and anti-British radio broadcasts.

" The [husband], who had spent the whole of his adult life in the service of Her Majesty's Forces, was at the date of the [wife's] said conviction for espionage, serving as a sergeant in Her Majesty's Royal Air Force. By her espionage activities and her subsequent conviction in the circumstances aforesaid, the [wife] caused the [husband] to be subjected to much shame and humiliation among his fellow service-men, and the [husband] thereby suffered much mental anxiety, distress and nervous strain."

Counsel for the wife did not feel able to press objections to the amendment; nor did he feel it necessary to act on the court's intimation that if he felt prejudiced he could seek an adjournment or could have the husband re-called for further cross-examination and the wife for further examination in chief.

It is convenient now first to turn to the issue of cruelty. In limine, one encounters the point which is of high importance on several aspects of this cause. What, in a case where the charge against a spouse is cruelty, is established by putting in evidence a conviction of that spouse and the indictment to which that conviction relates? On this point counsel for the wife cited the well-known decision of the Court of Appeal in *Hollington v. Hewthorn & Co., Ltd.* (1) ([1943] 2 All E.R. 35). There the plaintiff was claiming damages in respect of the

A alleged negligence of the defendant driver of a motor car and his employers. The driver of the plaintiff's car had died and it was sought to put in evidence against the defendants the conviction of the defendant driver for careless driving on the occasion of the collision. HILBERY, J., held it to be inadmissible and the Court of Appeal upheld that view. The judgment of the court was delivered by GODDARD, L.J., who said ([1943] 2 All E.R. at p. 39):

B "Before dealing with the authorities, let us consider the question in the light of the principles of modern law relating to evidence and see whether they support the admissibility of the conviction on such an issue as arises in this case."

The judgment contains (ibid., at pp. 39, 40) the following passages as regards modern law:

C "However, nowadays . . . generally speaking, all evidence that is relevant to an issue is admissible, while all that is irrelevant is excluded . . . In truth, the conviction is only proof that another court considered that the defendant was guilty of careless driving."

D The opinions of bystanders who saw the collision and of the criminal court hearing evidence relating to it are dealt with as follows (ibid., at p. 40):

E "It frequently happens that a bystander has a complete and full view of an accident; it is beyond question that while he may inform the court of everything that he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide; but in truth it is because his opinion is not relevant. Any fact that he can prove is relevant; but his opinion is not. The well-recognised exception in the case of scientific or expert witnesses depends on considerations which, for present purposes, are immaterial. So, on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant."

F After discussing the applicability of the general rules relating to "the best evidence" and to *res inter alios acta* GODDARD, L.J., goes on to say (ibid.):

G "It is for this reason that we have stressed the question of relevancy; and, indeed, it is relevancy that lies at the root of the objection to the admissibility of the evidence."

Proceeding then to deal with the authorities and to quote (ibid., at pp. 42, 43) the statement in *Leyman v. Latimer* (2) (1878) (3 Ex.D. 352 at p. 354) by BRAMWELL, L.J., that

H "... a conviction for felony is *res inter alios acta*, and of itself is no evidence in any civil proceeding, that the person convicted has committed a felony"

I as a ruling affecting the issue before the court, the court rejected the view that the conviction was admissible as *prima facie* evidence against the defendants, adding ([1943] 2 All E.R. at p. 44) that despite the interests of convenience it was safer for a civil court to come to its decision

"on the facts placed before it, without regard to the result of other proceedings before another tribunal."

Thus in *Hollington v. Hewthorn & Co., Ltd.* (1) the conviction itself was never admitted in evidence.

To turn back for a moment to the course of the present case, the conviction and the relevant indictment were admitted into evidence without any objection, and in my view rightly so. On my inquiring of the wife's counsel at an early

stage what was going to be his attitude to the conviction, he obtained instructions and said that the wife would aver the conviction was wrong. In fact when she went into the witness-box she gave evidence on this point, and it seemed to me right to permit her so to do despite the absence of any such issue on the pleadings. Her evidence, however, was confined in substance to bare assertions that the convictions were wrong and she gave no explanation of what had happened, still less evidence of any matter which could not have been put before the Central Criminal Court at the time or of any new factor since. Of such evidence as she did give me on this topic I merely record that it was most singularly unconvincing and obviously designed to keep this court in the dark: so it has no evidential weight at all. I would add that she never suggested for a moment that she had at any time tried to give some explanation of the conviction to the husband, not even when in 1945 he said in effect: "Look what you've done to me." That being the course which the trial took, counsel for the wife pressed strongly that on the authority of a passage in the judgment in *Hollington v. Heuthorn & Co., Ltd.* (1) ([1943] 2 All E.R. at pp. 43, 44) that whilst the court could accept in evidence the fact that there had been a conviction and that the wife had been sentenced to ten years' penal servitude, the court should in effect entirely disregard the conviction on the issues of cruelty and constructive desertion; that in relation to the conduct of the wife it established nothing; and that if the husband alleged any conduct of the wife which led to the conviction it was for him to prove it by evidence in these proceedings. Whilst not suggesting that the court should assume that the conviction was wrongful, he submitted that it had no more probative effect than if it were wrongful.

Counsel for the husband contended that *Hollington v. Heuthorn & Co., Ltd.* (1) was concerned with relevance and admissibility, whilst here the court is concerned with the inferences to be drawn when once a relevant conviction is in evidence; that in *Hollington v. Hewthorn & Co., Ltd.* (1) a true issue on the pleadings was the precise point purported to be dealt with by the conviction, whilst in the present case the issue was cruelty and the incurring of a conviction was part of an aggregate of material from which the court is asked to come to a conclusion; that the way in which a conviction disturbs relations between man and wife is something quite distinct from any matter on which authority had been quoted; and that the court should regard the conviction as *prima facie* evidence that it had rightly been incurred for the offences specified in the indictment, or, if the *Hollington v. Hewthorn & Co., Ltd.* decision (1) was a bar to that course, then at any rate the conviction was evidence that the wife's overt conduct had been such as to lead twelve reasonable men to consider she had actively done something gravely against the interests of the country and to lead a judge thereupon to give her a ten-year sentence. At this point it falls to be noted that, if one had to scrutinise the pleadings here from a similar viewpoint to that appropriate to the field of cross-demurrers, the petition did not originally allege and even as amended probably does not allege guilt of (as opposed to conviction for) a specified offence, whilst the answer simply traverses the relevant allegations and does not seek to confess and avoid any of them—as for instance by alleging that any conviction incurred was erroneous or that there were facts by reason of which this particular conviction should be regarded differently from other convictions. Such considerations do not, however, seem helpful and anyway I prefer to look at the position as it stands on the evidence as a whole.

The true issue argued by counsel, neither of whom stood on technicalities of pleadings, concerns the effect of a conviction in a field which is in many ways *sui generis*—the field of human relations between man and wife. It may thus be helpful first to consider what in that field is the likely impact on one spouse of a grave conviction of the other: what effect it may have on the innocent spouse: and how it will normally be regarded by the latter. That a conviction may have the most profound impact cannot be doubted. It can and not

- A infrequently does knock the bottom out of the marriage, according to the nature of the crime. To exclude the fact of the conviction from the evidence before a court considering the reason why the marriage ended would thus be wholly unrealistic—and was not argued in the present case. Why does it have that impact? The mere physical separation caused by imprisonment is one factor; but that is often only one factor among several. The conviction may have a
- B direct and profound effect on the life and health of the other spouse. Certain types of conviction may, as this one did, tend to bring suspicion and obloquy directly on that other spouse, with attendant effects on health. How is a conviction regarded as between spouses? Sometimes, as here, the innocent spouse adopts at first a loyal attitude of “I can’t believe it” or, perhaps more strictly, “I won’t believe it”. Whether or not that is the first reaction, realisation
- C normally ensues that the convicted spouse has done something which has led a jury of reasonable men to regard him as guilty; and such is the general regard for justice as administered in this country that only in exceptional cases do those near to the convicted spouse think otherwise—when they have some special reason for so thinking. “Look what you have done to me” expresses a typical view of the one party to a marriage both as to the guilt
- D of the convicted spouse and the effect on his or her innocent self. Accordingly in this particular field to assert that those most intimately concerned normally regard the conviction as no evidence of the person convicted having done something to incur the verdict, is also unrealistic.

- Once the conviction is admissible in evidence as being relevant, what then is the correct direction to a jury how that conviction should be regarded in a
- E case like the present, and in particular what inferences respectively may and may not be drawn against a spouse from the fact that the conviction has been incurred? Is that direction to the effect: (i) You may draw no inferences from the conviction as to the conduct of the spouse and you must regard it in the same way as an accident or misfortune affecting the marriage for which no blame is to be attributed to the spouse convicted; or (ii) You are entitled
- F as regards the conduct of the spouse convicted to draw such inferences as a reasonable man would normally draw, on becoming aware of the conviction against the background disclosed in evidence, and in particular such inferences as the other party to the marriage would normally draw. If the point as to inferences in a case such as the present is free from binding authority, one can perhaps first turn for guidance to an everyday event in the courts, albeit in
- G another field: the question put in cross-examination to credit in civil courts whether the witness has been convicted of an offence involving fraud. In that connection there is also the provision (applicable to civil procedure) of s. 6 of the Criminal Procedure Act, 1865*, which can result in the conviction itself becoming admissible. In such cases, at any rate, a direction of the type of the first part of (i) would clearly be wrong, and indeed absurd. Other instances
- H of a conviction being both admissible and relevant in civil proceedings have not been discussed before me, but generally speaking I would, subject always to authority, find myself on a question of inferences in sympathy with that passage in the *LAW QUARTERLY REVIEW*, 1943, Vol. 59, where in relation to such matters it is submitted (at p. 300):

- I “Although experience shows that the law and ordinary practice [of the community] are not always in accord, there is at least a presumption against a legal rule which gives rise to such a conflict [between them].”

For a judge to have to give in the same cause as regards the same man in regard to a conviction direction (ii) as regards his credibility and direction (i) as to his conduct would be odd. Unless, therefore, bound by authority to decide in the present case in favour of direction (i), I would be reluctant to do so.

* See 9 HALSBURY'S STATUTES (2nd Edn.) 588.

No authority dealing directly with the point was cited to me, nor have I A
so far come on such an authority. Indeed in the particular field under con-
sideration the point could hardly have arisen in its present form until both the
judgment in *Hollington v. Hewthorn & Co., Ltd.* (1) had crystallised the modern
principle under which a conviction may be inadmissible as irrelevant and also
the authorities of the last few years had clarified the law as to what may con-
stitute cruelty. The present position as regards, at any rate, modern authorities B
on convictions as evidence, thus appears to be as follows. First, *Hollington*
v. Hewthorn & Co., Ltd. (1) is a direct decision on admissibility only: and the
wide dictum there quoted of BLACKBURN, J., in *Castrique v. Imrie* (3) (1870)
(L.R. 4 H.L. 414 at p. 434) was concerned with a parallel situation. Turning
next to libel cases—for such was *Leyman v. Latimer* (2)—I am inclined to doubt C
if they help much in the field now under consideration, and that doubt particu-
larly applies to decisions on pleading points, when the defamatory words may
be construed so widely and a plea of justification must be construed so narrowly.
Having, however, considered the judgments in both reports of *Leyman v. Lati-*
mer (2) (3 Ex.D. 15 and 352) (a case on cross-demurrers noteworthy for the
conflict of eminent judicial views on more than one point, as the issues went
up from BLACKBURN, J., to CLEASBY, B., and POLLOCK, B., and then to BRAM- D
WELL, BRETT, and COTTON, L.J.J.) I find that BRAMWELL, L.J., in his above*
statement (3 Ex.D. at p. 354) (quoted in *Hollington v. Hewthorn & Co., Ltd.* (1),
[1943] 2 All E.R. at p. 42) seems to have differed on the relevant point from
BRETT, L.J., who, in relation to the defamatory words “felon editor” said (*ibid.*,
at p. 356):

“... a jury might possibly find that the plaintiff is a felon within its E
meaning; for it is admitted that he has been at some time convicted of
felony . . . and I suppose and shall assume that the plaintiff was rightfully
convicted”

whilst the other judgments do not refer to that point. I note, too, that neither
the standard text-books on libel current immediately before *In the Estate of* F
Crippen (4) ([1911] P. 108), which adopted a view on admissibility that has
been overruled by *Hollington v. Hewthorn & Co., Ltd.* (1), nor those books of
today appear to rely on the above* passage in the judgment of BRAMWELL, L.J.,
which did not form the basis of the decision of the court as a whole. Next,
one finds that on questions of credit a conviction is *prima facie* assumed to be
justified. Then as to cruelty—a rather special field—there is no considered G
directive available.

In the above circumstances it does not seem right to ascribe to phrases of the
width of those quoted in *Hollington v. Hewthorn & Co., Ltd.* (1) an intent that
they be applied rigidly to a whole range of fields not then under consideration,
however persuasively it may be argued that one might follow such a relatively
simple course. Accordingly, I think it is right to accede to the arguments of H
counsel for the husband and thus I reject direction (i) and adopt direction (ii)
as being correct in cases such as the present. The result is that where a marriage
breaks down on one spouse incurring a conviction it is open to a jury at least to
draw the inference that the overt conduct of the convicted spouse has been such
as to lead twelve reasonable men to consider him or her guilty. In many cases
I appreciate that that is tantamount to the drawing of an inference (in the I
absence of other acceptable evidence) of guilt—but that is not always necessarily
so. In a cruelty case the issue is not whether the conduct which can be inferred
constitutes the precise offence set out in the record of conviction, but whether
that conduct, even if falling short of the full, or perhaps any, offence, was such
as if discovered would be calculated to bring about harmful effects to the other
spouse. Thus, as regards a husband convicted of attempted rape on a young

* See p. 791, letter H, ante.

- A girl it may in some instances make little or no difference from the cruelty angle whether what the husband had done constituted attempted rape, indecent assault, or perhaps merely an act preparatory to either; and it might on the particular facts be open to a jury to infer any of these from the conviction. In taking this view I am fortified by having ascertained that it is usual in this Division in cruelty cases to accept a conviction, even where there has been no plea of guilty, as *prima facie* evidence of conduct resulting in that conviction. For instance, in each of the burglary cases, *Warburton v. Warburton* (5) and *Woollard v. Woollard* (6) ([1954] 3 All E.R. 351), I understand that at any rate one conviction seems to have been so accepted. To do otherwise might tend to result not so much in inconvenience as in a denial of justice, especially where the cumulative effect of a number of convictions is relied on. I need hardly add that of course the decision in *Hollington v. Hewthorn & Co., Ltd.* (1) is applied wherever the matrimonial offence charged is co-extensive with the subject-matter (e.g., rape, incest or sodomy) of the criminal conviction: there the facts constituting the offence have to be established *de novo*.

- Applying the above conclusions to the present case I draw the inference that the wife had been guilty of active and overt conduct of the type called "treasonable" and that it was that which led to the convictions for espionage and to the sentence of ten years thereon. On that footing the question arises whether in all the circumstances of the present case that conduct constituted cruelty to her husband, a serving R.A.F. sergeant, whom it in fact injured in the way previously mentioned. The authorities in which it has been discussed whether a conviction (in which term I include the conduct leading thereto) constituted cruelty to the other spouse, have mostly related to sexual conduct. Counsel for the wife submitted that sexual convictions were in a class apart as regards constituting cruelty; that there was no reported case of a single conviction for any other type of offence constituting cruelty, and that in any event a conviction for what he euphemistically called "political reasons" could in no circumstances constitute cruelty. It is, however, my view that in principle it does not matter whether the conviction relates to a sexual, violent, fraudulent, or treasonable matter. The first questions in each case must be: does the single conviction, viewed against the background of the particular marriage, tend to strike at the roots of the matrimonial relationship, and has it inflicted injury on the health of the other party? If the single conviction is of the requisite degree of gravity and has the above effect, then the court can look at the circumstances as a whole and see whether or not there is to be inferred that intention to injure which leads to a finding of cruelty. I should perhaps add that to my mind the difference between a single conviction and a succession of convictions is, in relation to cruelty, simply a practical one. Where there are a number the effect on the other spouse is cumulative and may more easily be shown to have resulted from the convictions. In addition, the remonstrances of the other spouse against a continued course of conduct can often provide evidence from which the convicted spouse's intent to injure may be the more readily established. Where there is only a single conviction it must be of special gravity and the surrounding circumstances would be somewhat exceptional before a court is satisfied that the elements constituting cruelty are convincingly proved. Wherever the word "conviction" is used above (or indeed elsewhere in this judgment) it is, of course, obvious that the conduct of the convicted spouse, its discovery, and the public verdict thereon each plays its part in affecting the other spouse; but it is the conduct which is the true cause of all that follows—and it is that conduct which has to be proved.

That the conviction here was of a high degree of gravity is clear; and where, at any rate, the other spouse is, as here, a loyal regular serving airman it is of a nature that strikes a fatal blow at the roots of joint life in mutual confidence as well as inflicting injury on the husband's career. That the conviction did strike

at the roots of this marriage and did injure this husband's health is established. There thus remains only the question of intent. On this I need but refer to a few short passages from recent authorities. There is first the judgment of KARMINSKI, J., in *Cooper v. Cooper* (7) ([1954] 3 All E.R. 415 at p. 421) where he summarises the law by first posing the question:

"... I have to ask myself whether a man of apparently normal intellectual powers should know the natural consequences on his wife of an indecent assault on the child of the marriage."

KARMINSKI, J., goes on to say that he could not

"help but infer... that a man in these circumstances... must have assumed or known, if he thought about it, that it would cause the gravest distress and possibly severe injury to health to his wife..."

Next came *Ivens v. Ivens* (8) ([1954] 3 All E.R. 446) (another sexual offence case) where LORD GODDARD, C.J., said (*ibid.*, at p. 448):

"I can imagine nothing more likely to affect the woman's health, as in fact it did in this case. I can conceive of no conduct more calculated to justify the court in saying that this man knew perfectly well what the effect would be on his wife and on the state of her health, and yet, being careless or indifferent of what the effect would be, he continued to carry on this filthy conduct."

Thirdly in *Crawford v. Crawford* (9) ([1955] 3 All E.R. 592 at p. 595) LORD MERRIMAN, P. (once more in relation to sexual offences), refers to the justices' finding that the husband's conduct

"... was such as must have been known by him had he considered the matter to be likely to injure her [the wife's] health when she came to know of it, both by reason of the shock of the disclosure and of the gossip which would be sure to arise in the small community in which they both lived",

and approves of the inference of cruelty drawn by the justices from those and other facts. Finally, there is *Waters v. Waters* (10) (*ante*, p. 432), reported since the trial of the present case. There LORD MERRIMAN, P., states (*at p. 441*) that the reasoning in *Lang v. Lang* (11) ([1954] 3 All E.R. 571) applies to cruelty cases, and WALLINGTON, J. (*ante*, at p. 442) summarises the position by saying that a man may be cruel to his wife if his attitude is:

"... I am going to live my own life in my own way, whatever the consequences to my wife..."

In the present case the wife admitted that she realised it would hurt her husband if he knew she had joined the British Union of Fascists. It is obvious that she realised that if she engaged in overt treasonable activities it would hurt him even more. She was an intelligent woman, and in choosing to pursue the active conduct which led to her conviction she must have done so having deliberately decided that she would adopt a course which could injure him gravely. Having in her own mind to choose between Hitler and her husband, she rejected her husband, reckless of the potential consequences to him. Even without the assistance of *Lang v. Lang* (11) (to which I will refer on a later point) I have no hesitation in inferring her intent to injure. She fully deserved the husband's reproach of "Look what you did to me", in 1945, and her conduct constituted cruelty. It was rightly neither pleaded nor argued that the cruelty had ever been condoned; and as regards the delay before the presentation of the petition, it seems to me that long though it was, it is excusable in all the circumstances of the case. Indeed I doubt if until recently it was realised exactly what legal claims he was entitled to put forward. In any event I would exercise in his favour the discretion that a court has in regard to matters of delay.

Having regard to the possibility that the present case will be taken further, it is proper for me also to deal with certain other issues that have been raised,

- A and in particular to find such facts as may be relevant to those issues. As regards desertion the case put forward by each spouse, irrespective of the issue which arose by reason of the wife's conviction, was that the other had during the course of the enforced separation due to the prison sentence evinced to the other an intention to desert. *Beeken v. Beeken* (12) ([1948] P. 302) was cited to show that where imprisonment is the cause of separation an animus deserendi
- B may supervene and then desertion will begin from that moment unless there is consent by the other spouse. Each spouse here relied on a statement alleged to have been made to the other during the husband's visits to the wife's prison in 1945. Those visits numbered three in all and I am satisfied that on the first of these the wife did say to the husband that she did not want him any more and made it plain that she did not intend to make a home with him
- C after her release. This state of mind on her part is consistent with her determined adherence to the Nazi point of view, the way in which she despises opposition to that view, and to her having sufficient intelligence to realise that life with the husband in his home town would in practice be impossible. It was after that interview—and not, as alleged by the wife, earlier—that the husband's association with another woman of his acquaintance took a closer
- D shape than before and led to the situation in which he desired to link his life with hers. At one of the next two prison interviews, however, the husband informed the wife of this desire, and there was then discussion as to the way in which the husband and wife could seek a divorce. The matter was left open to the wife either to start proceedings herself or to send the husband a letter confirming her desire not to live with him, which he could use in aid of such
- E proceedings as he might start. A correspondence developed on these lines and it is obvious that the only obstacle to the wife having taken one or other of the above courses was her desire to obtain to her own satisfaction admissions as to her right to certain property in the home. Thus at that stage it was merely financial matters which stood in the way. Indeed the wife has a strong desire to secure any financial advantage that is within her power up to this
- F very date, when she is demanding maintenance.

- When once the husband had told the wife of the other woman, she turned this round into a statement by him that he did not want her (the wife) and thus sought to fasten the animus deserendi on him. I am, however, clear that at no time from her statement at the first prison interview in 1945 did she depart from the view that she did not want to return to the husband. None of her
- G letters suggests such a return—although one of Sept. 21, 1945, contains a phrase (to which I will later refer) which was fallaciously relied on as showing such a desire. In the above circumstances the only matter which troubled me was whether the tenor of the correspondence as a whole showed that by the time the wife was due to leave prison there was a consensual separation. Neither party at that stage showed any desire to live with the other. There is, however,
- H this difference between their positions. On the wife's side she had taken the initiative and had as from the return of the husband to England both held and shown an unswerving intention not to live with him. As regards the husband his action really constituted a recognition of what were the wife's intentions, and thus an adoption of the only course open to him. I am inclined to the view that here such a recognition does not in law result in that type of mutual
- I agreement which terminates desertion, and thus does not bar the husband from obtaining a decree on that ground; but having decided the issue of cruelty, it does not seem necessary for me to deal more fully with this point.

I have so far considered the husband's charge of desertion without taking into account the wife's conviction. The fact that she had incurred that conviction was, however, relied on as also being grounds on which she was guilty of constructive desertion. That her conduct in incurring the conviction would, if it became known to the husband, render a joint life with him in the matrimonial

home at Portsmouth impracticable, was something which in my view was not merely obvious but was something which, as above indicated, was well appreciated by her. It is pointed out in *Lang v. Lang* (11) by LORD PORTER ([1954] 3 All E.R. at p. 580) that where a spouse is well aware that the probable result of his acts will be to drive the other party to the marriage into separation, his intention is so to do, whatever the consequence, even though he may hope or desire that the particular consequence will not result. Accordingly the same matters that lead me to conclude that the wife was guilty of cruelty, result in it being established that she in 1940 evinced an animus deserendi—and that would have been my finding even if there had been no injury to the husband's health. I need hardly add that the later death of the husband's mother in an air raid is not a matter which has been taken into account by me, although the bitterness of feeling against the wife in the husband's family was clearly increased by that factor. The wife's intentions, however, ought not to be inferred from events of which she had at the time no knowledge. It follows that the wife's desertion may well date back to long before the 1945 prison interview, but I would prefer to regard the wife's conduct in incurring the conviction as strong corroborative evidence of her capacity to reach a firm conclusion against the continuance of matrimonial life and thus as adding strength to the conclusion that what she said at the first prison interview in 1945 was meant by her to be decisive.

Turning now to the wife's charges against the husband of desertion, the findings of fact as to what happened in 1945 conclude against her the case she sought to set up. Having once evinced her firm intention not to make a home with him on her release from prison, she never resiled from that position. At no time after she made that statement did she in any way intimate to him that she desired after all to join him in any matrimonial home. On the contrary, in my view, she never desired so to do and I do not accept any evidence which she gave to the contrary. As to the passage in the letter of Sept. 21, 1945:

"As soon as I get my release I be home with you, unless you made some arrangements"

when properly construed against the background of what had been said and indeed of what was in the same letter, it constituted neither a hope that they might make a home together nor a request that there should be such a home. Those words were intended to communicate a threat. The meaning was to the effect: "If you do not make some satisfactory arrangements about my getting a proper share of the furniture, I will come to where you are living with your sister and make trouble." It was in this very letter that she used the word "cowardly" of the husband and his family and stated that she "will not change for any of you." It was in this way that it came about that she never returned to the husband when she left prison and sought the anonymity which she realised she could not get if she came to Portsmouth. It follows that her continued decisive intention not to join the husband bars her claim to a decree. I should perhaps add that I do not accept her version of certain letters from the husband which she alleges are missing. In the above circumstances I need not deal with the question of whether the correspondence after 1947 constituted an "agreement" on her part to live apart, save to say that she is in a far worse position on this point than is the husband. On that matter I do not think further findings of fact can assist. Nor does it seem necessary to deal separately with the husband's reply to her charge that he had good cause for staying separate, as the matters previously considered clearly preclude this point arising.

The present is a case in which both parties have sought a decree, and I have already indicated that I do not accept the wife's evidence that she desires to live again with the husband. On the contrary, the true reason why the present case has been contested is a financial one. The wife desires maintenance from the husband and considers that she would obtain it if the decree is awarded to

- A her. It is perhaps as well, therefore, to say that even were I wrong in holding the husband to be entitled to a decree, yet in any proceedings for maintenance in which the court is entitled to take into account the conduct of the wife, this seems to me to be eminently a case in which that conduct would operate in diminution—even to the point of extinction—of any sum which might otherwise be due to her. The true cause of the marriage breaking up was the wife's
- B continuing preference for the Führer over her husband. There will be a decree accordingly, and the prayer of the answer is rejected.

Decree nisi.

Solicitors: *Amphlett & Co.*, agents for *R. V. Stokes & Metcalfe*, Portsmouth (for the husband); *Wedlake, Letts & Birds* (for the wife).

- C [Reported by A. T. HOOLAHAN, Esq., *Barrister-at-Law.*]

Re H. L. BOLTON ENGINEERING CO., LTD.

- D [CHANCERY DIVISION (Wynn-Parry, J.), March 7, 13, 1956.]

Company—Winding-up—Petition by trustee in bankruptcy of shareholder—Competence—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 215, s. 216 (1), s. 224 (1).

- E H.L.B. held all the preference shares in a limited company which had a capital of £7,000 divided into 6,900 preference shares of £1 each and one hundred ordinary shares of £1 each. H.L.B. became bankrupt in 1950 and his trustee in bankruptcy presented a petition for the compulsory winding-up of the company. H.L.B.'s shares had not been transferred into the name of the trustee in bankruptcy. On the preliminary question whether the trustee in bankruptcy was entitled to apply for such an order, the trustee, conceding that s. 224 (1)* of the Companies Act, 1948 (which governs
- F the right to apply for a compulsory winding-up order), did not expressly confer on him the right to apply, contended that the right was conferred on him by virtue of s. 216* under which a trustee in bankruptcy of a contributory represents the contributory for all purposes of the winding-up.

- G **Held:** the trustee in bankruptcy was not entitled to present a petition for the compulsory winding-up of the company because s. 216 of the Companies Act, 1948, only began to operate after a winding-up had begun.

Per CURIAM: the Companies Act, 1948, s. 215 (under which on the death of a contributory his personal representatives become contributories) only begins to operate if and when a winding-up supervenes (see p. 801, letter E, post).

- H [**Editorial Note.** In BUCKLEY ON THE COMPANIES ACTS (12th Edn.), p. 441, it is stated that a shareholder does not become a contributory until the winding-up. WYNN-PARRY, J., commenting on this passage, intimates that it would be more accurate to say that a shareholder does not become liable, if at all, as a contributory until there is a winding-up (see p. 802, letter F, post).]

For the Companies Act, 1948, s. 215, s. 216, s. 224 (1), see 3 HALSBURY'S STATUTES (2nd Edn.) 634, 635, 642.

- I As to the position of a bankrupt contributory, see 6 HALSBURY'S LAWS (3rd Edn.) 634, para. 1247.]

Cases referred to:

- (1) *Morgan v. Gray*, [1953] 1 All E.R. 213; [1953] Ch. 83; 3rd Digest Supp.
- (2) *Re Cape Breton Co.*, (1881), 19 Ch.D. 77; 51 L.J.Ch. 202; 45 L.T. 395; 10 Digest (Repl.) 1039, 7186.

* The terms of s. 224 (1) and s. 216 so far as relevant are printed at p. 800, letter G, p. 801, letter G, post.

Petition.

The trustee in bankruptcy of the property of Henry Lorraine Bolton, a bankrupt, presented a petition for the compulsory winding-up of H. L. Bolton Engineering Co., Ltd. The ordinary shares of the company had, in or before January, 1950, been vested in or transferred to the petitioner's wife and children. The bankrupt was adjudicated bankrupt on July 27, 1950. The allegations in the petition included an allegation that the petitioner had in June, 1955, requested the company to register him as the holder of 6,900 preference shares to which he was entitled but the petitioner had not been registered as the holder of them. The company raised a preliminary question of law whether the petitioner, as trustee in bankruptcy, was entitled to present a petition for winding-up.

C. A. Settle for the petitioner, the trustee in bankruptcy.

Raymond Jennings, Q.C., and *N. S. S. Warren* for the respondent company.

Cur. adv. vult.

Mar. 13. **WYNN-PARRY, J.**, read the following judgment: At an early stage of the hearing of this petition, counsel for the respondents (to whom I will refer as "the company") intimated that he was prepared, without making any admissions, to proceed on the basis that the allegations in the petition were true, and that, if I were against him on the point which he wished to raise by way of demurrer, he would not further resist the making of a compulsory order. I am, therefore, concerned only with a question of law which can be put thus: Has the petitioner, who has presented this petition in his capacity of trustee in bankruptcy of one Henry Lorraine Bolton, to whom I will refer as "the bankrupt", the holder of 6,900 fully paid up preference shares of £1 each in the capital of the company (the remainder of its capital, consisting of one hundred ordinary shares of £1 each, being spread among the members of the bankrupt's family) any locus standi as such trustee in bankruptcy to present this petition?

The question, which is an interesting one, does not appear ever to have come before the courts for consideration. The Companies Act, 1948, s. 224, deals with the persons and bodies by whom a petition for the compulsory winding-up of a company may be presented. So far as material it provides as follows:

"(1) An application to the court for the winding-up of a company shall be by petition presented, subject to the provisions of this section, either by the company or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, together or separately: Provided that—(a) a contributory shall not be entitled to present a winding-up petition unless . . . (ii) the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months before the commencement of the winding-up, or have devolved on him through the death of a former holder . . ."

Prima facie, at any rate, that section would appear to be designed to provide an exhaustive list of those who are entitled to present a petition for compulsory winding-up. If the petitioner is to qualify as a person entitled to present such a petition, it must be on the ground that he is a contributory at the time when he presents the petition. Having regard to the provisions of s. 455, the definition section, it is necessary to refer to s. 213 for the definition of "contributory". This section reads as follows:

"The term 'contributory' means every person liable to contribute to the assets of a company in the event of its being wound up, and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of, the persons who are to be deemed contributories, includes any person alleged to be a contributory."

A In order, in turn, to find out who is liable to contribute to the assets of a company in the event of its being wound up, it is necessary to turn back to s. 212, where it is provided that, subject to a number of expressed qualifications, which I need not pause to consider, every present and past member shall be so liable. The emphasis is on membership: but, if the matter stood only on s. 212 and s. 213, there would be difficulty in the administration of the affairs of a company

B in liquidation as regards contributions from the estates of a deceased contributory, and as regards a contributory who had become bankrupt, and whose property was vested in and whose affairs were being administered by a trustee in bankruptcy. Some further provision in the Act was therefore necessary to deal with these two categories of cases. The first category is dealt with by s. 215, sub-s. (1) of which reads as follows:

C “If a contributory dies either before or after he has been placed on the list of contributories, his personal representatives, and the heirs and legatees of heritage of his heritable estate in Scotland, shall be liable in a due course of administration to contribute to the assets of the company in discharge of his liability and shall be contributories accordingly.”

D In construing this section, it should be borne in mind that the right of a personal representative of a deceased shareholder to present a petition is expressly given by s. 224. Bearing in mind that circumstance, having regard to the phrase [in s. 215 (1)] “either before or after he has been placed on the list of contributories”, having regard further to the limited object of s. 215 (1), viz., to establish the liability of the personal representative to contribute in a due course

E of administration, and having regard, finally, to the consequential provision with which the sub-section ends, I am of opinion that the section only begins to operate if and when a winding-up supervenes.

I have felt it advisable to construe s. 215 because of the necessity of construing s. 216, and because, in my view, the construction of s. 215 bears on the construction of s. 216, to which I now turn. This is the section on a particular construction

F of which counsel for the petitioner rested his submission that the petitioner as trustee in bankruptcy had a locus standi to present the petition. Section 216, so far as material, reads as follows:

“If a contributory becomes bankrupt, either before or after he has been placed on the list of contributories,—(a) his trustee in bankruptcy shall represent him for all the purposes of the winding-up, and shall be a contributory accordingly, and may be called on to admit to proof against the estate of the bankrupt, or otherwise to allow to be paid out of his assets in due course of law, any money due from the bankrupt in respect of his liability to contribute to the assets of the company . . .”

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Counsel's submission put shortly is that, admitting, as he must, that the case of a trustee in bankruptcy as such is not dealt with by s. 224 (1) (a) (ii), the omission

H is deliberate, on the ground that the right to present a petition has already been conferred on a trustee in bankruptcy by s. 216. To support this contention he submits that the words “shall represent him for all purposes of the winding-up” must include the right to present a petition. I am unable to accept this construction. In the first place, it would represent a very odd method of drafting, if it had to be said that the legislature had omitted from the apparently exhaustive list in s. 224 of those who have the right to present a petition, a particular class, because that right had already been given to that class, and to that class alone, and then only by implication and not expressly. In the second place, this section like s. 215 contains the phrase “either before or after he has been placed on the list of contributories”, and it is a phrase which, while perhaps not of itself decisive, points at any rate to a period of time at which a winding-up is in existence. In the third place the first operative provision is that the trustee is to represent, i.e., stand in the shoes of, the bankrupt, for what?—for all purposes

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of the winding-up—not, be it marked, a winding-up. In the fourth place it must be remembered that on a member of a company becoming bankrupt, the company being still a going concern, he does not by reason only of his bankruptcy cease to be a member: *Morgan v. Gray* (1) ([1953] 1 All E.R. 213). It is he and not his trustee in bankruptcy who is and continues to be the contributory. Apart from such an event as the trustee in bankruptcy becoming registered in respect of the bankrupt's shares, the position only changes on the company going into liquidation and then only to a limited extent. The name of the bankrupt may appear on the list of contributories, but he is treated as a stranger to the company (see *Re Cape Breton Co.* (2) (1881) (19 Ch.D. 77)), and is represented by his trustee in bankruptcy for the purposes of the winding-up, for example, the administrative provisions contained in the Companies Act, 1948, s. 257 to s. 277, and the trustee becomes a contributory accordingly. The vital point is the event of winding-up. Until then, assuming that the trustee does not obtain registration of the bankrupt's shares in his name, it is he and not the bankrupt who is a stranger to the company; and as such he can have no locus standi to present a petition as a contributory.

A number of authorities were cited in argument, but I agree with counsel that they do not really help towards the solution of the problem with which I have to deal, which essentially depends for its solution on the true construction of the sections of the Act to which I have referred.

I would only add that I have difficulty in accepting the statement in *BUCKLEY ON THE COMPANIES ACTS* (12th Edn.), at p. 441, "A shareholder does not become a contributory until the winding-up". I express this difficulty with considerable hesitation, because the statement on which it is clearly based appears at any rate as far back as the seventh edition, an edition, indeed the last, edited by the author himself: but I fail to see anything in the language of s. 212 and s. 213 which operates to limit the period during which a person is to be regarded as a contributory to a period beginning with the commencement of the winding-up of the company, nor can I appreciate, if the period is so limited, how any person could present a petition under s. 224 as a contributory. It would, I think, be more accurate to say that a shareholder does not become liable, if at all, as a contributory until there is a winding-up.

In the result the petition must be dismissed with costs.

Petition dismissed.

Solicitors: *Tarry, Sherlock & King* (for the petitioner); *Stafford Clark & Co.*, agents for *Faber & Co.*, Birmingham (for the respondents).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

A

NOTE.

DONN AND ANOTHER v. FEINSTEIN AND ANOTHER.

[QUEEN'S BENCH DIVISION (Slade, J.), March 5, 1956.]

- B *Evidence—Examination of plaintiff before examiner—Action for defamation—Examination on medical grounds—Risk to plaintiff's life of attending trial.*

[As to the examination out of court of witnesses within the jurisdiction, see 13 HALSBURY'S LAWS (2nd Edn.) 774, para. 851; and for cases on the subject, see 22 DIGEST (Repl.) 573-575, 6538-6561.]

- C **Appeal to judge in chambers.**

By their statement of claim, the plaintiffs, Hyman Donn and his wife, Eve Donn, both alleged that they had each been slandered by both of the defendants, Michael Feinstein and his wife, Marie Feinstein. Both the defendants denied by their defence that either of them had spoken or published the words alleged. On Jan. 4, 1956, Master CLAYTON ordered, on medical grounds, that the first-named plaintiff be examined before an examiner of the court, or a master or an examiner to be agreed on. The defendants appealed against this order to SLADE, J., in chambers, who has approved the publication of the following note of the reasons for his decision supplied by counsel.

- E *G. Cohen* for the plaintiffs.
Lord Dunboyne (F. H. Lawton with him) for the defendants.

SLADE, J., said that he was fully alive to the practice of requiring strong evidence in support of an application by a party to an action to have his evidence taken otherwise than before the court. Further, he was fully alive to the even greater importance of following that practice when the action was to be before a jury, more especially so when the party applying was the plaintiff and not the defendant, because it was the plaintiff who had chosen the venue, and, when the action was one for defamation, it was of paramount importance that the jury should see the plaintiff. Although granting or refusing leave was a question of discretion, the discretion should be exercised on the principle of refusing to allow the plaintiff's evidence to be given elsewhere than before the court, unless "there are very strong positive reasons" for his not attending to be examined at the trial" (see GATLEY ON LIBEL AND SLANDER (4th Edn.), p. 545, citing COTTON, L.J., in *Lawson v. Vacuum Brake Co.* (1884), 27 Ch.D. at p. 143).

- G He was prepared to assume that, where the reasons were based on the plaintiff's ill-health, an order for examination before an examiner would not be made unless it was shown that the plaintiff could only attend with some risk to his life.
- H There was evidence, which was not in dispute, that the first-named plaintiff suffered serious organic heart disease, and there was also evidence, which was not common ground although quite strong evidence, that the excitement of attending the trial and undergoing cross-examination might well involve considerable risk to his life. It seemed that no serious injury could accrue to the defendants by making the order which he proposed to make subject to conditions as to the use of the depositions at the trial whereas very grave injury might accrue to the first-named plaintiff if he refused to make the order *de bene esse* and, when the trial was reached, it was no longer in dispute between the parties that the first-named plaintiff's attendance would involve risk to his life. Therefore, he exercised his discretion, and varied the master's order by providing that the deposition of the first-named plaintiff to be taken thereunder should not be used at the trial of the action without the consent of the trial judge, who should be furnished with evidence of the first-named plaintiff's then state of health, he

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undertaking to submit himself for examination at his house by a doctor selected by the defendants, in the presence, if so desired, of his own doctor. A

Order varied.

Solicitors: *John Holt* (for the plaintiffs); *Max Bitel & Co.* (for the defendants).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law, from information supplied by counsel.*] B

HURLSTONE v. HURLSTONE AND ANOTHER. C

[COURT OF APPEAL (Singleton and Hodson, L.JJ.), February 27, 1956.]

Divorce—Appeal—Decree absolute—Leave to appeal—Applicant having had opportunity to appeal against decree nisi—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5 c. 49), s. 31 (1) (e). D

In May, 1954, the husband commenced proceedings for divorce. The wife was served with the petition in or before June, 1954. The petition was not defended. On Oct. 14, 1954, the husband was granted a decree nisi and on Dec. 3, 1954, the decree was made absolute. On Feb. 27, 1956, the wife applied for leave to appeal from the decree nisi and the decree absolute notwithstanding that the time limited for appealing had expired. She alleged that she had been told by the husband and believed that the proceedings for divorce had been discontinued; further that although she was told that the decree nisi had been mentioned in a newspaper and, on asking an inquiry agent in November, 1954, was told by him by letter that the husband had obtained a decree nisi on Oct. 14, 1954, yet on asking her husband whether this were true he had denied again that he had divorced her and she had believed him. E

Held: the wife had had time and opportunity within s. 31 (1) (e) of the Supreme Court of Judicature (Consolidation) Act, 1925, to appeal from the decree nisi before it was made absolute and her application must be refused. F

Application refused.

[As to appeal against a decree absolute of divorce, see 12 HALSBURY'S LAWS (3rd Edn.) 422, para. 942; and for cases on the subject, see 27 DIGEST (Repl.) 592, 593, 5543-5548. G

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1), see 5 HALSBURY'S STATUTES (2nd Edn.) 357.]

Application. H

The wife applied for leave to appeal from two decrees, viz., a decree nisi and a decree absolute of divorce made on Oct. 14, 1954, and Dec. 3, 1954, respectively, notwithstanding that the time limited for appealing had expired.

By petition dated May 19, 1954, the husband prayed for a decree of divorce on the ground of his wife's adultery. In or before June, 1954, the petition was served on the wife who signed acknowledgment of service and returned it to the husband's solicitors. On Oct. 14, 1954, the petition, which was undefended, was heard by His Honour JUDGE TUCKER at Hanley and a decree nisi was pronounced in the petitioner's favour. The decree was made absolute on Dec. 3, 1954. I

The grounds on which the wife applied for leave to appeal, notwithstanding that the time had expired, were that the decrees were obtained by fraud and by withholding material evidence. By her affidavit in support of the application, the wife alleged the following, among other, facts: (a) that she had told the

- A husband that she had committed adultery with the co-respondent and that as a result she was pregnant, she asked him to forgive her but he said he would commence divorce proceedings; (b) that at about the same time as the petition was served on her, she received a letter in her husband's handwriting proposing a reconciliation and she replied that she was willing to accept the proposal; (c) that on June 11, 1954, she received a telegram from the husband asking that she should meet him on June 12; (d) that they met, that there was a reconciliation and the husband asked her to return to him after the expected child had been born, they agreed that she should arrange for the child to be adopted, that sexual intercourse took place and that the husband asked her to give him the divorce papers which she had had from his solicitors as he had dropped the proceedings but to sign the acknowledgment of service and return it by post to his solicitors as a matter of form, and that the husband said he had told the solicitors to stop proceedings; (e) that she handed back the copy of the petition and other papers but retained and subsequently signed the acknowledgment of service and returned it as he suggested; (f) that on July 18, 1954, the wife gave birth to a male child by the co-respondent; (g) that on or about Aug. 27, the husband sent her money and she went to join him at Stoke-on-Trent; (h) that they continued to live separately until the husband had sufficient money for them to set up home together, and that during this period they met frequently and intercourse took place, and the husband on several occasions said that the divorce proceedings had been discontinued; (i) that on Nov. 24, 1954, she was told by a friend that the friend had read of her divorce in a local newspaper; (j) that she (the wife) thereupon wrote to an inquiry agent who told her that a decree nisi had been pronounced on Oct. 14, and that the husband, to whom she spoke of this, denied that he had divorced her and told her that "the decree nisi is termed for so long and then it is cancelled. You have nothing to worry about", which she believed; (k) that in May, 1955, she was asked whether she had seen a report of her divorce in a newspaper, that she had not but, the same evening, asked the husband whether it was true and that he said that it was not true and that he had dropped the divorce; (l) in June, 1955, the husband signed, as her husband, the necessary consents for the adoption of the child born to her in June, 1955; (m) in or about July, 1955, she received an anonymous letter, subsequently admitted to have been written by the husband's mother, informing her that the husband had re-married; and (n) that ultimately on Sept. 29, 1955, she consulted solicitors and obtained a copy of the decree absolute, and also a copy of the husband's marriage certificate to a third party and a certificate of the birth of a child to them. The wife deposed in her affidavit that until she obtained a copy of the decree absolute she did not know or suspect that her marriage had been dissolved and that if she had known that the husband had not abandoned the proceedings she would have defended them.
- H *E. B. Gibbens* for the wife.
The husband did not appear and was not represented.

SINGLETON, L.J.: This court cannot accede to the request for leave to appeal notwithstanding that time has expired. I should have liked to do so, but if we did so it appears to me, from that which we have been told by counsel I for the wife and from the documents before us, that there could only be one end to this matter.

Section 31 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, provides:

"No appeal shall lie . . . (e) from an order absolute for the dissolution or nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree nisi on which the order was founded, has not appealed from that decree."

The dates which are given to us are these. The decree nisi was granted to the husband, on the ground of the wife's adultery, on Oct. 14, 1954. It is quite clear that some little time later the wife was told by a friend of hers that she had read of her divorce in the paper. The wife then wrote to the inquiry agent with whom she had had an earlier interview, and the inquiry agent wrote on Nov. 22, 1954, telling her that her husband had

"obtained what is termed a 'Decree Nisi' on Oct. 14, 1954, at Hanley Divorce Court. I understand the decree has not yet been made absolute."

On Nov. 27, 1954, the wife wrote to the inquiry agent again:

"Thank you very much for the information you have given me. I would like this to be kept private and from my husband Thomas Hurlstone, in case he thinks I'm interfering with his business, as I'm still good friends with him and would like this kept."

The wife had seen her husband and he had told her something which apparently led her to think that he had dropped the divorce proceedings. She had said earlier how she knew from the friend that there had been something in the paper saying that a divorce had been granted against her. She knew from the inquiry agent that a decree nisi had been granted. I cannot see that anyone could successfully argue that she had not "time and opportunity to appeal from the decree nisi" before it was made absolute. If that be right, it would be a waste of time and money to give leave to appeal. It is for that reason that I think we are bound to refuse this application. At the same time, I feel sure that counsel is not quite right in saying that the wife's right to maintenance goes. I feel (without having had the matter argued) that that which has been told us is material on any application for maintenance which she may bring. I do not think that she ought to be prevented from having the whole of these matters put before whoever has to fix the amount of maintenance (if any) which she is granted. The application must be refused.

HODSON, L.J.: I agree. I also agree that, so far as we have investigated the matter, it does not appear that there is anything in s. 19 of the Matrimonial Causes Act, 1950, which would prevent the court looking into the whole of the facts of this case in the event of this ex-wife making an application for maintenance.

Application refused.

Solicitors: *Cunliffe & Airy*, agents for *Knight & Sons*, Newcastle-under-Lyme (for the wife).

[Reported by **PHILIPPA PRICE**, *Barrister-at-Law*.]

A INLAND REVENUE COMMISSIONERS v. HAMBROOK.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), March 5, 6, 7, 14, 1956.]

Master and Servant—Loss of service—Established civil servant injured through negligence of the defendant—Claim by the Crown to recover damages for loss of his services—Status of an established civil servant.

B Crown—Crown servant—Established “civil servant”—Whether under contractual relationship with Crown.

The defendant B. was an established civil servant, a tax officer in the Inland Revenue. When riding a motor cycle off duty he was injured in a collision with the defendant's motor vehicle, and responsibility for the accident was apportioned by agreement as to two-thirds to the defendant and as to one-third to B. B. was away from work for over nine months and the Crown sued the defendant for damages for loss of B.'s services during the period. The amount claimed was equivalent to the whole of B.'s pay (i.e., full pay, half pay and half increased pay) during the period less a credit for sickness benefit which he had not drawn. It was conceded that the payment of this pay to B. was a voluntary act, and no evidence was tendered of any other damage suffered.

D Held: the action, viz., an action per quod servitium amisit, did not lie because

(i) one element in the cause of action was that the relationship of master and servant should have existed between the plaintiffs and the servant, and the relationship between the Crown and an established civil servant was a different relationship (*A.-G. for New South Wales v. Perpetual Trustee Co. (Ltd.)*, [1955] 1 All E.R. at p. 856, applied), and further

E (ii) damage was essential to the cause of action and the payment of sick pay to B. was an act of bounty which did not amount to damage in law (*A.-G. v. Valle-Jones*, [1935] 2 K.B. 209, not followed; *Martinez v. Gerber* (1841), 3 Man. & G. 88, and dictum of LORD SUMNER in *Admiralty Comrs. v. S.S. Amerika*, [1917] A.C. at p. 60, applied).

F Per CURIAM: (i) an established civil servant is appointed to an office and is a public officer, remunerated by moneys provided by Parliament. His employment depends not on contract with the Crown but on appointment by the Crown, though there may be exceptional cases . . . where there is a contractual element (see p. 812, letter A, post).

G (ii) if the action per quod servitium amisit had lain, it would have been immaterial that the injury occurred when B. was off duty (see p. 813, letter I, post).

[**Editorial Note.** Apart from the decision in the present case whether an action lay at the suit of the Crown for damages for loss of the services of a civil servant, the judgment is of importance as authority on the legal relationship between the Crown and an established civil servant. LORD GODDARD, C.J., intimates that a civil servant would more properly be described as an “officer in the employment of Her Majesty” (see p. 810, letter I, post). Although an action for wrongful dismissal will not lie at the instance of such an officer, it seems that he, as distinct from an officer or soldier of the armed forces, may be able to maintain an action on a quantum meruit for salary if it should be unpaid (see p. 811, letter H, post; and generally compare 7 HALSBURY'S LAWS (3rd Edn.) 340, para. 732).

I As to the rights of a master for loss of the services of a servant from personal injury, see 22 HALSBURY'S LAWS (2nd Edn.) 251, para. 437; and for cases on the subject, see 34 DIGEST 180, 181, 1451-1470.]

Cases referred to:

- (1) *A.-G. v. Valle-Jones*, [1935] 2 K.B. 209; 104 L.J.K.B. 358; 152 L.T. 513; Digest Supp.

- (2) *A.-G. for New South Wales v. Perpetual Trustee Co. (Ltd.)*, [1955] 1 All A E.R. 846; [1955] A.C. 457.
- (3) *Admiralty Comrs. v. S.S. Amerika*, [1917] A.C. 38; 86 L.J.P. 58; 116 L.T. 34; 34 Digest 182, 1489.
- (4) *Best v. Samuel Fox & Co., Ltd.*, [1952] 2 All E.R. 394; [1952] A.C. 716; 3rd Digest Supp.
- (5) *Pigg v. Caley*, (1618), Noy 27; 74 E.R. 997. B
- (6) *Taylor v. Neri*, (1795), 1 Esp. 386; 170 E.R. 393; 34 Digest 180, 1453.
- (7) *Martinez v. Gerber*, (1841), 3 Man. & G. 88; 10 L.J.C.P. 314; 133 E.R. 1069; 34 Digest 180, 1456.
- (8) *Ditcham v. Bond*, (1814), 2 M. & S. 436; 105 E.R. 443; 34 Digest 180, 1454.
- (9) *Evans v. Walton*, (1867), L.R. 2 C.P. 615; 36 L.J.C.P. 307; 17 L.T. 92; C 34 Digest 169, 1315.
- (10) *R. v. Dr. Burnell* (1698), Carth. 478; 90 E.R. 875.
- (11) *Shenton v. Smith*, [1895] A.C. 229; 64 L.J.P.C. 119; 72 L.T. 130; 11 Digest (Repl.) 570, 79.
- (12) *Dunn v. R.*, [1896] 1 Q.B. 116; 65 L.J.Q.B. 279; 73 L.T. 695; 60 J.P. 117; 11 Digest (Repl.) 571, 85. D
- (13) *Reilly v. R.*, [1934] A.C. 176; 103 L.J.P.C. 41; 150 L.T. 384; Digest Supp.
- (14) *Terrell v. Secretary of State for the Colonies*, [1953] 2 All E.R. 490; 8 Digest (Repl.) 793, 509.
- (15) *R. v. Doutre*, (1884), 9 App. Cas. 745; 53 L.J.P.C. 85; 51 L.T. 669; 3 Digest 332, 207. E
- (16) *Bushe v. R.*, (May 29, 1869), *The Times*.
- (17) *Mitchell v. R.* (1890), [1896] 1 Q.B. 121n.; 16 Digest 240, 357.
- (18) *Leaman v. R.*, [1920] 3 K.B. 663; 89 L.J.K.B. 1073; 124 L.T. 159; 16 Digest 240, 358.
- (19) *Gibson v. East India Co.*, (1839), 5 Bing. N.C. 262; 8 L.J.C.P. 193; 132 E.R. 1105; 5 Digest 929, 7606. F

Action.

The plaintiffs, the Commissioners of Inland Revenue, claimed damages against the defendant, Walter Edward Hambrook, arising out of a road accident on July 26, 1952, in which Raymond Joseph Bryning, a tax officer employed by the plaintiffs, was injured, when his motor cycle came into collision with the defendant's car. The plaintiffs claimed damages for loss of his services, giving as particulars by which their amount would be measured the sums which they had paid to Mr. Bryning for full pay, half pay, and half increased pay during successive parts of the period while he was away from work recovering from his injuries. The net amount of these payments, after allowing for national insurance sick benefit payments, was £231 13s. 11d. The responsibility for the accident was agreed to be apportioned as to two-thirds to the defendant and as to one-third to Mr. Bryning. G

The Solicitor-General (Sir Harry Hylton-Foster, Q.C.), Sir Frank Soskice, Q.C., Sir Reginald Hills and Rodger Winn for the plaintiffs. H
N. R. Fox-Andrews, Q.C., and Humfrey Edmunds for the defendant.

Cur. adv. vult. I

Mar. 14. **LORD GODDARD, C.J.**, read the following judgment: This is a civil proceeding by the Crown brought on its behalf by the Commissioners of Inland Revenue pursuant to s. 17 (2) of the Crown Proceedings Act, 1947*,

* Section 17 (2) of the Crown Proceedings Act, 1947, provides: "Civil proceedings by the Crown may be instituted either by an authorised government department in its own name, whether that department was or was not at the commencement of this Act authorised to sue, or by the Attorney-General."

- A claiming damages from the defendant for the loss of the services due to personal injury of one R. J. Bryning, a tax officer, which loss they allege was caused by the negligent driving of the defendant.

By s. 4 of the Inland Revenue Regulation Act, 1890, and s. 57 of the Income Tax Act, 1918, the commissioners are required to

- B “ . . . appoint such collectors, officers, and other persons for collecting, receiving, managing, and accounting for inland revenue as are not required by law to be appointed by any other authority.”

Mr. Bryning was first appointed as a temporary clerk in the Inland Revenue Department in January, 1947. On Dec. 2, 1950, he was appointed a tax officer on a provisional basis pending the satisfactory completion of inquiries by the Civil Service Commission, whose duties are prescribed by an Order in Council of July 22, 1920, and finally on June 22, 1951, he was informed that he had been established as a tax officer, his appointment taking effect as from Jan. 1, 1950. By the letter of appointment he was informed of the salary he would receive and he was also given a copy of the Treasury Handbook for new Civil Servants from which he could ascertain the rules of the service with regard to sick leave and sick pay.

- D On July 26, 1952, Mr. Bryning was off duty and for his own purposes was riding a motor cycle which came into collision with a motor vehicle driven by the defendant. This action was tried on certain admissions of fact which were that: (1) The responsibility for the collision was as to two-thirds that of the defendant and as to one-third that of Mr. Bryning. (2) Mr. Bryning was off duty at the time of the collision. (3) Mr. Bryning's injuries were such as to keep him from work from the date of the collision until May 16, 1953. (4) The sum paid to Mr. Bryning in respect of that period was £274 9s. 9d. but for reasons which are not material to this judgment the plaintiffs are only claiming £231 13s. 11d.

- E The question that falls for decision is whether the Crown are entitled to maintain the action commonly known as “ per quod servitium amisit ” in respect of the loss of the services of an established civil servant. There is no direct authority on this point in English law. The only case in which such an action has been brought is *A.-G. v. Valle-Jones* (1) ([1935] 2 K.B. 209) where the Attorney-General preferred a Latin information claiming as damages the wages paid to and the expenses incurred on behalf of two members of the Royal Air Force who had been injured in a motor car collision caused by the negligence of the defendant. In that case the defendant conceded that an action for the loss of the services of a servant by the tortious act of a third party was available to the Crown as an employer as well as to a subject, which is the precise point which is in issue in this case. In the recent case of *A.-G. for New South Wales v. Perpetual Trustee Co. (Ltd.)* (2) ([1955] 1 All E.R. 846) it was held that the action per quod servitium amisit does not lie at the suit of the Government of New South Wales for the loss of the services of a police constable and while I shall have to deal fully and carefully with the judgment of the Judicial Committee in that case it differs from the present because of the particular and peculiar position of a police constable whose duties and authority remove him from the ordinary category of a Crown servant. It therefore becomes necessary to consider the origin and nature of this form of action and the nature of the employment of an established civil servant.

- I This action has often been described as an anomaly, for instance by LORD SUMNER in *Admiralty Comrs. v. S.S. Amerika* (3) ([1917] A.C. 38) where he added (*ibid.*, at p. 60): “ It appears to be a survival from the time when service was a status ”. Villein status gave the lord a proprietary interest in his villeins and so the old law by the time of Henry 4, probably by a gradual development, regarded a master as having a like interest in his servant. At any rate, this class of action is referred to in the Year Book of the 11th year of that king. In the same way a husband had a proprietary right in his wife which gave rise to

actions of criminal conversation and for loss of consortium: see *Best v. Samuel Fox & Co., Ltd.* (4) ([1952] 2 All E.R. 394) where the authorities are collected. SIR WILLIAM HOLDSWORTH in his HISTORY OF ENGLISH LAW, Vol. 3, p. 508, tells us that villeinage died a natural death under the Tudor dynasty and says it so appears from a case in 1618, *Pigg v. Caley* (5) (1618) (Noy 27) the last case in the books which relates to villein status, so it is remarkable that this action survived. But survive it did and though EYRE, C.J., thought that the action was confined to cases of menial, that is domestic, service (*Taylor v. Neri* (6) (1795) (1 Esp. 386), by 1841 we find in *Martinez v. Gerber* (7) (1841) (3 Man. & G. 88) a case where the loss of service was attributable as here to a road collision. So firmly established was the idea of a proprietary right in a servant that it is observable that the action was usually laid in trespass showing that the infliction of an injury on a servant was regarded as a direct injury to the master. The main question for decision in the last quoted case was whether if the servant only had an action on the case the master could bring a per quod action in case and it was held that he could. It does appear from *Ditcham v. Bond* (8) (1814) (2 M. & S. 436) that pleaders were accustomed* to lay this action and that of criminal conversation either in trespass or case. That service de facto though not under a contract was sufficient is clear from the cases relating to the seduction or abduction of a daughter and it was the opinion of SIR FREDERICK POLLOCK in his standard work on TORTS that the purpose for which alone this class of action may be said to survive is for the punishment of seducers or abductors. It would, however, be impossible to hold that it is only if there should be seduction, or, as in *Evans v. Walton* (9) (1867) (L.R. 2 C.P. 615), abduction, that the action can now be maintained; but it is clear that there must be some relationship of master and servant, whether arising out of contract or of domestic circumstances, on which to found the action. Having regard to its nature and origin, I am equally clear that it is not an action that the courts should be acute to extend and I am supported in this opinion by that of the Judicial Committee in *A.-G. for New South Wales v. Perpetual Trustee Co. (Ltd.)* (2) to which I shall refer later in this judgment.

Let me now consider the nature of the employment of an established civil servant. The terms "servant" and "service" are convenient expressions and in common use relating to civil employment under the Crown but I have to consider the true legal relationship. In BACON'S ABRIDGMENT sub. tit. "Prerogative" it is stated (Vol. 4 op. cit. at p. 167) that

"... the King hath an interest in all his subjects and is entitled to their services and may employ them in such offices as the public good and the nature of our constitution require."

It was also said in *R. v. Dr. Burnell* (10) (1698) (Carth. 478 at p. 479) that

"... every man is a publick officer who hath any duty concerning the publick, and he is not less a publick officer where his authority is confined to narrow limits, because 'tis the duty of his office, and the nature of that duty, which makes him a publick officer, and not the extent of his authority."

It is true that this was said in argument for the king in that case but the quotation has found its way into works of authority such as the late Mr. STUART ROBERTSON'S work PROCEEDINGS BY AND AGAINST THE CROWN (at p. 354) and in my opinion is accurate. An established civil servant, whatever his grade, is more properly described as an officer in the civil employment of Her Majesty and I can see no ground on which different rules of law in respect of his employment can be

* The old action for criminal conversation was abolished by s. 59 of the Matrimonial Causes Act, 1857, since repealed; cf. now the right to petition for damages under s. 30 of the Matrimonial Causes Act, 1950; 29 HALSBURY'S STATUTES (2nd Edn.) 416.

- A applied according to the grade or position he may occupy. They apply to a junior clerical officer as they do to a Permanent Secretary, just as the Judicial Committee said in *A.-G. for New South Wales v. Perpetual Trustee Co. (Ltd.)* (2) ([1955] 1 All E.R. at p. 857), the same rules of law in this respect apply in relation to the armed forces to a field marshal as to a private soldier. It is settled beyond controversy that the Sovereign can terminate at pleasure the employment of
- B any person in the public service unless in special cases where it is otherwise provided by law. If authority be needed for what may be considered as axiomatic, I need only refer to *Shenton v. Smith* (11) ([1895] A.C. 229) and *Dunn v. R.* (12) ([1896] 1 Q.B. 116); but it is curious that there does not appear to be a definite and clear decision whether there is a contract of service between the Crown and its officers in the civil service. Mr. STUART ROBERTSON in the work
- C to which I have already referred, after citing numerous cases and instances of petitions of right that have been presented though not in all cases tried, says (op. cit. at p. 359):

“Even if there be a contract of service the Crown’s absolute powers of dismissal must be deemed to be imported into it . . .”

- D LORD ATKIN said in *Reilly v. R.* (13) ([1934] A.C. 176 at p. 180) that

“ . . . a power to determine a contract at will is not inconsistent with the existence of a contract until so determined.”

Just previously to this passage he said (*ibid.*, at p. 179):

- E “ . . . their Lordships do not find it necessary to express a final opinion on the theory accepted in the Exchequer Court [i.e. in Canada] that the relations between the Crown and the holder of a public office are in no degree constituted by contract. They content themselves with remarking that in some offices at least it is difficult to negative some contractual relations,
- F whether it be as to salary or terms of employment, on the one hand, and duty to serve faithfully and with reasonable care and skill on the other.”

It is I think fair to say that the trend of their Lordships’ opinion seems to be that in the absence of some special term, such as engagement for a definitely expressed period, there is not a contractual relationship.

- G The Solicitor-General contended that in these cases there is a contract though it is one which cannot be enforced against the Crown, so that not only can no action lie for wrongful dismissal but that no action, or formerly no petition of right, could be brought for salary earned but not paid. This contention, if correct, would I think be enough without more to show the vast difference between the relationship of the Crown and its officers to the ordinary relation of
- H master and servant. Although it is clear that no action for wrongful dismissal can be brought by a discharged civil servant, I may be allowed to say that I adhere to the opinion which I expressed in *Terrell v. Secretary of State for the Colonies* (14) ([1953] 2 All E.R. 490 at p. 497) that he could recover his salary for the time during which he has served. He would claim on a quantum meruit and I am fortified in this view by *Reilly v. R.* (13), by *R. v. Doutré* (15) (1884) (9 App. Cas. 745) and by *Bushe v. R.* (16) (May 29, 1869, *The Times*) referred to in ROBERTSON’S book at p. 338. It may well be that there is a difference in this respect between pay due to a civil servant and to a soldier, whether private or officer. That a soldier cannot recover pay by action was laid down in *Mitchell v. R.* (1890) (17) ([1896] 1 Q.B. 121n.) and followed by ACTON, J., in *Leaman v. R.* (18) ([1920] 3 K.B. 663), but the reason for this rule will be found in the judgment of TINDAL, C.J., in *Gibson v. East India Co.* (19) (1839) (5 Bing. N.C. 232 at p. 274). If I may be bold enough to express a conclusion on a matter on
- I

which the Judicial Committee hesitated in *Reilly v. R.* (13), it is that an established civil servant is appointed to an office and is a public officer, remunerated by moneys provided by Parliament, so that his employment depends not on a contract with the Crown but on appointment by the Crown, though there may be as indicated in *Reilly v. R.* (13) exceptional cases, as for instance an engagement for a definite period where there is a contractual element in or collateral to his employment.

The Solicitor-General contends, however, that it is unnecessary, in order to support this class of action, to show that service should be rendered under a contract. De facto service, he contends, is enough. I agree that the cases support this though I believe that those that do are all concerned with service of a menial, that is domestic, character, such as that of a daughter or female servant who has been seduced or of a son enticed away from working for his father. Even these all depend on there being some, though it may be almost fictitious, relation of master and servant. On this matter I am fortunate in having the guidance of the Judicial Committee in *A.-G. for New South Wales v. Perpetual Trustee Co. (Ltd.)* (2) and I would refer in particular to the concluding paragraphs of the judgment beginning with the penultimate paragraph ([1955] 1 All E.R. at p. 858). As I have said above, it is true that the case was concerned with the service of a police constable whose common law duties relating to independent action distinguish him from other servants of the Crown, but if the master and servant relation on which the action per quod servitium amisit rests is wholly different in kind not only from the relation of the Crown and a constable but from that of the Crown and a serving soldier so also do I think it is different from that of the Crown and an established civil servant whose duties are of a public nature and in part at least laid down by statute.

Even if I am wrong in the opinion which I have expressed above that the relationship is not contractual, a contract which gives no remedy to the employee against his employer for its breach is wholly different in kind to those which have hitherto supported the action. As I am myself a member of the Judicial Committee it is not, I hope, impertinent for me to say how wholly I agree with their opinion ([1955] 1 All E.R. at p. 858) that

“ . . . this form of action should not be extended beyond the limits to which it has been carried by binding authority or, at least, by authority long recognised as stating the law.”

There is another point raised by the defence with which I ought to deal. It is conceded that the payment of sick pay is a voluntary act in the discretion of the Crown. Apart from the other matters with which I have dealt, it is contended that this forms a complete answer to the plaintiffs' claim in that the Crown cannot recover as damages what they have paid as a bounty. To that the Solicitor-General's answer was that I should apply the reasoning of *MACKINNON, J.*, on this matter in *A.-G. v. Valle-Jones* (1) ([1935] 2 K.B. 209) and also that the claim was not for the sick pay itself but for compensation for loss of service which might be measured by that payment. On this second and somewhat subtle contention I say that this is an action on the case in which damage is an essential ingredient; see *Martinez v. Gerber* (7) (3 M. & G. 88). If the damage alleged to have been suffered consists of the payment out of money which is in fact no more than a gift or bounty, that, in my opinion, cannot amount to damage in law. It has not been caused by the wrongful act because the Crown was pleased to extend its bounty to the injured man. I had no evidence that any actual damage was caused to the department by being deprived of the services of a trained man or that they in fact incurred any expense in training or engaging someone else to take his place. But it was said that in *A.-G. v. Valle-Jones* (1) *MACKINNON, J.*, applied the simple test of whether it was reasonable

- A for the Crown to have made the payments. With all the respect that I always pay to that learned judge's opinions, I am unable to understand the view he formed with regard to LORD SUMNER's speech in *Admiralty Comrs. v. S.S. Amerika* (3) ([1917] A.C. 38). It is true that that case was dealing with the question whether the death of a human being could be relied on as forming a cause of action but, as the headnote accurately shows, there was also the question
- B whether pensions, which were voluntary payments as is the sick pay in the present case, could form the subject of a claim for damages. That the noble and learned Lord throughout his speech also had these per quod actions for loss of service in mind is clear from the opening words of the first paragraph on p. 53 and also from the first paragraph of p. 60. Then the concluding paragraph of his speech begins ([1917] A.C. at p. 60):

- C "My Lords, apart from the question of civil liability for the death of a human being, there is another aspect of this case"

and then he discusses whether, as I read it, in any action of tort a voluntary ex gratia payment to a third party can be the subject of a claim for damages. His decision that it cannot appears both clear and emphatic. I accordingly

D think that the judgment of MACKINNON, J., on this point cannot be supported. On this ground also the action fails.

- Before parting with the case, I hope I shall not be regarded as going beyond my province if I add a word, as this action was said to be brought to test the question whether in such cases as these the loss ought to fall on the taxpayer. There is, as it seems to me, a perfectly simple way of protecting that much
- E harassed class. Those of us who have to try these personal injury cases know quite well how often it happens that a considerate employer, relative, or some kindly disposed friend gives an injured man a sum equivalent to his wages during incapacity on the terms that if he recovers his loss of wages as part of his special damage in an action he should repay what is advanced to him. Sometimes, too, I have known a loan to enable an injured man to go away for convalescence or to receive some special treatment which he could not afford from his
- F own resources. I have never known these items when claimed as special damage to be disallowed, provided they were reasonable, because the injured man had to seek assistance such as I have described to enable him to obtain the benefits and which he would have to repay. There may be some ground of high policy
- G of which I am unaware which would prevent a department from giving sick pay to an injured member of its staff on the terms that it was to be repaid if he recovers what he would have earned but for the accident as special damage. I cannot think that there is. If this were done, the taxpayer would be adequately protected. One other consideration should not be overlooked. Under modern
- H legislation an injured man if he is in part to blame will only be entitled to recover a proportion of his damage. The Solicitor-General boldly argued that the department was entitled to recover the whole of a man's wages as the measure of compensation although were the latter the plaintiff he could on the admitted facts of this case, make the defendant liable only for two-thirds. I do not propose to decide whether this argument is sound or not for it has become unnecessary but if it is it would, in my opinion, not only be an injustice to the
- I defendant but would add another to the many anomalies which surround this class of action.

I ought perhaps to add this, to show that I have not overlooked the second submission made by the defendant. If a per quod action would lie, it could in my opinion make no difference that the infliction of the injury which caused the loss of service happened when the servant was off duty. So long as the service was in existence that is enough. Were it otherwise, there would I think have been a short and simple answer in most of the seduction cases.

There must be judgment for the defendant with costs.

Judgment for the defendant.

Solicitors: *Solicitor of Inland Revenue* (for the plaintiffs); *White & Co.* (for the defendant).

[*Reported by A. P. PRINGLE, ESQ., Barrister-at-Law.*]

R. v. HUDSON.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Byrne, JJ.),
March 19, 1956.]

Criminal Law—Fraud on the Crown and public—False accounts and certificate with intent to defraud the Revenue—Whether an offence at common law.

Not only is a fraud by a public officer on the public indictable, but also it is a misdemeanour at common law for any subject to act in such a way as to defraud the Crown and the public (see p. 816, letter I, to p. 817, letter A, post).

The appellant was convicted of making false statements to the prejudice of the Crown and the public revenue with intent to defraud in that he had sent to the Inland Revenue accounts which falsely stated the profits of his business and also a certificate of disclosure which he knew to be false. On appeal against his conviction, he contended that the offences charged were not known to the common law and were not indictable.

Held: the appellant had been rightly convicted, since the offence charged disclosed the offence of fraud on the Crown and the public which was indictable as a common law misdemeanour.

Dicta of LORD MANSFIELD, C.J., in *R. v. Bembridge* (1783) (22 State Tr. at p. 155) and *R. v. J.* ([1933] N.I. 73) approved.

Appeal dismissed.

[As to fraud by a public officer being a misdemeanour, see 10 HALSBURY'S LAWS (3rd Edn.) 618, para. 1162; and as to cheating affecting the public being a misdemeanour at common law, see 10 HALSBURY'S LAWS (3rd Edn.) 820, para. 1585; and for cases on the subject, see 15 DIGEST 977, 10,928 et seq.]

Cases referred to:

- (1) *R. v. J.*, [1933] N.I. 73; Digest Supp.
- (2) *R. v. Bembridge*, (1783), 3 Doug. K.B. 327; 22 State Tr. 1; 99 E.R. 679; 15 Digest 663, 7160.

Appeal against conviction.

The appellant, Alan Harry Hudson, was convicted before SLADE, J., at Nottingham Assizes on Dec. 8, 1955, of making false statements to the prejudice of the Crown and the public revenue with intent to defraud. In eight counts (on one of which he was acquitted) he was charged with causing to be delivered to an inspector of taxes accounts relating to his business as a fruit grower and farmer which falsely stated profits of the business for the years 1945 to 1952, and in the ninth count he was charged with intent to defraud in that he caused to be delivered to an inspector of taxes a certificate of disclosure certifying that he had made a complete disclosure of banking accounts existing in his own and in his wife's name between 1939 and 1953 and of all facts bearing on his

A liability to income tax or other duty between those dates, knowing such certificate to be false. He was fined a total of £2,600 with £1,500 costs, and he appealed against his conviction.

N. E. Mustoe, Q.C., and V. A. C. Durand for the appellant.

B *The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), Richard Elwes, Q.C., and J. A. Grieves* for the Crown.

LORD GODDARD, C.J., delivered the judgment of the court in which he stated the facts, and continued: The point which has been taken and argued with much ingenuity and eloquence by counsel for the appellant is that this is an offence unknown to the law. It is perfectly true that it is not an offence which is specifically included either in the Income Tax Acts or in the Perjury Act, 1911.

C It is an offence which arises in this way. Sometimes a trader, instead of making a return of his profits by putting in a figure into his income tax return, sends in his profits and leaves the inspector to decide how much his return should show. If he sends in incorrect accounts, knowing that they are incorrect, he is deliberately endeavouring to defraud the Crown, and he is endeavouring to mislead the inspector who has to calculate his liability to tax from the documents

D which he sends in. When the income tax authorities have a large bundle of such accounts sent in, and are going to consider whether they will effect a settlement between themselves and the taxpayer, they require him to give a certificate. Although it is called a "certificate", it is no more than a statement; it is not a statutory document. They are saying, in effect, "Tell us in so many words that you have made full disclosure". If the taxpayer says that he has made a full disclosure when he knows full well that he has not, then he is acting fraudulently.

E The point which has been argued here, as I say, is that the sending in of false accounts and the giving of a false certificate do not disclose an offence known to the law. The offence is not expressly provided for by the Income Tax Act, 1952, or by the Perjury Act, 1911; but because the offence is not provided in any particular section of any particular Act, there is no reason why, if what is done

F is an offence at common law, it should not be prosecuted as such. Indeed, when this very point came before a judge of great experience in Northern Ireland, *ANDREWS, L.J., in R. v. J. (1) ([1933] N.I. 73)*, he expressly called attention to that fact. He said, in giving his various reasons (*ibid.*, at p. 78):

G "The second reason for my opinion is founded on the express words in s. 224 of the Income Tax Act, 1918*, which provides that the provisions of that Act 'shall not affect any criminal proceedings for any felony or misdemeanour.' Therefore, no enactment which provides for the imposition of treble charge or for power to have the matter considered at petty sessions, in any way interferes with the common law rights of the King."

H Section 224 is the section which says it does not affect the common law rights. The only point that we have to decide is whether in this case a common law offence is disclosed. The common law offence which the case discloses is a fraud on the Crown. That is the charge.

I It is laid down in *HAWKINS' PLEAS OF THE CROWN* (8th Edn.), Vol. 1, p. 322, which is a work of the highest authority, in this way: "all frauds affecting the Crown and public at large are indictable as cheats at common law, as in the following case", and then an illustration is given. The reason why it cannot simply be said that cheating is an offence is because it has not been held that, if one subject merely cheats another by telling him lies, that is indictable; but it is otherwise if the false representation or the false device (or whatever it may be) is used to defraud the Crown because that is a fraud on the public. The Crown and the public are really synonymous terms. In *EAST'S PLEAS OF*

* See now the Income Tax Act, 1952, s. 503; 31 *HALSBURY'S STATUTES* (2nd Edn.) 472.

THE CROWN, Vol. 2, p. 821, which is a book of at least as high authority, it is said: A

"So all frauds affecting the Crown and public at large are indictable, though arising out of a public transaction or contract with a party."

Then he cites much the same cases as HAWKINS cited.

The matter came before the Court of King's Bench in 1783 in *R. v. Bembridge* (2) (1783) (22 State Tr. 1) when a public officer, one Charles Bembridge, was indicted for a fraud on the Crown because he had wrongly certified, knowing that he had wrongly certified, the amount due from the late Paymaster-General, Lord Holland, to the Crown. It does not appear that he had got anything out of it, but he did it, and did it fraudulently, as found by the jury. LORD MANSFIELD, C.J., in giving the judgment of the court when a motion had been made for arrest of judgment, refused the motion on two grounds. He said this (*ibid.*, at p. 155): B C

". . . the objection then is, that at most this amounts to a breach of trust, a concealment, a fraud of a pecuniary nature, which is a civil injury, and therefore not indictable; that he is accountable—an agent, a trustee that embezzles money, or by neglect suffers it to be lost, is accountable,—for a civil injury, and not for a public offence; and farther, they add that there is no precedent exactly the same. The law does not consist in particular instances, though it is explained by particular instances and rules, but the law consists of principles which govern specific and individual cases, as they happen to arise." D E

The learned lord chief justice goes on (*ibid.*):

"Now, there are two principles which seem to me clearly applicable to this prosecution; the first I will venture to lay down is, that if a man accepts an office of trust and confidence, concerning the public, especially when it is attended with profit, he is answerable to the King for his execution of that office; and he can only answer to the King in a criminal prosecution, for the King cannot otherwise punish his misbehaviour, in acting contrary to the duty of his office, and that this holds equally by whomsoever or howsoever he is appointed to the office"; F

and then he goes on to give instances which I need not read. He continues (*ibid.*, at p. 156): G

"There is another principle too, which I think applicable to this prosecution, and that is this; where there is a breach of trust, a fraud, or an imposition in a subject concerning the public, which, as between subject and subject, would only be actionable by a civil action, yet as that concerns the King and the public (I use them as synonymous terms), it is indictable." H

That is the clearest possible statement by a great master of the common law that a fraud on the public by an individual is indictable, although the particular fraud might not have been indictable if it had been a fraud by one subject on another.

The simple question is, therefore, this: Has that law ever been altered? We can find no case in which it ever has been altered. The doctrine laid down by HAWKINS, the doctrine laid down by EAST, was affirmed in the clearest possible manner by LORD MANSFIELD in *R. v. Bembridge* (2). Counsel, in the course of his very careful argument, submitted to us that all LORD MANSFIELD was deciding was that a fraud by a public officer on the public or on the King (which is the same thing) was indictable. That is not what LORD MANSFIELD decides. He decides, as has been repeated in other cases, that a fraud by a public officer on the public is indictable. It may be that a particular fraud could only be I

A punished by indictment, especially if the accused gets no money out of it so that he could be made to account for it; but that is only one instance which is given. Then comes the other instance which says that not only if public officers but if any subject acts in such a way as to defraud the King, that is an indictable misdemeanour. That is exactly the case here.

Thirty-five years ago the same objection was taken before BRAY, J., at Hampshire Assizes*, where, on an indictment in this form, BRAY, J., held, without any hesitation apparently, that the facts disclosed a common law misdemeanour. This form of indictment has been used ever since by the Inland Revenue where the offence charged was that of sending in false accounts. It has been challenged once or twice, but it has never been challenged after conviction by being brought up to this court. It seems to me perfectly clear since the matter was ventilated before BRAY, J., that the communis opinio among lawyers has been that BRAY, J.'s decision was right, and I cannot see any ground on which we can say that the authorities on which he acted, and on which we are acting today, have ever been limited or dissented from. In Northern Ireland the same view has been taken in the case to which I referred at the beginning of this judgment, and it has never been in any way dissented from in Northern Ireland.

D The offence here was sending in documents to the inspector of taxes which were false and fraudulent to the appellant's knowledge. The jury found it proved. They had a very clear summing-up from SLADE, J., who took the same view that BRAY, J., had taken and that this court is taking. The jury must be taken to have found that these documents were not only false and fraudulent and that the appellant knew that they were false, but also they must have taken the view, E the only possible view, that the appellant did it for the purpose of avoiding the payment of tax, and that is defrauding the Crown and defrauding the public. In our opinion, the appellant was properly convicted, and the law as stated by HAWKINS, by EAST, by LORD MANSFIELD, by BRAY, J., and by ANDREWS, L.J., in Northern Ireland, remains exactly as it always has been. This is a common law offence and has always been a common law offence. It is not necessary for F this court to make a new offence and we are not making a new offence. We are merely reaffirming what the common law has, in our judgment, always been on this matter.

For these reasons the appeal is dismissed.

Appeal dismissed.

Solicitors: *Jaques & Co.*, agents for *Ollard, Ollard & Sessions*, Wisbech (for the appellant); *Solicitor of Inland Revenue*.

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

* In *R. v. Bradbury*, (1920), unreported; affirmed [1921] 1 K.B. 562.

Re COUNTY OF LONDON (DEVONS ROAD, POPLAR)
HOUSING CONFIRMATION ORDER, 1945.

[CHANCERY DIVISION (Upjohn, J.), February 10, 14, March 22, 1956.]

Housing—Compulsory purchase order—Purchase price paid into court—Failure of owner to make title—Previous work of repair to dangerous structure carried out by council—Whether council entitled to payment of costs of repairs out of money in court—Discretion of court—London Building Acts (Amendment) Act, 1939 (2 & 3 Geo. 6 c. xcvi), s. 70—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 78—Land Charges Act, 1925 (15 & 16 Geo. 5 c. 22), s. 15 (1), as amended by the Law of Property (Amendment) Act, 1926 (16 & 17 Geo. 5 c. 11), s. 7 and Schedule.

In 1940 certain properties in the metropolitan borough of Poplar which were in a dangerous state of repair and whereof the respondent claimed to be the owner in fee simple were put into a state of safety by the London County Council under powers conferred on it by the London Building Acts (Amendment) Act, 1939. On Mar. 19, 1941, the properties were so damaged by enemy action as to be classified as a total loss and in October and November, 1943, the council obtained orders under s. 70 of the Act of 1939 fixing the costs which it was entitled to recover from the respondent at £207 7s. 11d., and which it duly registered as local land charges in the council's register. The orders directed that no part of any building rebuilt on the sites should be let until the council had been paid the costs fixed by the orders. In 1944 the council made a compulsory purchase order acquiring the properties and this order was confirmed by the Minister on Apr. 25, 1945. On Nov. 16, 1945, the council served a notice to treat on the respondent who neglected to prove his title. On Oct. 12, 1955, pursuant to the provisions of the Lands Clauses Consolidation Act, 1845*, the council paid the sum of £3,735 (the full value certified by the War Damage Commission) into court in respect of the compulsory purchase and proceeded to vest the land in itself. On an application by the council for payment to it of the sum of £207 7s. 11d. out of the sum paid by it into court,

Held: (i) the council having registered the orders fixing its costs had a good equitable charge in the nature of a restrictive covenant enabling it to prevent any letting of any building rebuilt on the sites in question until the costs fixed by the orders were paid.

(ii) the value of the respondent's interest which was acquired by the council was £3,527 12s. 1d., that is, £3,735 less the costs of the council, and thus the council had paid £207 7s. 11d. too much into court; that sum, however, was properly expended by the council pursuant to its statutory powers and duties and was recoverable as a debt from the respondent, and the court, in the discretion conferred on it by s. 78 of the Lands Clauses Consolidation Act, 1845, would order payment out to the council of the £207 7s. 11d.

Quaere whether s. 70 of the London Building Acts (Amendment) Act, 1939, either alone or in conjunction with s. 15 of the Land Charges Act, 1925, confers a charge enabling the chargee to exercise all the powers of a mortgagee to recover the expenses incurred by him (see pp. 820, 821, post).

[As to the payment out of compensation paid into court under the Lands Clauses Consolidation Act, 1845, see 10 HALSBURY'S LAWS (3rd Edn.) 193, para. 353.

As to mistakes in statutes, see 31 HALSBURY'S LAWS (2nd Edn.) 497, para. 635.

For the London Building Acts (Amendment) Act, 1939, s. 70, see 15 HALSBURY'S STATUTES (2nd Edn.) 1241.

* See the Lands Clauses Consolidation Act, 1845, s. 76.

A For the Lands Clauses Consolidation Act, 1845, s. 78, see 3 HALSBURY'S STATUTES (2nd Edn.) 927.

For the Land Charges Act, 1925, s. 15 (1), as amended, see 20 HALSBURY'S STATUTES (2nd Edn.) 1088.]

Cases referred to:

B (1) *Ayrshire Employers Mutual Insurance Assn., Ltd. v. Inland Revenue Comrs.*, (1946), 27 Tax Cas. 331; 1946 S.C. (H.L.) 1.

(2) *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.*, [1952] 1 All E.R. 531; [1952] A.C. 401; 33 Tax Cas. 259; 3rd Digest Supp.

Adjourned Summons.

C The applicant, the London County Council, applied by originating summons for a determination of the question whether it was entitled to be paid out of the sum of £3,735 paid by it into court on Oct. 12, 1955, pursuant to the provisions of the Lands Clauses Consolidation Act, 1845, the sum of £207 7s. 11d., expended by it in 1940 in putting certain premises then standing on sites in Grace Street, Stratfield Road and Talwin Street in the Borough of Poplar, whereof the respondent claimed to be the owner in fee simple, into a state of safety.

D The facts appear in the judgment.

H. E. Francis for the applicant.

N. C. Bridge for the respondent.

Cur. adv. vult.

E Mar. 22. UPJOHN, J., read the following judgment: In this case the respondent claims to be, and to have been at all material times, the owner in fee simple of certain properties in Grace Street, Stratfield Road and Talwin Street in the metropolitan borough of Poplar, although he has not yet established his title. In 1940 some of the properties were in a dangerous state of repair and under powers conferred by the London Building Acts (Amendment) Act, 1939 (which I shall call "the Act of 1939") the applicants (whom I shall call "the council") did certain works of repair to render the properties safe. Unfortunately on Mar. 19, 1941, these properties suffered damage through enemy action and were later classified as a total loss, which qualified them for a value payment under the War Damage Act, 1943. In October and November, 1943, the council obtained nine orders under s. 70 of the Act of 1939 fixing the costs which the council were entitled to recover from the owner and directing that no part of the dangerous structure, if repaired or rebuilt, should be let for occupation until after payment to the council of the expenses and costs fixed by the order. These expenses and costs aggregate £207 7s. 11d., and the orders were duly registered as local land charges in the register of the council. In 1944 the council made a compulsory purchase order* acquiring, amongst other properties, the properties in question in this application, and that order was confirmed by the Minister on Apr. 25, 1945, by order entitled "The County of London (Devons Road, Poplar) Housing Confirmation Order, 1945". On Nov. 16, 1945, the council duly served a notice to treat. It appears that the respondent, although claiming to be the owner, either failed or neglected to prove his title, and ultimately, on Oct. 12, 1955, pursuant to the provisions of the Lands Clauses Consolidation Act, 1845†, the council paid the sum of £3,735 into court to the ledger credit

"Ex parte the London County Council, the account of John Segar or other the owners or owner of the freehold interest in land being . . ."

and then setting out the properties. The council proceeded to vest the land in itself.

* Under Part 5 of the Housing Act, 1936.

† See the Lands Clauses Consolidation Act, 1845, s. 76.

The question is whether the council is now entitled to be paid out of the fund in court the sum of £207 expended by it in putting the premises then standing on the sites in question into a state of safety. The first question which I have to determine is whether the council has a charge on the premises in respect of its expenditure. That depends on s. 70 of the Act of 1939, which I must now read:

“Repayment of expenses incurred by council.—(1) Where the council have incurred any expenses in respect of any dangerous or neglected structure and have not been paid or have not recovered those expenses it shall notwithstanding anything to the contrary in any Act be lawful for a court of summary jurisdiction on complaint by the council within twelve months after the date of the demand for the payment of the said expenses to make an order fixing the amount of the said expenses and the costs of the proceedings before the said court and directing that no part of the land upon which the dangerous or neglected structure was or is situate shall be built upon or that no part of the dangerous or neglected structure if repaired or rebuilt shall be let for occupation until after payment to the council of the said amount and thereupon no part of the said land shall be built upon and no part of the dangerous or neglected structure so repaired or rebuilt shall be let for occupation until payment to the council of the said amount.

“(2) (a) Section 15 of the Land Charges Act, 1925, shall apply to orders made under sub-s. (1) of this section and for the removal of doubts it is hereby declared that the said s. 15 applies and shall be deemed to have applied heretofore to orders made under s. 115 (Removal of dilapidated and neglected buildings) of the London Building Act, 1894, or under s. 141 (Provision for enforcing repayment of expenses incurred by council) of the [London Building Act, 1930] and any such order is accordingly registrable under the said Act of 1925 as a local land charge.

“(b) For the purpose of enforcing any such charge arising out of an order made after the commencement of this Act the council shall have all the same powers and remedies under the Law of Property Act, 1925, and otherwise as if they were mortgagees by deed having powers of sale and lease of accepting surrenders of leases and of appointing a receiver.”

It is unfortunate that, unlike sections in earlier comparable Acts—for example, s. 257 of the Public Health Act, 1875, and s. 13 of the Private Street Works Act, 1892—s. 70 (1) imposes no charge in express terms on the property enabling the council to recover the expenses incurred as though it was a mortgagee for that amount. Sub-section (3) of that section appears to proceed on the footing that registration under the Land Charges Act, 1925, puts the council in the position of a mortgagee, but it is important to observe that the sub-section in itself creates no charge. If the section proceeds on an erroneous view of the law it cannot be construed otherwise than in its ordinary meaning so as to attain the result which it is thought was achieved by registration under the Land Charges Act, 1925; if the view be truly erroneous the section has misfired: *Ayrshire Employers Mutual Insurance Assn., Ltd. v. Inland Revenue Comrs.* (1) (1946) (27 Tax Cas. 331) and *Inland Revenue Comrs. v. Dowdall, O'Mahoney & Co., Ltd.* (2) ([1952] 1 All E.R. 531). The Land Charges Act, 1925, can only operate to impose a charge if the last paragraph of s. 15 (1), a paragraph inserted by the Law of Property (Amendment) Act, 1926, s. 7 and Schedule, does so. That paragraph is in these terms:

“For the purposes of this section any sum which is recoverable by a local authority under any of the Acts aforesaid from successive owners or occupiers of the property in respect of which the sum is recoverable shall, whether such sum is expressed to be a charge on the property or not, be deemed to be a charge.”

- A It only creates a charge if successive owners are liable, and s. 66 of the Act of 1939 [which deals with the payment of the council's expenses in respect of dangerous structures] only provides that the expenses incurred shall be paid "by the owner of the structure". I am not convinced that that section imposes on successive owners any obligation to pay, although no doubt subsequent owners will do so where the charge has been registered as the price of being permitted to
- B develop the land.

- Whatever my doubts may be whether s. 70 in fact achieves its object of conferring a charge enabling the chargee to exercise all the powers of a mortgagee to recover the expenses incurred, there can be no doubt that the council, having registered its charge, had a good equitable charge in the nature of a restrictive covenant enabling it to prevent any letting of any building rebuilt on the site
- C until the amount of the expenses and costs is paid. On that footing counsel for the respondent submits that a mistake has been made; too much has been paid into court, and the council, he says, now has no right to obtain payment out of any part thereof. This argument, which involves a review of some complicated statutory provisions, may be stated thus: On a compulsory purchase of land which had qualified for a value payment under the War Damage Act, 1943,
- D the value was to be that certified by the War Damage Commission (see the Town and Country Planning Act, 1944, Sch. 8, para. 1 (1)*), and this sum had been certified to be the sum of £3,735 mentioned earlier in this judgment. That provision, however, was subject to the qualification contained in para. 1 (3) (b) of Sch. 8* to the Act of 1944, that where there was a material difference between the incumbrances to which the property was subject at the time of the war
- E damage and the incumbrances to which it had been subject at the date of the notice to treat, being incumbrances of a kind required by the War Damage Act, 1943, to be taken into account in ascertaining the value of the hereditament, then where the incumbrances had increased such increase had to be deducted from the previously ascertained value by the War Damage Commission.

- To ascertain what incumbrances must be taken into account for the purposes
- F of the War Damage Act, 1943, reference must be made to para. 1 of Sch. 2 to that Act, which provides that the hereditament is to be valued as on a sale made in the open market with vacant possession subject (inter alia) to any restriction imposed by or under any enactment passed before the War Damage Act, 1941, to which the hereditament was subject at the time immediately after
- G the occurrence of the war damage. The charge created by the orders made under s. 70 of the London Building Acts (Amendment) Act, 1939, came into effect after the war damage, but before the notice to treat. Consequently it is argued that at the time of the notice to treat the land should have been valued subject to the right of the council to restrict development until its costs and expenses had been paid. It can hardly be doubted that that right ought to be
- H evaluated at £207, the amount of the expenses, and so it is said that the value of the interest of the vendor in the land which was being acquired was £3,735 less £207, that is, £3,528, and too much has been paid into court. I accept that argument.

- It is then urged that payment into court under s. 76 of the Lands Clauses Consolidation Act, 1845, and vesting of the land by the council in itself
- I under s. 77 of that Act operate as a statutory conveyance of the property; the money has been paid into court to the credit of the owner, and if too much has been paid in it is as though too much had been paid to the vendor by mistake and the council has no equity or title to claim repayment of any sum so overpaid. That is a formidable argument, but it overlooks the powers given to the court

* The Town and Country Planning Act, 1944, Sch. 8, was repealed, with savings in respect of land compulsorily acquired in pursuance of a notice before Aug. 6, 1947, by the Town and Country Planning Act, 1947, s. 113 (2) and Sch. 9, Part 1.

under s. 76 and s. 78 of the Lands Clauses Consolidation Act, 1845. Section 76 A empowers the acquiring authority, in the circumstances therein mentioned, to pay the purchase money into court "subject to the control and disposition of the said court". Section 78 is in these terms:

"Application of moneys so deposited.—Upon the application by petition of any party making claim to the money so deposited as last aforesaid, or any part thereof, or to the lands in respect whereof the same shall have been so deposited, or any part of such lands, or any interest in the same, the said Court of Chancery . . . may, in a summary way, as to such court shall seem fit, order such money to be laid out or invested in the public funds, or may order distribution thereof, or payment of the dividends thereof, according to the respective estates, titles, or interests of the parties making claim to such money or lands, or any part thereof, and may make such other order in the premises as to such court shall seem fit."

That section confers a wide discretion on the court in ordering payment out. The facts are clear. The value of the interest of the respondent which was acquired by the council was £3,528, and too much by £207 has mistakenly been paid into court. That sum was properly expended by the council pursuant to its statutory powers and duties. It is recoverable as a debt from the respondent although that right may now be statute-barred. The difficulty has arisen solely because of the neglect or failure of the respondent to make a title. No question could have arisen if he had made a title, and the matter completed in 1945.

It seems to me that in those circumstances the discretion of the court can only be exercised in one way, namely, by ordering payment out to the council of the money it mistakenly paid in rather than in permitting the respondent to receive an admitted and entirely unmerited windfall, which has come about solely through the circumstance of his own failure or neglect to make title.

Order accordingly.

Solicitors: *J. G. Barr* (for the applicant); *Victor Mishcon & Co.* (for the respondent).

[*Reported by* PHILIPPA PRICE, *Barrister-at-Law.*]

A

CLARK v. CLARK (by her Guardian).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), March 5, 6, 1956.]

Divorce—Desertion—Insanity—Wife a voluntary patient in mental home—Wife's volition retained—Wife in need of attention.

B *Divorce—Desertion—Defence—Just cause—Wife a voluntary patient in mental home—No home offered by husband—Wife in need of attention.*

The parties were married in August, 1939, the husband being then in the army. They spent the husband's leaves together at the wife's parents' home and other places, but they never had a matrimonial home. On June 11, 1943, the wife was admitted to a mental hospital as a voluntary patient. After October, 1943, the husband never visited or wrote to the wife at the hospital. In August, 1952, in reply to a letter from the husband's solicitors, the medical superintendent wrote: "She [the wife] is quite definite in her answers to the questions which I repeated several times. She states that she wishes to stay in hospital and that she does not want to go to her husband, and has not wanted to go to him in the past". On July 28, 1954, the husband presented a petition for divorce on the ground of the wife's desertion. The wife by her guardian ad litem filed a reply denying the alleged desertion and pleaded that she had just cause for living separate and apart. The wife was not fit to run a home or look after the husband. He was a working man and there was no evidence that he had a home to which she could come or was able to provide anyone to look after her.

E **Held:** the petition should be dismissed because (i) the husband had originally consented to the separation and had failed to show a fixed intention on the part of the wife not to live with him for at least three years immediately preceding the presentation of the petition; and

(ii) the husband had not provided a home to which the wife could have come, nor had he found anyone to look after the wife if she had left the hospital, and she had, therefore, just cause for living separate and apart from him.

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Keeley v. Keeley ([1952] 2 T.L.R. 756) distinguished.

[As to the effect of insanity on desertion, see 12 HALSBURY'S LAWS (3rd Edn.) 255, para. 478; as to voluntary patients, see *ibid.*, 256, para. 480, note (a); and as to just cause for separation caused by mental illness, see *ibid.*, 262, para. 499, note (f); and for cases on the subject, see 27 DIGEST (Repl.) 346, 2876, 359, 2968-2974 and 3rd Digest Supp.]

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Case referred to:

(1) *Keeley v. Keeley*, [1952] 2 T.L.R. 756; 3rd Digest Supp.

H **Petition.**

The husband petitioned for divorce on the ground of the wife's desertion alleging, as particulars of desertion:

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"That the [wife] was on June 11, 1943, admitted as a voluntary patient to the Rainhill Hospital, Liverpool . . . and that she has retained her volition for a period of at least three years prior to the presentation of this petition and still retains her volition and is not desirous of leaving the said hospital and has had no intention of returning to the [husband] for at least three years immediately preceding the presentation of this petition."

The husband prayed for the exercise of the court's discretion in his favour.

As further and better particulars of the allegation of desertion, the husband alleged:

"That desertion without cause began in or about the month of August,

1949. That from the said date onwards the [wife] was living separate and apart from the [husband] as a voluntary patient at the Rainhill Hospital . . . retaining her volition and showing an intention to desert by refusing to return to the [husband].”

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The wife, by her guardian ad litem, filed an answer in which she denied the alleged desertion and pleaded that she

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“is and has at all material times been in need of institutional and/or hospital care and treatment . . . and/or that she has good cause for remaining apart from the [husband].”

D. Weitzman, Q.C., and J. B. R. Hazan for the husband.

B. S. Horner for the Official Solicitor, as the wife's guardian ad litem.

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BARNARD, J.: The parties were married in August, 1939, according to the rites of the Roman Catholic Church, the wife being a Catholic but the husband, I think, being then a Protestant. At the time of the marriage the husband was serving in the army, and within a very short time of the marriage war broke out. The parties never really had a matrimonial home. They lived occasionally, when he had leave, with her parents, who had a home somewhere near Liverpool, and occasionally she went to wherever he happened to be stationed. The marriage was unfortunate in one sense in that the wife had a number of miscarriages and apparently she was anxious to have a child. A child was born to her in October, 1942, but only lived for about seven months, and there can be no doubt that the loss of this child had a very grave effect on the wife's mind. According to the husband when giving his evidence she completely went to pieces, and after being for a time in some general hospital (no doubt for observation) eventually, on June 11, 1943, she was admitted as a voluntary patient to Rainhill Mental Hospital, Liverpool, where she has remained ever since. Apart from the fact that they never had any matrimonial home I think it is only fair to say that the marriage had been a normally happy one. The husband visited the wife from time to time up to October, 1943, but he has never visited her since. It is only fair to the husband to say that on the last occasion when he visited her she was not even able to recognise him, and that may have had some ill effect on him. In June, 1944, the husband was sent to Europe, and he served overseas until December, 1945, when he returned to England. On Feb. 19, 1946, he was released from the army, and then he returned to Liverpool where they had been when the wife had been admitted to the mental hospital, and he remained in Liverpool until June, 1948. During that time although, he says, he telephoned the mental hospital on occasions he never once visited her; never even once went to the hospital to make personal inquiries about her, and in June, 1948, he went to London. He does not seem to have been very fortunate since coming out of the army. He was not a skilled man in any sense and he did different labouring jobs in Liverpool and then later in the London district.

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I shall have to deal in more detail with some of the husband's evidence, more particularly in regard to letters which he wrote. The facts, however, are fairly simple, but I admit that I find it difficult to apply the law to them. In May, 1952, which is some four years after he had been in London, he consulted some citizen's advice bureau. I think it is perfectly clear from their letter to him that he had really put the wife out of his mind and was not worrying about her at all. In fact even when he was in Liverpool in 1946, when he had come out of the army, he never went to see her, and if one looks at his discretion statement one finds that during that year he is having an affair with some other woman, and obviously was not bothering about the wife. It is plain that he was not even certain that the wife was still in the hospital because the citizen's advice bureau wrote on May 20, 1952, asking whether the wife was still a patient in the hospital and asking for any other information about her. It is also clear

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A that the husband told the citizen's advice bureau that he was not quite sure where she was. When he found that she was still in the same hospital and that the hospital authorities were not willing to give any information about her except to the husband himself, he wrote a letter on May 29, 1952, in which he said:

B ". . . my reason [for asking for full information] being that I am about to make a start at sorting out the mess I have made of this last ten years. Your information will give me a good lead in a really determined start. Another woman and child is involved who befriended me when I was really down and unable to work and during the times when I was in hospital she supplied my needs. With her I found a happiness which I had never enjoyed before, although I have never lived with her."

C We now know from his discretion statement that this was yet another woman whom he said he met early in the year 1952, but on his own evidence it is clear that he met her in January, 1951.

D The husband would not agree that he wrote that letter with divorce in his mind. His explanation was that through this other woman he realised for the first time what companionship was, and it was that which made him want his wife all the more. I find myself unable to accept that explanation, since later in the same letter he said: "However, I shall await your reply before putting my case before a solicitor". Whatever case could he have put before a solicitor if all he really wanted was to have his wife back? I do not think that the husband was being at all frank with me about that letter, and it is obvious

E to my mind that having met this other woman he really was thinking about matrimony again and getting rid of the wife; hence his inquiries whether she was still in the hospital, and hence his remarks about putting his case before a solicitor. The reply which he received made it clear that the wife was

F "solitary and self-absorbed, understanding what is said to her but never conversing. She is tidy in habits and occupies herself usefully. She is in good physical health."

The reply goes on to say:

G "You would not, I am afraid, be able to obtain a divorce on the grounds of her detention in a mental hospital since she has not been here as a certified patient"

and suggests that there might be a possibility of divorce if he could prove that she had deserted him. It may be that when he received that letter his first thought was, "I had better make the best of a bad job and give up the idea of divorce, even give up this other woman and try and get my wife back", because

H he writes the very next day, June 3, 1952:

I "I acknowledge my responsibility and so my wife has first claim. The information you gave has given me some hope, so casting everything aside for the time being, I shall try and plan a return to her. As I am only an ordinary working man, having no capital or other means, I shall need a period of time to get some money saved. When I think that I have enough to start a home, then I shall return to Liverpool and hope for the best. I think I shall need about six months at the most. It is my intention now to try and make up to her as much as I can as fast as I can . . . When my holidays come, I shall endeavour to come up for a personal interview with you and also to see my wife."

His holidays did come, but he never went to Liverpool, he never saw the medical superintendent and he never made any attempt to see the wife.

It is only fair to the husband to say that the letter he got back from the medical superintendent may have damped his enthusiasm for having the wife back, because the medical superintendent wrote on June 4, 1952:

"... she is still ... suffering from a mental illness and would hardly be fit to leave hospital even if she wished, which is not the case."

The medical superintendent had, on Dec. 4, 1951, personally examined the wife. That was because some other consultant thought that she ought to be certified and the medical superintendent reported:

"Although mute I found her accessible. She nodded when asked repeatedly whether she wished to remain here and said no when asked if she wished to go home. Although confused she retains her volition and, as I saw her today, she is fit to remain as a voluntary patient."

She said "No" when asked if she wished to go home, but what puzzles me is what home was there for her to go back to? They had never had a home. There is no evidence before me that she knew of the husband having any home in London or anywhere else where he was ready to receive her. It is significant that shortly after these letters were written—the letter in which the husband wants to see whether he can divorce the wife because he is carrying on with another woman, then his second letter, when it looks as if a divorce is out of the question, in which there is some expression of intention at any rate, to live with the wife, and the reply telling him that that is going to be difficult because of her health—on his own admission he has committed adultery with the woman with whom he has been having an affair. Then comes a complete change of front again, when obviously the husband is out once more to get a divorce, because a series of interrogatories are delivered to the medical superintendent for him to answer, which are written by the husband but obviously prepared for him by someone having legal knowledge. I have heard the evidence of Dr. Finkleman, who has been at Rainhill Hospital ever since August, 1946, and who has been the medical superintendent there since January, 1950. There is no doubt that the wife had enough mind to say whether she wanted to remain in the home or whether she wanted to return to her husband, and so she certainly had a mind that was capable of forming an intention to desert.

The first legal problem that I am faced with is this: It is clear on the evidence that when the wife went into the mental hospital as a voluntary patient the husband consented to her going; in fact it was he who persuaded her to go, maybe for her own good, maybe, as was suggested, because he had got a compassionate posting to Liverpool and preferred being there to being up in the Orkneys where he had come from. But I say nothing about that; the motive does not matter. He consented to her going into the hospital, and, therefore, their separation from then on was a separation by consent. Has anything happened since then to alter the character of that separation and turn it into one of desertion? Unlike *Keeley v. Keeley* (1) ([1952] 2 T.L.R. 756), in the present case, after October, 1943, the husband never went near the wife, and never even wrote to her. In *Keeley v. Keeley* (1) during a period of two years the husband had visited the wife in the mental hospital and had tried to persuade her to return to a home which he had. The evidence in *Keeley v. Keeley* (1) showed that the wife seemed quite normal to the husband when he visited her and it was clear that he wanted her home, but she said that she preferred to stay where she was. I have got no such evidence in the present case. The only evidence is that at some stage or other she expressed an intention not to live with the husband. The first record I find of that is when the medical superintendent saw her on Aug. 1, 1952, and that was obviously as a result of a letter he had from solicitors appearing on behalf of the husband. On Aug. 1, 1952, the medical superintendent reports:

A "She is quite definite in her answers to the questions which I repeated several times. She states that she wishes to stay in hospital and that she does not want to go to her husband, and has not wanted to go to him in the past."

B The petition was presented on July 28, 1954, and so I have to be satisfied that she had a fixed intention never to live with the husband again prior to July 28, 1951. The only evidence is what she said in August, 1952. The medical superintendent did write to the husband's solicitors:

"In any case I could without doubt establish a three year period from December, 1951, or August, 1952, to date."

C December, 1951, was the occasion when she was asked whether she wanted to go home, and she said: "No." What that answer meant exactly I do not know, for there was no home. I do not feel that on those facts the husband has established a charge of desertion for three years immediately prior to the presentation of this petition.

I do not think that the matter rests there. There is the question of just cause. On the facts of the present case (which, as I have stated, are very different from those in *Keeley v. Keeley* (1)) I have come to the conclusion that there was just cause. I do not want to recapitulate what I have already said about the husband never going near the wife after October, 1943, and never writing to her. The only information which he got in the first instance from the medical superintendent was when he was wanting to get a divorce, not to live with the wife. The medical superintendent's evidence amounted to this, that if she had sought his advice he would not have advised her to go out from the mental home unless he felt satisfied that she was going to a home where she could be properly looked after. In this particular case although the husband in a letter said that he was going to save money and get her a home he did not do anything of the sort. It may not have been his fault. As far as I know there never was a home to offer the wife, and even if there had been a home she was the wife of an ordinary working man and there is not any evidence that the husband had found anyone who was prepared to give him a home and look after the wife when he was out. The medical superintendent made it perfectly clear that she was not fit to run a home and look after the husband, and therefore on the facts of the present case I should be prepared to say that there was just cause, which would also defeat the charge of desertion. For these reasons, and it may be regrettable, I consider that it is my duty to dismiss the petition.

Petition dismissed.

Solicitors: *Harewood & Co.* (for the husband); *Official Solicitor.*

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

CHLORIDE BATTERIES, LTD. v. GAHAN (INSPECTOR OF TAXES).

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Radcliffe and Lord Somervell of Harrow), February 27, March 26, 1956.]

Income Tax—Deduction in computing profits—Profits tax—Subsidiary company's reimbursement of profits tax paid by principal—Principal company's notice that subsidiary's profits be treated as principal's—Whether amount payable "by virtue of the notice" was whole profits tax paid by principal—Finance Act, 1947 (10 & 11 Geo. 6 c. 35), s. 38 (3).

Following a notice given to the Inland Revenue Commissioners under s. 22 (1) of the Finance Act, 1937, requiring the profits of a subsidiary company to be treated as its profits for profits tax purposes under s. 22 (2), a principal company was assessed to profits tax for both companies in the sum of £209,437. But for the notice, the principal company would have paid £131,742 and the subsidiary company £191,420, the difference in total being due to the different operation of non-distribution relief on the two companies. The subsidiary company reimbursed the whole £191,420 to the principal company and claimed that that sum was deductible from its profits for income tax purposes under s. 38 (3) of the Finance Act, 1947, as being the "amount by way of reimbursement of profits tax which by virtue of the notice having been given is payable" by the principal company, within the meaning of s. 38 (3) (b).

Held: the profits tax payable by the principal company by virtue of the notice having been given was £77,695, the amount by which the profits tax bill of the principal company had been increased in consequence of the notice, and that sum only could be deducted from the subsidiary company's profits for income tax purposes.

Decision of the COURT OF APPEAL (sub nom. *Gahan (Inspector of Taxes) v. Chloride Batteries, Ltd.*) ([1955] 1 All E.R. 633) affirmed.

[**Editorial Note.** The Finance Act, 1947, s. 38 (3), was repealed as respects profits tax payable for chargeable accounting periods ending after 1951 by the Finance Act, 1952, s. 76 (8) and Sch. 14, Part 4.

For the Finance Act, 1947, s. 38 (3), see 12 HALSBURY'S STATUTES (2nd Edn.) 783.]

Appeal.

Appeal by the taxpayer company from an order of the Court of Appeal, dated Feb. 18, 1955, and reported sub nom. *Gahan (Inspector of Taxes) v. Chloride Batteries, Ltd.*, [1955] 1 All E.R. 633, reversing an order of UPJOHN, J., dated Oct. 22, 1954, whereby he dismissed an appeal by the Crown by Case Stated from a decision of the Special Commissioners of Income Tax. The facts appear in the opinion of VISCOUNT SIMONDS.

Sir Andrew Clark, Q.C., Heyworth Talbot, Q.C., and H. M. Allen for the appellant company.

Sir Millard Tucker, Q.C., Sir Reginald Hills and E. B. Stamp for the Crown.

The House took time for consideration.

Mar. 26. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the appellant company is a subsidiary of another company called Chloride Electrical Storage Co., Ltd., which I will refer to as "the principal company". For the purpose of the Acts, which I must examine, a company is the subsidiary of another company if the

A latter holds not less than three-quarters of its ordinary shares; but, in fact, the principal company held all the shares of the appellant company.

The appeal arises on three assessments to income tax made on the appellant company for the years 1949-50, 1950-51 and 1951-52 under Case I of Sch. D to the Income Tax Act, 1918, in respect of the profits arising from its trade. The matter in dispute is whether a payment of £191,420 made by the appellant company to the principal company was a deductible outgoing in computing the profits of the appellant company for the purpose of income tax, or whether only £77,695 4s. of that amount was so deductible. The answer to this question depends on the true construction of a very few words in the Finance Act, 1947, but it is necessary first to look at the Finance Act, 1937, by which profits tax (then called "national defence contribution") was first imposed. This tax, which I will continue to call profits tax, was, by s. 19 of the Finance Act, 1937, imposed on the profits arising in each accounting period from the trades or businesses therein described. During the relevant chargeable accounting period, the appellant company and the principal company each carried on a trade falling within the charging provisions, and each had profits arising from its trade. This enabled them to take advantage of the provision to which I now refer. By s. 22 of the Act it was enacted as follows:

"(1) Where a body corporate resident in the United Kingdom is a subsidiary of another body corporate so resident (hereafter in this section referred to as 'the principal company') the principal company may, by notice in writing given to the Commissioners of Inland Revenue before the expiration of any chargeable accounting period of the subsidiary or within two months thereafter, require that the provisions of sub-s. (2) of this section shall apply to the subsidiary as respects that period and all subsequent chargeable accounting periods throughout which it continues to be a subsidiary of the principal company . . . (2) Where such a notice is given, the profits or losses arising in any chargeable accounting period to which the notice relates from the trade or business carried on by the subsidiary shall be treated, for the purpose of the provisions of this Act relating to the national defence contribution . . . as if they were profits or losses arising in the corresponding chargeable accounting period from the trade or business carried on by the principal company."

By s. 25 (1) of the same Act, it was provided that the amount of profits tax payable in respect of the profits arising from a trade or business in a chargeable accounting period should be allowed to be deducted as an expense in computing for the purpose of income tax the profits and gains arising from that trade or business in that period.

The Finance Act, 1947, introduced important changes into the law. With one of them, a change of great practical importance, by which the rate of tax was made to vary according to whether profits were or were not distributed by way of dividend, your Lordships are not concerned. I mention it only to explain that the sum of £191,420, which I mentioned at the beginning of this speech, is the sum which the appellant company would have paid by way of profits tax if the notice under s. 38 to which I now refer had not been given. Section 38 of the Act of 1947 is the material section. The relevant parts of it are as follows:

"(1) Where a notice under s. 22 (1) of the Finance Act, 1937 (which relates to subsidiary companies) is in force . . . (3) Where—(a) such a notice as aforesaid is in force; and (b) the subsidiary to which the notice relates pays to the principal company *an amount by way of reimbursement of profits tax which by virtue of the notice having been given is payable by that company* for any chargeable accounting period ending after Dec. 31, 1946; and (c) the principal company and the subsidiary jointly so elect

by notice in writing given to the Commissioners of Inland Revenue within six months from the end of that chargeable accounting period or such longer time as those commissioners may in any case allow, the amount so paid, and any amount so paid in relation to a subsequent chargeable accounting period, by the subsidiary to the principal company shall for all the purposes of the Income Tax Acts be treated—(i) as regards the subsidiary, as an amount of profits tax payable in respect of its profits arising in the chargeable accounting period of the subsidiary corresponding to the chargeable accounting period to which the payment relates; and (ii) as regards the principal company, as reducing the amount of the profits tax payable by the principal company for the chargeable accounting period to which the payment relates . . . (6) This section shall be construed as one with the said s. 22.”

I have italicised the important words on whose construction the issue depends. Before considering them, however, I will state the material facts which are undisputed.

The appellant company commenced business on Jan. 1, 1950, as a manufacturer of storage batteries, and made up its first accounts to Dec. 31, 1950, which thus constituted or included the basic period for the years of assessment under appeal. The principal company duly gave notice, pursuant to s. 22 (1) of the Act of 1937 requiring that sub-s. (2) of that section should apply to the appellant company. Therefore, profits tax became payable by the principal company in respect of its own and the appellant company's profits. This tax was assessed at £209,437 12s. If the notice had not been given, the principal company would have had to pay the sum of £131,742 8s. by way of tax on its own profits only, a difference of £77,695 4s. Taking advantage of s. 38 (3) (b), which I have set out, and purporting to do so by way of reimbursement as therein mentioned, the appellant company paid to the principal company the sum of £191,420 (that sum being calculated in the way I have already described), and then, under s. 38 (3) (c), the principal company and the appellant company jointly elected that the sum should, for all the purposes of the Income Tax Acts, be treated as provided for in para. (i) and para. (ii) of s. 38 (3), or, in other words, that, as regards the appellant company, it should be treated as the amount of profits tax payable in respect of the profits arising in the chargeable accounting period of twelve months to Dec. 31, 1950. The revenue authorities did not accept the view that £191,420 or any larger sum than £77,695 could be reimbursed to the principal company by the appellant company and assessed the latter company to income tax accordingly. From these assessments the appellant company appealed to the Commissioners for the Special Purposes of the Income Tax Acts, who allowed their appeal. From their determination the respondent, the inspector of taxes, appealed by way of Case Stated to the High Court, UPJOHN, J., who upheld their determination. From his order the respondent appealed to the Court of Appeal, which allowed the appeal. From their order the appellant company brings this appeal.

I state again the short question in this case. What is the meaning of the words “an amount by way of reimbursement of profits tax which by virtue of the notice having been given is payable by that company”, where they occur in s. 38 (3) (b) of the Act ?

The notice to which reference is made is the notice given under s. 22 of the Act of 1937, and I do not dissent from the contention of the appellant company that the effect of that notice was to create a single liability in the principal company in respect of profits tax. It was a single liability computed on the aggregate of its own and the appellant company's profits. Nor would I dispute that, in the judgments of SIR RAYMOND EVERSHED, M.R., and JENKINS, L.J., there are to be found expressions which suggest that, after the notice, the

A principal company became subject to two separate liabilities, the one in respect of its own profits, the other an additional one in respect of the appellant company's profits. But these are, I think, verbal criticisms only and do not affect the substance of their reasoning, with which I find myself in complete agreement.

The structure of s. 38 (3) is not to be disregarded. It does not purport to authorise any payment by a subsidiary to a principal company. But it provides that, where certain conditions are satisfied, including a payment by a subsidiary to a principal company, then certain results for tax purposes shall follow. It assumes that such a payment is authorised by the general law. This throws some light on the construction of the vital words; for a subsidiary company may have as many as twenty-five per cent. minority shareholders, and it may have trade and other creditors. I do not understand how, under the general law, a subsidiary could, by way of reimbursement, pay to a principal company a sum which it, the subsidiary, was never liable to pay. Learned counsel urged that it was purely a domestic arrangement between the two companies how much one should pay the other, but this argument ignores the position of minority shareholders and creditors, and it ignores, too, the salient fact that, while the payment may be a domestic arrangement, the purpose of the section is to give to that payment certain consequences for tax purposes. It is with this background that the material words must be considered. It is possible, too, that some light may be thrown on the problem by the use of the word "reimbursement". It suggests to me, as it did to MORRIS, L.J., that the sum paid by the subsidiary company was one for which the principal company would not, but for the notice, have become liable. This consideration leads me at once to the ground on which, in effect, the Court of Appeal decided against the appellant company. They ask "what profits tax can answer the description of being payable by virtue of the notice?" I take the answer of JENKINS, L.J. ([1955] 1 All E.R. at p. 640):

"Surely only such profits tax as is payable by the principal company by reason of the notice having been given, and which would not have been payable by the principal company if the notice had not been given."

This he describes as the natural and inescapable meaning of the language used. I agree with him.

The principal company paid £209,437 12s. profits tax in respect of the relevant accounting period. Notice or no notice, it incurred a liability to pay profits tax under s. 19 of the Act of 1937. If there had been no notice, its liability would have been £131,742 8s. As a result of the notice its liability was £209,437 12s. What amount of profits tax became payable "by virtue of the notice"? No other sum than the difference between those amounts, viz., £77,695 4s. Even here there is, in the last analysis, a misstatement. For it is not by virtue of any notice that liability to tax arises. The liability arises under the Act. But the quantum of liability, both as between the subsidiary and principal company and as between the companies and the revenue authorities, may be affected by the notice. It is, therefore, legitimate, though not entirely accurate, to speak of profits tax "which by virtue of the notice having been given is payable". It is, at least, true that, quoad the profits of the subsidiary company, the liability of the principal company arises from s. 19 of the Act of 1937 combined with the notice under s. 22. It would be untrue to speak of the liability of the principal company in respect of its own profits as arising from a notice. That liability arose under the Act alone, though the quantum might be affected by a notice. It would be increased if the subsidiary company made a profit, or reduced if it made a loss. This latter possibility may throw some light on the relevant words. For it would, as it appears to me, be plain nonsense to speak of the subsidiary company paying an amount by way of reimbursement

of profits tax which by virtue of the notice having been given is payable by the principal company, when the only result of the notice was to reduce the amount of tax so payable. A

For these reasons, which are intended only to supplement those of the Court of Appeal, with which, as I have said, I am in full agreement, I am of opinion that this appeal should be dismissed with costs.

LORD REID: My Lords, I agree. B

LORD RADCLIFFE: My Lords, I am in full agreement with what has fallen from my noble and learned friend on the Woolsack. I, too, think that the decision of the Court of Appeal was correct. The point is a very short one and it does not need elaboration from me.

I would like to make it plain, however, that I do not regard a construction of s. 38 (3) of the Finance Act, 1947, which limits the appellant company's deduction for income tax purposes to £77,695 4s. as a construction which introduces into sub-s. (3) (b) any words not already there. On the contrary, I think that this construction offers the only tenable meaning of the words used. Even though the tax enactments in question relate to "group" assessments and to inter-company transfers of money from a subsidiary (though not necessarily a wholly owned subsidiary) to a principal company, the payment by the subsidiary which we are supposed to envisage cannot just be a transfer to the principal of as much cash as it may need to make good whatever it has had to pay in satisfaction of its own liability for profits tax as a whole. It must be a payment to the principal of some amount which the giving of the notice under s. 22 (1) of the Finance Act, 1937, has made it reasonable and fair that the one company should pay over to the other. Against this background, the words "reimbursement" and "by virtue of the notice" acquire an obvious significance, and, in my opinion, they limit the ranking amount to such an amount as that by which the profits tax bill of the principal company has been increased in consequence of the notice. C D E

LORD SOMERVELL OF HARROW: My Lords, I agree with the opinion delivered by my noble and learned friend on the Woolsack, and have nothing I wish to add to it. F

Appeal dismissed.

Solicitors: *Simpson, North, Harley & Co.*, agents for *March, Pearson & Green*, Manchester (for the appellant company); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

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Re PARKES' SETTLEMENT TRUSTS.
MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. AND
ANOTHER *v.* INLAND REVENUE COMMISSIONERS
AND OTHERS.

B [COURT OF APPEAL (Lord Evershed, M.R., Jenkins and Birkett, L.J.J.), March 8, 9, 12, 1956.]

C

Estate Duty—Passing—Property deemed to pass—Annuity payable during life of settlor out of each year's income—Annuity of same amount payable after settlor's death but then charged on appropriated fund—Surplus income payable to four persons during life of settlor—Those persons absolutely entitled to capital and income subject to annuity after settlor's death—"Beneficial interest arising"—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (d).

D

Under a settlement made in 1929 each of the two daughters of the settlor was entitled to receive the trust income of each year until his death up to an amount of £250 or half the income, whichever was the less, and was entitled after his death to an annuity of £250 payable out of the trust income or, if need be, out of trust capital. During the settlor's life, but not after his death, the yearly sum payable to either daughter might be increased to £410 or the whole of the trust income, whichever might be the less, if the other daughter died. Under the settlement each of the four children of the settlor was entitled to an equal share of any surplus trust income during the settlor's life and was entitled during his life contingently on surviving him to share the trust capital equally with others of the four children, subject to the yearly sums of £250 payable to the daughters; but after the settlor's death the four children were entitled, subject to the annuities, to immediate and absolutely vested equal interests in the capital and future income of the trust fund. The settlor died in 1952 and his four children survived him. On the question whether estate duty was chargeable under s. 2 (1) (d) of the Finance Act, 1894*, on (i) the annuities provided for the daughters on the settlor's death, or (ii) the vested quarter shares in capital of the four children on his death,

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Held: (i) estate duty was not chargeable in respect of the daughters' annuities payable under the settlement on the death of the settlor, because there was no such change in the beneficial enjoyment of the yearly sums before and after his death as would justify the conclusion that in respect of the annuities a beneficial interest accrued or arose within s. 2 (1) (d) on the settlor's death, and

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(ii) estate duty was chargeable in respect of the interest in capital of each of the four children on the settlor's death because, although before then each child had both a present interest in surplus income and a future interest in the capital contingent on surviving the settlor and uncertain in amount, yet after the settlor's death each child had an absolutely vested interest in a quarter of the capital, which interest was a beneficial interest that accrued or arose on the settlor's death within s. 2 (1) (d).

I

Adamson v. A.-G. ([1933] A.C. 257) as explained in *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* ([1953] 1 All E.R. 403) applied.
Appeal allowed in part.

[As to estate duty on interests arising on death, see 13 HALSBURY'S LAWS (2nd Edn.) 242, para. 233; and for cases on the subject, see 21 DIGEST 15, 16, 73-80.

For the Finance Act, 1894, s. 2 (1) (d), see 9 HALSBURY'S STATUTES (2nd Edn.) 350.]

* The relevant terms of the enactment are printed at p. 840, letter E, post.

Cases referred to:

- (1) *Adamson v. A.-G.*, [1933] A.C. 257; 102 L.J.K.B. 129; sub nom. *A.-G. v. Adamson*, 148 L.T. 365; Digest Supp.
- (2) *Inland Revenue Comrs. v. Westminster (Duke)*, [1936] A.C. 1; 104 L.J.K.B. 383; 153 L.T. 223; 19 Tax Cas. 490; Digest Supp.
- (3) *Coutts & Co. v. Inland Revenue Comrs.*, [1953] 1 All E.R. 418; [1953] A.C. 267; 3rd Digest Supp.
- (4) *Re Norfolk (Duke)*, [1950] 1 All E.R. 664; [1950] Ch. 467; 2nd Digest Supp.
- (5) *D'Avigdor-Goldsmid v. Inland Revenue Comrs.*, [1953] 1 All E.R. 403; [1953] A.C. 407; 3rd Digest Supp.

Appeal.

Appeal by the plaintiffs, the trustees of a settlement, from an order of DANCKWERTS, J., dated Oct. 11, 1955, declaring that on the true construction of a settlement dated Jan. 4, 1929, and made between Ebenezer Thomas Parkes (hereinafter called "the settlor") of the first part Marjorie Parkes and Rosalind Hilda Parkes of the second part and Midland Bank Executor and Trustee Co., Ltd., Reginald Parkes and Marjorie Parkes of the third part and certain deeds supplemental thereto, and in the events which had happened, estate duty became payable on the death of the settlor under the Finance Act, 1894, s. 2 (1) (d), in respect of (a) the value of the annuities of £250 payable under cl. 4 of the settlement to each of the daughters of the settlor during her life and so long as she should continue unmarried; and (b) the capital of the trust funds after deducting the funds required by the said cl. 4 to be appropriated to answer the said annuities.

J. Pennycuik, Q.C., and *S. M. Young* for the trustees.

E. B. Stamp for the Crown.

Cur. adv. vult.

Mar. 12. **LORD EVERSHERD, M.R.:** In this appeal is raised the familiar question of the applicability, on the death of a settlor, of s. 2 (1) (d) of the Finance Act, 1894, in relation to certain of the beneficial interests created by the settlement. The settlor was Ebenezer Thomas Parkes. The settlement was made by him on Jan. 4, 1929, in favour of his four children, two sons and two daughters. All four children survived their father, who died on Feb. 13, 1952, though one of the sons has since died. Both daughters are still unmarried.

The subject-matter of the settlement consisted partly of freehold property and investments and partly of policies on the life of the settlor. The terms of the settlement are of a somewhat unusual character. So far as material to the present question, they are (as will appear) to be found in cl. 3 and cl. 4 of the settlement. By cl. 3 it was provided that, during the life of the settlor, the trustees should stand possessed of the income of the premises settled and the investments for the time being representing the same on trust: (1) to pay the same unto and equally between the settlor's two daughters

"so long as they shall remain unmarried and after the death or marriage of either of them then to the other so long as she shall remain unmarried, but so that the income so to be paid to each or either of the daughters under this provision shall not exceed £250 in any year during which they shall both be alive and unmarried or in case either of them shall have died or married then the income so payable to the other shall not exceed £410";

(2) subject to the trust aforesaid, to pay the said income or the surplus arising in each year of the trust unto and equally between the four children of the settlor or such of them as should from time to time be living. By cl. 4 it was provided that, on the death of the settlor, (1) the trustees should appropriate and retain out of the trust fund (the policy moneys then having become payable)

A "in respect of each or such of the beforementioned daughters of the settlor who shall then be unmarried a fund sufficient at the time of appropriation to produce out of the annual income thereof an annuity of £250, which annuity shall be paid by the trustees to each such daughter respectively during her life and so long as she shall continue unmarried and so that if the income of the funds or fund so appropriated shall at any time prove insufficient for payment in full of the annuities or annuity so payable thereout respectively resort may be had to the capital thereof from time to time to make good such deficiency, but the surplus income (if any) of the said appropriated funds or fund from time to time remaining after the payment of the said annuities or annuity shall be applicable as income of the remainder of the trust fund; (2) as and when the said annuities or annuity shall cease the funds or fund appropriated in respect thereof shall revert to and become subject to the trusts hereinafter declared concerning the trust fund; (3) subject to the trusts aforesaid the trustees shall stand possessed of the capital and future income of the trust fund upon trust for such one or more of [the four children of the settlor] as shall be living at the death of the settlor and if more than one in equal shares absolutely."

D By cl. 5 each of the daughters covenanted with the settlor and separately with the trustees to pay in equal shares between them the premiums on the settled life policies as they became due, and they also charged the income payable to them under cl. 3 (1)—i.e., their prior right to income up to the maximum of £250 each—with payment by them of the premiums. Clause 10 was expressed to empower the settlor to bring further life policies on his own life into the settlement, on the terms (i) that, if he did so, the rights of the daughters under cl. 3 (1) to the first £500 between them of the income of the settlement should be increased by the amount of the premiums on the additional policies brought into the settlement; and (ii) that the covenants on the daughters' part for payment of premiums and the charges on their priority income rights should extend also so as to be applicable to the premiums on the additional policies.

E F By the terms of certain later memoranda and deeds, the income of the daughters was wholly released from the charges above mentioned. The settlor did in fact bring into settlement further policies, and what I have called the daughters' priority income rights were augmented accordingly. The daughters remained liable to pay all the premiums on all the settled policies under their covenants to that effect and they have in fact paid all such premiums down to the settlor's death.

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It appears from the evidence that the income of the settled property during the settlor's life barely sufficed to provide for the daughters' priority income rights, and during the whole of that period the total of the surplus income divisible among all four of the settlor's children amounted to no more than about £77.

H I I have referred to these various matters of fact and to the original imposition and the subsequent release of the charges on the daughters' priority income rights; but it was conceded before us by counsel, as I understood them, that, for the purposes of determining the questions before us, all such matters and also the existence and performance of the daughters' covenants should be ignored, and that we should equally disregard actual figures; in other words, that we could proceed as though the relevant terms of the settlement were confined to the terms which are found in, and which I have recited from, cl. 3 and cl. 4 of the settlement. I should add on the figures that, from the time when the added policies were brought into settlement, the daughters' priority income rights were in fact in each year above the original maximum of £250 each.

On these premises, it was contended by the Crown that duty under s. 2 (1) (d) of the Finance Act, 1894, became exigible on the death of the settlor (a) in respect of the annuities, so expressly described, payable to the two daughters under

cl. 4 (1) of the settlement and (b) in respect of the shares of corpus of the settled property to which the four children of the settlor, all having survived him, became absolutely entitled by virtue of cl. 4 (3) of the settlement; the annuities in the one case and the absolute interests in possession in the other constituting beneficial interests in the subject-matter of the settlement which arose to the two daughters and the four children respectively for the first time on the settlor's death, within the meaning of s. 2 (1) (d) of the Act. The learned judge, DANCKWERTS, J., accepted these contentions and decided in favour of the Crown under both heads. The present appeal is brought against these conclusions. A B

As regards the second of the two heads of claim, I entertain for myself no doubt that the view of DANCKWERTS, J., is correct. It was the submission of counsel for the trustees that the joint effect of cl. 3 (2) and cl. 4 (3) of the settlement was, as regards the interests thereunder of any one of the settlor's four children, in substance entirely the same as an immediate and absolute gift in favour of A, subject only to the liability of being divested in the event of A not surviving the happening of a particular event, e.g., the death of the donor—a kind of gift which in fact, it was said, had never given rise to a claim for duty on the donor's death. Counsel for the trustees submitted further that the existence of a right in possession to an aliquot share of surplus income during the settlor's life distinguishes this case from *Adamson v. A.-G.* (1) ([1933] A.C. 257). But whatever the "substance" of the children's interests might be in the sense in which counsel used that term, it is to my mind incontrovertible that the legal effect of the settlement was to confer or give rise for the first time on the death of the settlor to an absolute interest in capital in favour of each of the settlor's four children who survived the settlor. Those interests were, to my mind, distinct and different in kind and quality from the rights of the four children to share in surplus income during the life of the settlor. I therefore agree with the view of DANCKWERTS, J., which he expressed as follows in his judgment: C D E

"It seems to me that, as regards the capital, the interests which the beneficiaries got were interests which arose only on the death of the settlor. Until then they had merely contingent interests in the capital, dependent on them surviving his death and it was on the death of the settlor that they obtained vested interests in equal shares in the rest of the capital, and on that event fresh interests came into being." F

But the question in regard to the daughters' annuities given by cl. 4 (1) of the settlement is, to my mind, far more difficult. Counsel for the Crown argued with great force that, by parity of the reasoning applied in answering the question of the head of claim relating to capital, the legal effect of the settlement was in this regard to create and give rise for the first time on the settlor's death in favour of the daughters to two annuities of £250 for the remainder of their respective spinsterhoods; and that these interests, being properly speaking annuities (as that term is commonly used) are quite distinct and different not only in their incidents but also in kind and in quality from any beneficial interests in the settled property which the daughters had during the settlor's life, particularly from what I have called their priority income rights to the extent of £250 each during that period. The daughters' rights to receive the last-mentioned sums of £250 were not, according to counsel's argument, in truth annuities as that word should be understood at all. During the settlor's life, said counsel, the rights of the daughters were to receive certain shares of the total annual income of the settled property, the fractions varying with the amount of the income received. Put simply, they were entitled each to one-half of the first £500 of such income and to one-quarter each of the balance (assuming, of course, that both daughters remained unmarried and that both sons continued to live). After the settlor's death, each unmarried daughter would be entitled to get each year £250 no more and no less: before the settlor's death, she would never receive that sum, except in the very improbable event of the income of the G H I

A settled property being in any year exactly £500 to a penny. Except in that event, each daughter would in fact receive from the trustees a cheque for a varying sum, either less or greater than £250. According to this argument, it follows further that, since the interests of the daughters which I have tried to describe ceased altogether on the settlor's death and were replaced by the new annuities, the latter fall within the scope of s. 2 (1) (d) of the Act.

B Notwithstanding the force and attraction of the argument, I have, on the whole, come to the conclusion that it ought to be rejected. I do not, of course, forget that, according to the rule laid down for us by the House of Lords in *Inland Revenue Comrs. v. Duke of Westminster* (2) ([1936] A.C. 1) it is the duty of the court to determine the question of liability to duty according to the legal effect of the settlement or other transaction which gives rise to the claim. The

C court is not entitled to decide the question by reference to the substance of the matter, if by that term is meant according to the process of treating the rights created as equivalent to rights of a well-recognised and similar character which would or might have been created in some other or more usual way, and which those responsible are to be presumed to have intended, and by disregarding the true legal effect of the deed or other transaction which is before the court. On

D the other hand, the words in the section, "beneficial interest", ought not to be construed as referring exclusively to the technical forms of conveyancing (see per LORD REID in *Coutts & Co. v. Inland Revenue Comrs.* (3), [1953] 1 All E.R. 418 at p. 422). Nor ought the word "annuity" for this purpose to be confined to a beneficial disposition expressly so called or to one having specific incidents, providing for its security (see the language of JENKINS, L.J., in *Re Duke of*

E *Norfolk* (4), [1950] 1 All E.R. 664 at p. 675).

In the present case, as I think, the legal effect of the settlement was to provide for each unmarried daughter a first right—i.e., a right in priority to all other interests created or conferred—to the personal enjoyment of the yearly sum of £250. There was, of course, this difference in the incidents of that right during the settlor's life and after his death. During the former period, the yearly

F sum was payable exclusively out of the income of each year and was supported by no charge on capital and by no continuing charge on income. After the settlor's death, the yearly sum was charged on the corpus of a fund specially appropriated for the purpose; but in point of beneficial enjoyment there was no essential difference, in my judgment, before and after the settlor's death. The difference was that of incidents (particularly security) in accordance with the

G provisions in the settlement which were, in their nature, administrative in kind; i.e., directing the appropriation of specific sums to provide and secure the yearly sum to the exoneration of the rest of the settled property. In my judgment, the fact that, save in the very exceptional case mentioned, the sum paid in any year to each daughter was some sum other than £250 is not significant. In

H any year in which the income of the settled property exceeded £500, a strict statement accompanying the trustees' cheque would show it to be made up, as to £250, of a sum payable under cl. 3 (1) and, as to the balance of one-quarter, of a share of surplus income under cl. 3 (2). The case in this respect is not different from that commonly met with, where an annuitant, in the ordinary sense, is also one of the residuary legatees of income. The present case, in my

I judgment, has to be determined as if the surplus income under cl. 3 (2) were divisible among a class of persons which did not include either of the daughters.

The learned judge, DANCKWERTS, J., accepted the argument of counsel for the Crown. He said:

"I must look at the terms of the settlement. What each of the two sisters had during the lifetime of the settlor was not, as it seems to me, in truth an annuity at all. They were entitled to the income of the settled fund in equal shares. There was a top limit of £250 which would prevent

them getting more than £250 a year so long as they both remained unmarried, but, in fact, during most of the time what happened was that the top limit never came into consideration at all because the fund produced less than £500 a year. There were some years in which the fund produced more than £500 a year and then, of course, the top limit would apply. Otherwise, what they got was simply an annual share in the income of the trust fund. If one of them married or died, then the survivor had a different limit . . . Now, what happened on the death of the deceased? Those arrangements, as it seems to me, came to an end and instead you find that the trustees are required to set aside two appropriated funds; each of them is to be sufficient to produce £250 a year and out of that £250 a year an annuity in the proper sense of the term is to be provided in each case for the relevant daughter; then, subject to that, the whole capital and income of the trust funds becomes divisible among the four beneficiaries, the four children of the settlor. Therefore, it seems to me, there comes into being an interest of quite a different nature from that which was created during the lifetime of the settlor, to wit, two definite annuities of £250 with different rights from anything the daughters had before."

"With all respect to the learned judge, I have come to a different conclusion. In my judgment, during the settlor's life each daughter was entitled to receive and was in beneficial enjoyment and possession of a yearly sum of £250 in priority to all other interests, subject only to the limitation that, if the income of the settlement did not extend to £500 altogether, each daughter would pro tanto go short. I should perhaps state again that I am proceeding throughout on the hypothesis conceded by counsel before us that we are to judge the matter on the footing that all the relevant provisions of the settlement are those in cl. 3 and cl. 4 and we are not concerned with actual figures. The daughters being in beneficial enjoyment of that right, there was, as it seems to me, no change in the beneficial enjoyment and possession such as would give rise to a claim for duty. I agree with counsel for the trustees that *prima facie* there must, in order to give rise to a valid claim for duty, whether under s. 1 or s. 2 of the Finance Act, 1894, be a change not merely of source or title, but of possession or enjoyment.

Counsel for the Crown conceded that there must be some limits on the full rigour of his argument. Suppose a case where under a settlement an annuity, expressly so called, of £X per annum is given to A during a settlor's life, also expressed to determine on the settlor's death, and thereafter another annuity of exactly similar amount is given to A for the rest of A's life; or suppose an annuity of £X to A charged on income only during the settlor's life and after his death on corpus also, or an annuity charged after the settlor's death on different funds from those funds designated to support the annuity during the settlor's life. In all these cases counsel conceded, rightly and inevitably, as I think, that no claim for duty could arise on the settlor's death. Counsel for the Crown was challenged by counsel for the trustees to indicate where in such cases the line should be drawn, so that all these cases falling on one side of the line could be recognised as exempt for duty. He declined to accept the challenge, quite properly and justifiably. We are not here concerned with the attempted formulation of principle or rule of thumb for the determination of all cases of this character, but with the question, aye or no, whether on the facts of this case, on the true interpretation and legal effect of the settlement made by Mr. E. T. Parkes on Jan. 4, 1929, duty became exigible on Mr. Parkes' death in respect of annuities given to his daughters by cl. 4 of the settlement. Cases of this kind are always difficult (and I have found this case no exception), some on their special facts falling on one and some falling on the other side of the so-called dividing line. There will no doubt be fine distinctions; but, for the reasons that I have tried to state, in the present case I have come to the conclusion that no

A duty is payable in respect of the daughters' annuities. On this point, therefore, I would allow the appeal; but, on the other point, I think it should be dismissed.

B JENKINS, L.J.: I am of the same opinion. In the course of the hearing before us, it was, as I understood it, agreed on both sides that the provisions of the settlement as regards the payment by the daughters of the premiums on the original and additional policies, and the compensating increase of the maximum yearly sum of £250 payable to each daughter under the primary trust of income by the amount of the premiums on the additional policies as and when brought into the settlement, could be ignored; that £250 per annum could be treated as the relevant maximum figure in respect of each daughter; and that one-half of each year's income of the trust fund could be treated as having amounted, at all material times during the life of the settlor, to not less than £250.

C With the above mentioned simplifications, the legal effect of the settlement may be thus summarised: (i) During the life of the settlor: (a) each of the two daughters, so long as both were living and unmarried, was entitled to receive year by year out of the income of the trust fund one-half of the amount of such income or the sum of £250, whichever should be the less, with no right of recourse to the income of any future year or to the capital trust fund to make good any amount whereby one-half of such income for any year might fall short of £250; (b) in the event (which did not in fact happen) of either daughter marrying or dying, her interest in income as above described was to cease and the other daughter was thenceforth until her death or marriage to receive year by year the whole of the income of the trust fund or £410, whichever was the less, with the same absence of recourse to the future income or to capital as in the case of the £250; (c) in the event of the income for any year being more than sufficient to provide for each daughter the sum of £250 or, for the surviving unmarried daughter, the sum of £410, as the case might be, the surplus income for that year was to be divided equally amongst all the four sons and daughters of the settlor or such of them as should for the time being be living. (ii) After the death of the settlor: (a) the trustees were to appropriate out of the trust fund in respect of each daughter, provided she should then be unmarried, a fund sufficient at the time of appropriation to produce out of its income an annuity of £250, which was to be paid to such daughter so long as she should be living and unmarried, and, in the event of the income of such appropriated fund proving at any time insufficient to pay such annuity in full, resort might be had to the capital thereof to make good such deficiency; but any surplus income of such appropriated fund remaining after payment of such annuity was to be applicable as income of the remainder of the trust fund; (b) the trust fund remaining after the appropriation as above of the funds or fund required to provide the annuities or annuity payable to the daughters, or either of them, and also each or any fund so appropriated after the annuity to which it related should have ceased to be payable, were to be held, both as to capital and income, in trust absolutely for all the four sons and daughters of the settlor or such of them as should be living at his death and, if more than one, in equal shares.

I It thus appears that from the date of the settlement until the death of the settlor each of the daughters was entitled to receive, in respect of each year during her life, or until her marriage, out of the income of the trust fund for such year the sum of £250, or one-half of the income of the trust fund for such year, whichever was the less: whereas on the death of the settlor she became entitled during her life or until her marriage to a yearly sum of £250 payable out of the income for each year or, if need be, out of the capital of a part of the trust fund appropriated for the purpose; and that, during the life of the settlor (but not after his death), the yearly sum payable to either of the daughters as above might be increased to £410 or the whole of the income of the trust fund, whichever might be the less, in the event of the other daughter dying or marrying. It further appears that, from the date of the settlement until the death of the

settlor, the four children, or such of them as should for the time being be living, were entitled in equal shares to any surplus income of the trust fund for any year remaining after payment of the two yearly sums of £250 payable to the two daughters respectively, or the sum of £410 payable to the sole surviving or unmarried daughter, as the case may be, in respect of that year; and each of the four children was further contingently entitled in the event of his or her surviving the settlor to share equally in the capital of the trust fund with the others or other of them so surviving, subject, as regards the funds or fund appropriated to provide the annuities or annuity of £250 payable to both or either of the daughters, to the trusts for payment of such annuities or annuity out of the income or, if need be, the capital thereof; whereas, from and after the death of the settlor, in the events which happened, all four children became entitled, subject as aforesaid, to immediate and absolutely vested interests in the capital and future income of the trust fund in equal shares, including the two funds appropriated to provide the two daughters' annuities as and when those annuities should respectively cease to be payable, and any surplus income arising from those funds in the meantime.

Such being the effect of the settlement, the question in the appeal is whether each or either of the following interests, viz., (a) the annuities of £250 each provided for the daughters on the death of the settlor by means of the appropriations directed to be made for that purpose, and (b) the absolute vested interest in one-fourth of the capital and future income of the trust fund (subject as regards the appropriated funds to the trusts for payment of the annuities) attained on the death of the settlor by each of his four children—attracted estate duty on the death of the settlor under the provisions of s. 2 (1) (d) of the Finance Act, 1894, which, so far as relevant, is in these terms:

“Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . . (d) Any annuity or other interest purchased or provided by the deceased . . . to the extent of the beneficial interest accruing or arising . . . on the death of the deceased.”

Counsel for the trustees of the settlement admits that the investments and, for the purposes of this appeal, the policies, comprised in the settlement must be taken to have constituted an “interest” within the meaning of para. (d), though I understand him to reserve this point, so far as the policies are concerned, for possible argument to the contrary in the event of the matter going higher. On the footing that the settled investments and policies constituted an “interest”, it is, of course, plain that they were an interest provided by the deceased. It follows that the interest so provided (the investments and policies) attracted estate duty on the death of the deceased to the extent of any beneficial interest accruing or arising on such death, and the point at issue is whether any beneficial interest did so accrue or arise within the meaning of the paragraph.

I agree with the learned judge that, so far as decided cases are concerned, the whole of the guidance available on this question is to be found in *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (5) ([1953] 1 All E.R. 403), and in particular in the passages referred to by him from the speeches of LORD PORTER and LORD REID at p. 408 and at p. 415.

LORD PORTER said (*ibid.*, at p. 408):

“In *Adamson's* case (1) there was, as the majority of their Lordships held, a change in the interest of the beneficiaries: before the death they had a contingent interest which might have been divested; after it they had a vested interest. The reasoning is best seen in the observations of LORD WARRINGTON OF CLYFFE ([1933] A.C. at p. 277). He says: ‘In the present case the interest of each child was unquestionably provided by the deceased, and is therefore to be deemed to be included in the expression “property passing on the death of the deceased”, but only to the extent of the beneficial interest accruing or arising on the death of the deceased. Before his death

- A each child had a beneficial interest, but one that might be destroyed either by an exercise of the power of appointment or by the death of the child in the lifetime of the deceased; on his death without exercising his power the beneficial interest of each child became absolute and indefeasible.' Your Lordships' House so decided in *Adamson's* case (1), and LORD WARRINGTON's words set out the ground on which the decision was based. On that
- B reasoning there was as a result of the death a change in the rights which each child enjoyed. Until it occurred he might have got all or nothing or some intermediate sum: afterwards his rights were finally determined."

LORD REID said (*ibid.*, at p. 415):

- C "In the cases where the Crown has succeeded it has been because it was held that some right or property of a different kind from that previously enjoyed by the beneficiary arose or accrued on the death or the right of the beneficiary was in some way enlarged or altered and not merely because the beneficiary's existing right became more valuable after the death."

- D On the death of the deceased in the present case, was there such a change in the rights enjoyed by the two daughters or in the rights enjoyed by all the four children of the deceased as to justify the conclusion that a beneficial interest then accrued or arose within the meaning of the section? First, as to the position of the two daughters. Apart from her interest in any surplus income, the rights of each daughter during the life of the settlor did not materially differ from those of the recipient of an annuity of £250 payable as regards each year out of the income of a given fund for that year and not further or otherwise,
- E with no right of recourse to future income or to capital to make good any deficiency. Such an annuitant, if the designated income for any year exceeded £250, would be entitled to receive out of such income £250 and no more; and, if the designated income for any year fell short of £250, would be entitled to the whole of such income. It is true that the primary trust of income in favour of the two daughters in the present case is expressed as a trust to divide the income
- F equally between them, with a proviso to the effect that the income payable to each or either of them is not to exceed £250 in any year, but this seems to me to be no more than a somewhat periphrastic method of achieving the same result as if each of them had in form been given a yearly sum of £250 payable as regards each year out of and to the extent of one-half of the income of the trust fund for that year and not further or otherwise. Like the annuitant referred to above,
- G each daughter was, when the designated income (i.e., as regards each daughter one-half of the income of the trust fund) for any year was equal to or exceeded £250, entitled to receive £250 out of such income; and, apart from the trust for division of any surplus (which I am for the moment ignoring) nothing more. If, on the other hand, the designated income for any year were to fall short of £250, she was, again like the annuitant referred to above, entitled to receive in
- H respect of that year the whole of such income and nothing more. In other words, each daughter was entitled during the life of the settlor, so long as she was living and unmarried, to receive in respect of each year £250 out of the designated income for each year or the whole of such designated income, whichever was the less; and I think I was accurate in so describing her position earlier in this judgment.
- I If I am right so far, then it seems to me to follow that each daughter is to be regarded as entitled, as from the date of the settlement and before as well as after the settlor's death, to receive during her life or until her marriage the yearly sum of £250, payable as regards each year during the settlor's life out of and to the extent of one-half of the income of the trust fund for that year, with no right of recourse to future income or to capital to make good any deficiency, and payable as regards each year after the settlor's death out of the income of a part of the trust fund appropriated for the purpose, with a right of recourse to the capital of the appropriated fund to make good any deficiency in such income. If the

rights of each daughter under the primary trust of income are accurately thus described, it follows that the only changes in the character of her interest on the settlor's death were (i) that the possibility of her yearly payment being increased to £410 or the whole of the income of the trust fund, whichever might be the less, through the death or marriage of her sister, came to an end, which, as it seems to me, is wholly immaterial; and (ii) that her yearly sum of £250, instead of being payable as regards each year only out of and to the extent of one-half of the income of the trust fund for such year, was thenceforth provided for by the income of a fund appropriated for the purpose, with a right of recourse to capital to make good any deficiencies in such income. In deciding this part of the case in favour of the Crown, the learned judge expressed his reasons thus:

"I must look at the terms of the settlement. What each of the two sisters had during the lifetime of the settlor was not, as it seems to me, in truth an annuity at all. They were entitled to the income of the settled fund in equal shares. There was a top limit of £250 which would prevent them getting more than £250 a year so long as they both remained unmarried, but, in fact, during most of the time what happened was that the top limit never came into consideration at all because the fund produced less than £500 a year. There were some years in which the fund produced more than £500 a year and then, of course, the top limit would apply. Otherwise, what they got was simply an annual share in the income of the trust fund. If one of them married or died then the survivor had a different limit. She then, of course, received the whole income of the trust fund, but the limit in her case was not twice £250 but was £410 a year; and subject to those payments to be made to the two daughters, then the four children were to receive the surplus income, if there was any surplus income, after providing for the daughters' rights, in equal shares. Now, what happened on the death of the deceased? Those arrangements, as it seems to me, came to an end and instead you find that the trustees are required to set aside two appropriated funds; each of them is to be sufficient to produce £250 a year and out of that £250 a year an annuity in the proper sense of the term is to be provided in each case for the relevant daughter; then, subject to that, the whole capital and income of the trust funds becomes divisible among the four beneficiaries, the four children of the settlor. Therefore, it seems to me, there comes into being an interest of quite a different nature from that which was created during the lifetime of the settlor, to wit, two definite annuities of £250 with different rights from anything the daughters had before. Now, the daughters will not suffer any diminution if the income of the funds is insufficient, and the ultimate beneficiaries cannot touch the income of the appropriated fund, but the daughters are to get annuities of a definite sum of £250 each which are, if necessary, to be made up not only out of the income of the appropriated funds, but out of the capital of those appropriated funds if the income is insufficient for the purpose of paying the annuities. It seems to me that these are interests of quite different kinds which arise on the death of the settlor and, therefore, it seems to me, must fall within the terms of s. 2 (1) (d)."

So far as the learned judge's reasoning is based on his statement to the effect that in fact most of the time the top limit never came into consideration at all because the fund produced less than £500 per annum and that, accordingly, save in the exceptional years when it produced more, what the daughters got was a share in the annual income of the trust, this no longer holds good; for, as mentioned at the beginning of this judgment, I understand that it was in the course of the hearing before us agreed on both sides that one-half of each year's income of the trust fund could be treated as having amounted at all material times to not less than £250. So far as the learned judge proceeds on the ground that,

A apart from any question of deficiencies, a share of the income of a trust fund with a top limit is not an annuity, I think, with respect to him, that he takes too narrow a view. I have endeavoured earlier in this judgment to show that a trust in 'this form confers on the beneficiary rights not distinguishable, in any material respect, from those conferred by a trust for payment of an annuity out of the income of a particular fund, where the annuity is payable as regards

B each year only out of the income of that year with no right of recourse to future income or to capital. So far as the learned judge founds himself on the difference between an annuity secured by the income of an appropriated fund with a right of recourse to capital, and an annuity (though he would not so term it) of the kind taken by each daughter in the present case, where the payment in respect of each year is limited to the designated income for that year and there is no

C right of recourse to capital, I do not think this change, which only concerns the security for the annuity, and not its amount or duration, is of such a character as to justify the conclusion that, as from the death of the settlor, each daughter became entitled to a new and different right to receive £250 per annum, which accordingly constituted a beneficial interest accruing or arising on the death of the deceased within the meaning of s. 2 (1) (d). A provision for appropriation

D to answer an annuity is an administrative provision whereby the annuitant's rights are limited to a particular part of a fund in order that the remainder of the fund may be set free for distribution; and I do not think the use of such a provision in the present case makes the position any different for the present purpose from what it would have been if the settlement had simply directed that from and after the settlor's death each of the daughters, so long as she was

E living and unmarried, should receive an annuity of £250 payable as regards each year only out of one-half of the income of the trust fund for that year. Such a direction could, in my view, hardly have been held to attract duty under s. 2 (1) (d). The appropriation merely limits the annuitant's rights against income to the income of a particular fund, and makes up for that by giving a right of recourse to the capital of such fund.

F Counsel for the Crown argued that the right of the two daughters to share equally with the two sons in any surplus income for each year during the life of the settlor remaining after payment to each daughter of £250 for that year in some way affected the character of the maximum yearly sum of £250 so as to make it different from an annuity. I cannot follow this. An annuity in the strictest sense may well be given in conjunction with a provision to the effect

G that the surplus income for any year remaining after payment of the annuity is to be divided among a class which includes the annuitant. The learned judge rightly took the view that the question at issue is not to be resolved by loose references to the substance as distinct from the form of the settlement; but that does not mean that it is not permissible to ascertain the true nature and effect of the rights conferred by the settlement, whatever forms of words or machinery

H of conveyancing the draftsman may have employed to confer them.

As regards the interest of each of the four children in the capital of the trust fund, I think the learned judge was clearly right in holding, as he did, that s. 2 (1) (d) applied. Before the death of the settlor, each child had a future interest in the capital of the fund contingent on him or her surviving the settlor and uncertain as regards its amount, which depended on the number of children

I who might survive him. After the death of the settlor, each child had an absolutely vested interest in one-fourth of the capital of the trust fund, and the future income thereon. I find it impossible consistently with the ratio decidendi in *Adamson v. A.-G.* (1), as explained in *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (5) to hold that such vested interest in capital was not a beneficial interest accruing or arising on the death of the deceased within the meaning of s. 2 (1) (d). It is further, to my mind, quite plain that, in arriving at the extent or value of such beneficial interest, no deduction can be made in respect of the four children's

interests *pur autre vie* in the surplus income during the life of the settlor, for these interests came to an end on his death. Any deduction in respect of their interests in expectancy is, of course, precluded by the Finance Act, 1934, s. 28. For these reasons, I would allow this appeal, to the extent only of excluding from the property chargeable with duty under s. 2 (1) (d) the funds appropriated to provide the two annuities.

BIRKETT, L.J.: I agree with the judgments which have been delivered by LORD EVERSHED, M.R., and JENKINS, L.J., and have nothing further to add.

Appeal allowed in part. Leave to appeal to the House of Lords granted.

Solicitors: *Baddeleys & Co.* (for the trustees); *Solicitor of Inland Revenue.*

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

GILL AND ANOTHER *v.* LEWIS AND ANOTHER.

[COURT OF APPEAL (Singleton, Jenkins and Hodson, L.JJ.), March 13, 14, 1956.]

Landlord and Tenant—Lease—Forfeiture—Arrears of rent—Judgment for possession and arrears of rent obtained against one of two joint tenants—Relief—Court's discretion to grant relief—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5 c. 49), s. 46—Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 212.

Joint Tenancy—Leasehold land—Recovery of possession—Judgment against one of two joint tenants—Whether effective judgment within Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 212.

The defendants W. and L. were joint tenants of two dwelling-houses demised to them by two separate leases for terms of five years from Dec. 25, 1952, and ten years from Sept. 29, 1953, respectively. Both leases contained provisos for re-entry by the landlord (whose personal representatives the plaintiffs were) on the ground of non-payment of rent. The defendants were consistently in arrears with the rent and in an action for arrears of rent in March, 1954, the landlord found it impossible to serve the defendant W. and obtained judgment against the defendant L. In a second action for arrears of rent in July, 1954, the landlord had to obtain an order for substituted service. Judgment was given in her favour. On Apr. 1, 1955, the plaintiffs issued a writ claiming possession of the premises on the ground of non-payment of rent amounting to £412 10s. The defendant W. was served but the defendant L. could not be found. On or about May 15, 1955, £400 was paid to the plaintiffs, but on May 17, judgment, including an order for possession, was entered against W. in default of appearance. On June 20 the defendant L. was convicted of two indecent assaults on boys committed on one of the demised houses and was sentenced to two years' imprisonment. On July 13 both defendants, having tendered or paid the balance due to the plaintiffs, entered appearance, service having been waived in the case of L. and applied for relief against forfeiture of their leases under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 46*, read together with the Common Law Procedure Act, 1852, s. 210, s. 211 and

* The terms of this section are printed at p. 848, letters B to F, post and the effect of s. 210, s. 212 is summarised there.

A s. 212. Relief was granted by the master and his order was upheld by the judge in chambers. On appeal, the plaintiffs contended that, although the defendants had paid or tendered all moneys due, yet owing to past conduct of the defendants, the court should, in its discretion, refuse relief from forfeiture.

B **Held:** (i) the judgment of May 17, 1955, was not an effective judgment for the purposes of s. 212 of the Common Law Procedure Act, 1852, since it was obtained against one only of two joint tenants (see p. 849, letter C, post; *T. M. Fairclough & Sons, Ltd. v. Berliner*, [1931] 1 Ch. 60, applied); accordingly, as the whole of the rent and costs due had been paid or tendered subsequently, all further proceedings in the action should cease and be discontinued by virtue of s. 212 and (per JENKINS, L.J., at p. 849, letter E, post) by way of corollary the court should grant relief against forfeiture for non-payment of rent.

C (ii) even if the judgment of May 17, 1955, had been an effective judgment, relief against forfeiture for non-payment of rent should be granted because the function of the court in exercising its equitable jurisdiction was to grant relief when all that was due in respect of rent and costs had been paid, save in exceptional circumstances, and no such exceptional circumstance was here established as would justify the court in refusing relief.

D *Stanhope v. Haworth* (1886), 3 T.L.R. 34; *Newbolt v. Bingham* (1895), 72 L.T. 852; and *Bowser v. Colby* (1841), 1 Hare, 109, considered.

Appeal dismissed.

E [Editorial Note. One ground on which it was contended that the court should refuse relief was that the tenants had proved, it was alleged, to be bad payers of rent and elusive as defendants to proceedings. That, however, does not amount to a ground for refusing relief when the rent and costs due have been paid within the time permitted by statute (see per HODSON, L.J., at p. 854, letter E, post). Similarly breaches of covenant are in general irrelevant (see p. 852, letter E, post). An instance of what may constitute exceptional circumstances justifying the withholding of relief is the notorious use of premises as a disorderly house (see p. 852, letter F, post).

F As to relief from forfeiture for non-payment of rent, see 20 HALSBURY'S LAWS (2nd Edn.) 264, para. 297; and for cases on the subject, see 31 DIGEST (Repl.) 535, 6592 et seq.

G For the Common Law Procedure Act, 1852, s. 210, s. 211, and s. 212, see 18 HALSBURY'S STATUTES (2nd Edn.) 412, 415, 416; and for the Supreme Court of Judicature (Consolidation) Act, 1925, s. 46, see *ibid.*, 483.]

Cases referred to:

- H** (1) *Fairclough (T. M.) & Sons, Ltd. v. Berliner*, [1931] 1 Ch. 60; 100 L.J.Ch. 29; 144 L.T. 175; 31 Digest (Repl.) 545, 6666.
- (2) *Stanhope v. Haworth*, (1886), 3 T.L.R. 34; 31 Digest (Repl.) 536, 6605.
- (3) *Newbolt v. Bingham*, (1895), 72 L.T. 852; 31 Digest (Repl.) 551, 6718.
- (4) *Chandless-Chandless v. Nicholson*, [1942] 2 All E.R. 315; [1942] 2 K.B. 321; 112 L.J.K.B. 19; 167 L.T. 198; 31 Digest (Repl.) 536, 6608.
- (5) *Nance v. Nalor*, [1928] 1 K.B. 263; 97 L.J.K.B. 39; 138 L.T. 165; 31 Digest (Repl.) 535, 6593.
- I** (6) *Bowser v. Colby*, (1841), 1 Hare, 109; 11 L.J.Ch. 132; 66 E.R. 969; 31 Digest (Repl.) 535, 6592.

Appeal.

The plaintiffs appealed from an order of PEARSON, J., in chambers, dated Oct. 11, 1955, and made in an action by the landlords for possession on the ground of non-payment of rent, by which order the tenants were granted relief from forfeiture of their leases.

The facts appear in the judgment of JENKINS, L.J.

F. E. C. Grundy for the landlords.

C. E. Rochford for the tenants.

JENKINS, L.J.: The plaintiffs in this case are Mr. Reginald Edwin Gill and Miss Edna Bradshaw, who sued as personal representatives of the late Ida Janet Dufour Cole. The action concerns certain leasehold premises, to be later described, which form part of the estate of Mrs. Cole. The defendants are a Mr. Archibald Lewis and a Mr. Neville Wright, who are the tenants of the leasehold premises in question. The action was brought by the plaintiffs against the defendants for non-payment of rent and judgment, including an order for possession, was obtained against one of them. Thereupon they both applied for relief from forfeiture for non-payment of rent under the provisions of s. 46 of the Supreme Court of Judicature (Consolidation) Act, 1925, read in conjunction with s. 210, s. 211 and s. 212 of the Common Law Procedure Act, 1852. The master held the defendants entitled to relief. On appeal PEARSON, J., in chambers affirmed the master's decision, and the plaintiffs now appeal to this court.

The premises in question consisted of two adjoining houses, Nos. 90 and 92 Ifield Road, Kensington. They were held under two separate leases, the earlier in date being the one which comprised No 92. That was a lease for five years from Dec. 25, 1952, at a rent of £375, paid quarterly in advance. The lease of No. 90 was dated Oct. 1, 1953, and that was for a term of ten years from Sept. 29, 1953, at a rent of £450, payable quarterly in advance; making £825 in all for the two houses. The parties to the lease in each case were Mrs. Cole, as landlord, and the two defendants as tenants. The leases contained various covenants, viz.: to use the premises as private dwelling-houses only, with an exception as regards the ground floor and basement, which could be used for office purposes; not to cause any nuisance or annoyance to the landlord or adjoining owners; and not to underlet or part with possession without the consent in writing of the landlord. There was the usual power of re-entry in the event of the rent being unpaid for twenty-one days. It is said against the tenants that they were always bad payers; and the facts seem to some extent to bear that out. It is also said that when it was sought to improve their performance in this respect by legal proceedings they were difficult to find. Two actions in respect of rent in arrear were brought before the present action. In the first, a writ was issued on Mar. 26, 1954, claiming rent due in March, 1954: there were no claims for possession or for breach of covenant other than the covenant to pay rent. The landlords found it impossible to serve the defendant Wright, who could not be found; and in the result, on July 6, 1954, judgment was obtained against Mr. Lewis alone for the amount of the arrears. That rent was later paid, but the complaint is made that the costs were left outstanding for a long time. The second of the two previous actions was begun by a writ dated June 30, 1954, and the claim was for rent due in June, 1954, again without any claim for possession. On this occasion an order for substituted service was obtained against the tenants on July 19, 1954, and on July 26, 1954, judgment was obtained against both tenants for the rent in arrear and costs. There again, it is said that although those costs have now been paid, at all events it was a long time before they were paid. Mrs. Cole died on Jan. 22, 1955; and the landlords obtained probate on Mar. 11, 1955.

On Apr. 1, 1955, the writ in this action was issued. The relief claimed differed from that in the previous actions, in that possession was claimed on the strength of the non-payment of rent, the claims being for possession of Nos. 90 and 92, arrears of rent and mesne profits. On this occasion, in contrast to the first, it was found possible to serve Mr. Wright, but Mr. Lewis was not to be found. In the end it appeared that he had been sent to prison over a matter to which I will later refer. The defendant Wright, although served, did not immediately

- A appear to the action, but he and Mr. Lewis entered appearances on July 13, 1955. I think that Mr. Lewis was never in fact served, but by arrangement with Mr. Wright appearance was entered for both of them, and service was waived so far as Mr. Lewis was concerned. On May 17, 1955 (the defendant Wright at this stage not having appeared and the defendant Lewis not having been served) judgment in default of appearance was signed against Mr. Wright alone.
- B Before the signing of judgment against Mr. Wright, £400 was paid off the total of £412 10s. owing for rent. The position thus was that while the bulk of what was due for rent was paid before the date of the judgment, there was a small balance outstanding at that date consisting, apart from costs, of the sum of £12 10s. It appears that on June 20, 1955—that is to say, after the issue of the writ in the action, and after judgment had been signed against the defendant
- C Wright—the defendant Lewis was convicted of two indecent assaults on boys; and it appears, further, that these assaults were committed at No. 92, Ifield Road. The defendant Lewis was prosecuted, and he was sentenced to two years' imprisonment. It appears that the defendant Lewis is a coloured man. He apparently is a singer or entertainer, and the defendant Wright is his manager. I gather that in the ordinary way they spend much of their time, or used to spend
- D much of their time, touring the country giving performances.

- The facts being as I have stated them, both tenants, having at length entered appearances on July 13, 1955, applied to the court for relief from forfeiture, and they made that application under s. 46 of the Supreme Court of Judicature (Consolidation) Act, 1925, read in conjunction with s. 210, s. 211 and s. 212 of the Common Law Procedure Act, 1852. As I have already said, when the
- E summons came before the master he granted relief; and PEARSON, J., affirmed his decision on Oct. 11, 1955. The learned judge, having considered the terms of the relevant sections, and also the authorities to which we have been referred, doubted whether he had any discretion in the matter: that is to say, he thought the position might well be that on proof of tender or payment of the arrears, the court was in effect bound to exercise its discretion in favour of the tenants;
- F he went on to say, however, having considered the facts, that if there were any discretion in the matter he thought it should be exercised in favour of the tenants so as to give them relief.

- On the part of the landlords it is urged that the court's jurisdiction in this matter is a discretionary jurisdiction, and, while it is conceded that in the ordinary way the court will make the order as a matter of course when satisfied
- G that the landlord has received, or has been tendered, all that is due to him for rent and for costs, that is not a wholly inflexible rule, for the conduct of the tenant may be looked into, and if it appears that it would be inequitable or unfair to grant relief, the court ought, in the exercise of its discretion, to refuse relief. As grounds on which, in his submission, relief should have been refused by the learned judge in the present case, counsel for the landlords relied on three matters.
- H The first was the previous history of the difficulties which the landlords had experienced in extracting the rent from the tenants; the second was the elusive habits of the tenants, which led to the difficulties of service to which I have referred; and the third was the defendant Lewis's conviction of the two acts of indecent assault, committed actually on a part of the demised premises. Taking all those matters into consideration, the learned judge, says counsel, ought
- I to have come to the conclusion that the tenants here were so wholly unmeritorious that it would be inequitable to grant them relief so as to saddle the landlords for a further period with such undesirable tenants. On the other hand, counsel for the tenants says that, although there may be exceptions, a case must be an exceptional one indeed for the court to refuse relief on other grounds when all the rent and costs have been paid. He does not go so far, I think, as to say that the court would never refuse relief, but he says that the court would only do so in very exceptional circumstances, such as do not exist in this case.

Those, briefly, are the arguments as presented to the learned judge and to us on the footing that this application properly came before the court as an application under s. 46 of the Act of 1925. I should next refer to that section and, briefly, to the relevant sections of the Common Law Procedure Act, 1852. Section 46 of the Act of 1925 (which substantially replaces s. 1 of the Common Law Procedure Act, 1860) is in these terms:

“In the case of any action for a forfeiture brought for non-payment of rent, the High Court or a judge thereof shall have power to give relief in a summary manner, and subject to the same terms and conditions in all respects as to payment of rent, costs and otherwise as could formerly have been imposed in the Court of Chancery, and if the lessee, his executors, administrators or assigns are so relieved they shall hold the demised premises according to the terms of the lease and without the necessity of any new lease.”

The provisions of the Common Law Procedure Act, 1852, to which I need refer are these. Section 210 provides (to put it very shortly) that a landlord is to have a right to re-enter when there is a half-year's rent in arrear; and then it goes on to stipulate that any claim to relief (under what was then purely the old equitable jurisdiction) which a tenant desires to make must be made within six months after execution of the judgment in respect of which relief is sought. It, therefore, sets a time limit on the equitable jurisdiction to which a tenant could formerly appeal at any distance of time. The time limit was first imposed by the Landlord and Tenant Act, 1730, which was in this respect substantially reproduced by s. 210 of the Act of 1852. Section 211 is to the effect that relief is not to be granted except on payment of everything that is due to the landlord in respect of rent in arrear and costs. That again imposes a condition or restriction on the claim to relief. Section 212 differs from the two preceding sections in that it confers on a tenant a substantive right and does not merely lay down conditions for the exercise of an existing right. It is in these terms:

“If the tenant or his assignee do or shall, at any time before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his or their attorney in that cause, or pay into the court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease and be discontinued; and if such lessee, his executors, administrators, or assigns, shall, upon such proceedings as aforesaid, be relieved in equity, he and they shall have, hold, and enjoy the demised lands, according to the lease thereof made, without any new lease.”

It is to be observed that in cases to which that section applies

“all further proceedings on the said ejectment shall cease and be discontinued”;

and it is to be observed, further, that it applies only to a case in which the amount due to the landlord is paid or tendered before the trial.

Those being the statutory provisions, I should briefly consider their application in the present case. It will be remembered that, the defendant Lewis not having been served, the landlords signed judgment against the defendant Wright alone on May 17, 1955. Judgment for possession of premises held by joint tenants was thus obtained against one only of those joint tenants. There has been a good deal of discussion in the course of the hearing before us as to the effect of a judgment for possession against one only of two joint tenants, and it raises a question of some difficulty. There is one case to which I should refer in this connection. That is the decision of MAUGHAM, J., in *T. M. Fairclough & Sons, Ltd. v. Berliner* (1) ([1931] 1 Ch. 60). The effect of that case was that one of two joint tenants could not claim relief from forfeiture under s. 146 of the Law of Property Act, 1925, and the learned judge's ground for so holding was that

- A One of two joint tenants was not the "lessee" within the meaning of s. 146. In such a case there are joint lessees, and neither of the two joint lessees can be held himself alone to be the lessee. This affords some support for the view that in the present case inasmuch as the two joint tenants together jointly constituted the "lessees" or "tenants" of the premises, and neither of them could be held to be the lessee or tenant by himself alone, any judgment for possession, to be
- B effective, should have been obtained against both.

- It seems to me that the right view must be that in order to obtain an effective judgment for possession against joint tenants judgment must be obtained against both of them. I cannot see that a judgment against one only, both being equally entitled to possession of the whole premises as joint lessees thereof, can have any effect at all. If that view be right, then the position seems to be this:
- C I think that the reference in s. 212 of the Common Law Procedure Act, 1852, to "the trial" must be a reference to an effective trial binding on all necessary parties, and, I would add, an effective judgment binding on all necessary parties. When all that has happened is that judgment for possession has been signed against one only of two joint tenants, I do not think there has been a completed "trial" within the meaning of s. 212, or an effective judgment for possession.
- D Although the tenants did not pay the whole of what was due from them before the judgment of May 17, 1955, they have in fact since paid or tendered the whole; and if, so far as the claim for possession is concerned, there has as yet been no effective trial, the result appears to be that there has as yet been no "trial" within the meaning of s. 212; and as the whole amount due for rent and costs has been paid or tendered, s. 212 applies to the case and "all further proceedings" in the action should "cease and be discontinued". As a corollary to this, and having regard to the concluding words of s. 212, the court ought to make an order for relief so as to restore the parties to their original position.
- E If that view is right, it is enough to dispose of the case. I propose, however, to deal with the matter as it would stand if judgment had been obtained against both joint tenants before the whole of the amount due for rent and costs had
- F been paid or tendered. I have already outlined the arguments on either side on the hypothesis that this was simply a case of two joint tenants, after judgment for possession against both, seeking relief under the Act of 1925, s. 46, as distinct from a case under the Common Law Procedure Act, 1852, s. 212. By way of illustration of the manner in which the jurisdiction to grant relief from forfeiture for non-payment of rent has been exercised by the courts, counsel for
- G the landlords referred us to *Stanhope v. Haworth* (2) (1886) (3 T.L.R. 34). That was a case in which an order had been made for possession for non-payment of rent, and the premises were a colliery. Relief was applied for towards the end of the period of six months allowed by s. 210 of the Common Law Procedure Act, 1852. It was held that the parties had so altered their position in the meantime that it would be inequitable to grant relief. It appears that in the
- H meantime the landlord had let other people into possession and had made arrangements with them for the working of the colliery, and a considerable amount of money had been spent on the footing that the lease was at an end. LORD
- ESHER, M.R., said this (3 T.L.R. at p. 35):

- I "Then the court was asked to give equitable relief under the Common Law Procedure Act, 1852, but the defendant, having judgment against him, had made no application until just before the end of the six months, and in the meantime the position of the plaintiff had become altered, as he had to keep up the colliery at considerable expense, and other parties who offered to take it had laid out money in purchasing plant to work the colliery and were now in possession. It would be unjust now to allow the tenant to dispossess them and resume possession of the colliery."

LINDLEY, L.J., concurring, said (*ibid.*):

"The tenant . . . had delayed his application for relief until just before the

end of the six months, and in the meantime the position of the plaintiff was altered. The plaintiff had in the meantime kept the colliery up, and had entered into an arrangement with other parties to let the colliery to them. There was no explanation of the delay by the tenant except that he had not had the money. That was no reason for allowing him now to have relief to the prejudice of the other parties, and it would be unreasonable to give him such relief."

LOPES, L.J., concurred. He said (*ibid.*) he quite agreed with the Divisional Court:

"that it would be 'monstrous' now to give the tenant such relief as he asked. Relief ought not to be granted if the landlord and other parties interested could not be put in the same position as before, and here that was impossible, and the relief asked for would be unjust and inequitable."

It will be observed that in that case the landlord and those dealing with him had altered their position on the footing that the lease to the party seeking relief was at an end, and they had been led to do that because the tenant had waited until almost the end of the period of six months allowed to him before he claimed relief. So that case shows that where parties have altered their position in the meantime, and in particular where the rights of third parties have intervened, relief ought not to be granted where the effect of it would be to defeat the new rights of third parties or be unfair to the landlord having regard to the way in which he has altered his position.

I may next refer to *Newbolt v. Bingham* (3) (1895) (72 L.T. 852) for the statements of general principle contained in the judgments. LORD ESHER, M.R., said (72 L.T. at p. 853):

"It seems to me that these Acts of Parliament give very large powers of relief to the court. That power is to be exercised by a judge at chambers. But the position of the judge at chambers as regards granting this relief is made by the Act as nearly as possible the same as that of a judge in a court of equity before the Act. If, at the time relief is asked for, the position has been altered, so that relief could not be given without causing injury to third parties, I think that the case that was cited to us (*Stanhope v. Haworth* (2)) applies. But if, at the time of the application, the position is not altered, so that no injustice will be done, I think, if the conditions mentioned in the section are complied with, that, according to the settled practice in equity, there is no longer a discretion in the judge, but that he ought to make the order. It does not matter whether it is called discretionary or not, if the discretion ought always to be exercised in one way. If the conditions are complied with, and no interests of third parties have intervened, there is no longer any real discretion in the matter. The order for relief in this case will, therefore, be made, if all repairs required by the covenants are done to the satisfaction of a surveyor within one month, and the rent in arrear and all costs, including the costs of this appeal, are paid."

SMITH, L.J., agreed, without, I think, adding anything material. RIGBY, L.J., said this (*ibid.*, at p. 854):

"I am of the same opinion. It was the settled practice of a court of equity to grant relief against forfeiture for non-payment of rent on payment of all rent in arrear and costs. Of course, the court was not absolutely bound by its practice where it would not do justice, and if some new interest had been created before the application, the court would refuse to interfere. That was not done to put the landlord in a better position, but because the rights of third parties had intervened. I know of no case where a court of equity has refused relief because actions had had to be brought on previous occasions to recover the rent. The Common Law Procedure Act, 1852, s. 210,

- A established a new procedure in actions of ejectment for non-payment of rent; but, upon the terms of the proviso, a mortgagee not in possession has lost nothing at all of his right to apply to the equitable jurisdiction, which is now, by s. 1 of the Common Law Procedure Act, 1860, vested in the judge at chambers. I am of opinion, therefore, that, upon performing the conditions mentioned in the proviso—that is, upon repairing the premises in accordance with the covenant to the satisfaction of a surveyor to be appointed by the parties or by the judge at chambers, and on payment of rent in arrear and all costs—the relief prayed for should be granted.”
- B

- Counsel for the landlords relied in support of his argument on the broad equitable principles embodied in such maxims as “He who comes to equity must come with clean hands”, and “He that seeks equity should do equity”. Counsel for the tenants referred us to other cases tending to support his argument that relief ought to be granted in all but the most exceptional cases where the statutory conditions have been satisfied. He referred us to the opening passage of the judgment of LORD GREENE, M.R., in *Chandless-Chandless v. Nicholson* (4) ([1942] 2 All E.R. 315 at p. 316). I do not think I need take up time by reading that, but counsel for the tenants relies on it because LORD GREENE, M.R., did there set out the effect of the equitable jurisdiction in terms tending to support counsel’s view. Next there was *Nance v. Nalor* (5) ([1928] 1 K.B. 263), in which the tenant seeking relief had actually signed an undertaking to pay the amount due and to give up vacant possession of the premises, but even in the face of that express undertaking it was held that the tenant could still claim relief under the equitable jurisdiction, and that the undertaking afforded no sufficient reason for excluding him from relief. On the other hand, counsel very properly referred us to *Bowser v. Colby* (6) (1841) (1 Hare, 109) as it tended to support the view of the matter taken by his opponent. The judgment of SIR JAMES WIGRAM, V.-C., shows clearly that, in his view, in the exercise of the equitable jurisdiction to grant relief it was proper to consider the conduct of the parties, and the conduct of the parties might be such as to make it wrong and inequitable to grant relief. He said, in laying down the general principle (1 Hare at p. 130):
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“The object of the proviso in both cases is to secure to the landlord the payment of his rent; and the principle of the court is—whether right or wrong is not the question—that, if the landlord has his rent paid him at any time, it is as beneficial to him as if it were paid upon the prescribed day.”

- G Then, having stated that general principle, he dealt with the point for which counsel cited the case (*ibid.*, at p. 132):

- “I think it clear that the defendants have a right to bring before me any breaches of covenant which may have been committed other than the non-payment of rent, and which, if committed, would have occasioned a forfeiture of the lease. Whether those breaches of covenant are to be proved in the cause, or to be tried in an issue, must, I apprehend, depend very much on the form and the course which the pleadings have taken . . . I have no doubt that the court is bound to take notice of the conduct of the plaintiffs’ testator in dealing with the property comprised in the lease, in considering the question whether he would have been entitled in equity to redeem the lease, although such conduct might not of necessity involve any breach of the covenants contained in it.”
- H
- I

In the course of some further observations of later date, the learned vice-chancellor said (*ibid.*, at p. 133):

“Thirdly, I was of opinion with the defendants (the Colbys) that they were entitled, at the hearing of this cause, to prove any breaches of covenant by the plaintiffs’ testator, other than that for the payment of rent; and that, if breaches of such other covenants were proved, for which the plaintiffs

might have been ejected, this court would not relieve against the breach of covenant for payment of rent.” A

That case clearly shows that in the view of the learned vice-chancellor other matters besides the non-payment of rent and the right of the landlord to receive in full his rent and costs before relief is granted were proper to be taken into account, and in particular breaches of other covenants under the lease, and even conduct not amounting to a breach of covenant. I think that this goes decidedly further than the more modern authorities. I do not consider that today it would be, generally speaking, legitimate to take into account other breaches of covenant. It should be remembered that many years after *Bowser v. Colby* (6) was decided the Conveyancing Act, 1881, made it necessary, before bringing any action for forfeiture for breach of covenant, to serve a notice specifying the breaches and requiring them to be remedied if capable of remedy. So that what would have been available breaches of covenant at the time of the decision in *Bowser v. Colby* (6) would not have been available breaches at the present time for want of the notice required by what is now s. 146 of the Law of Property Act, 1925. Nevertheless, it is a useful authority as showing that the court is not to exercise this equitable jurisdiction, as it were, “in blinkers”. B C

In my view, as the conclusion of the whole matter, the function of the court in exercising this equitable jurisdiction is, save in exceptional circumstances, to grant relief when all that is due for rent and costs has been paid, and (in general) to disregard any other causes of complaint that the landlord may have against the tenant. The question is whether, provided all is paid up, the landlord will not have been fully compensated; and the view taken by the court is that if he gets the whole of his rent and costs, then he has got all he is entitled to so far as rent is concerned, and extraneous matters of breach of covenant are, generally speaking, irrelevant. There may, however, be very exceptional cases in which the conduct of the tenants has been such as in effect to disqualify them from coming to the court and claiming any relief or assistance whatever. The kind of case I have in mind is that of a tenant falling into arrear with the rent of premises which he was notoriously using as a disorderly house: it seems to me that in a case of that sort if the landlord brought an action for possession for non-payment of rent and the tenant applied to the court for relief, the court, on being apprised that the premises were being consistently used for immoral purposes, would decline to give the tenant any relief or assistance which would in any way further his use or allow the continuance of his use of the house for those immoral purposes. In a case of that sort, it seems to me it might well be going too far to say that the court must disregard the immoral user of the premises and assist the guilty tenant by granting him relief. I cannot, however, find any facts in this case approaching the exceptional state of affairs I have in mind. Here we have the previous actions for rent, but, in my view, those are not material; and it will be remembered that RIGBY, L.J., said in *Newbolt v. Bingham* (3) (72 L.T. at p. 854) that he knew of no case where a court of equity had refused relief because actions had had to be brought on previous occasions to recover rent*. Nor, in my view, can anything really be made of the difficulty experienced in finding the two defendants for the purpose of bringing proceedings against them to recover the rent. Other breaches of covenant are hinted at, but none of them is clearly dealt with in the evidence, and I do not think it can affect the result so far as the present case is concerned. If there are indeed other breaches of covenant, then a landlord objecting to them has his remedy in bringing an action for breach of the covenants in question after all proper notices have been given. D E F G H I

We are left as the sole reason for refusing relief the fact of the two acts of indecent assault committed by the defendant Lewis at No. 92, Ifield Road, against two boys. Counsel for the plaintiffs urged that that matter was enough

* See p. 850, letter I, ante.

- A in itself to justify the court in refusing relief. This is the aspect of the case which has occasioned me most difficulty, but, in my view, that matter is not in itself enough to justify the court in refusing relief. So far as the evidence goes, although there are some rather vague hints in an affidavit filed on behalf of the landlords, this was apparently one isolated instance. We have no evidence at all beyond the bare fact of the conviction and we know nothing of the circumstances.
- B I should add that it is a charge made against one only of the two joint tenants, and the acts were done at one only of these two houses, which are, as I have said earlier, comprised in two separate and distinct leases. I am, therefore, of opinion that no exceptional case is here made out such as to justify the court in refusing relief on payment or tender of the whole of the amount due. Accordingly, if the matter depends on the equitable jurisdiction to give relief, I think
- C that the tenants are entitled to succeed in this appeal. If I am right in the view I have formed that, in view of the fact that the judgment obtained was obtained against Mr. Wright only, s. 212 of the Act of 1852 applies to the case, the same result is produced independently of any question as to the proper mode of exercising the equitable jurisdiction.

- For the reasons I have endeavoured to state, I am of opinion that the result
- D arrived at by the learned judge in this case was right, and that the appeal fails and should be dismissed.

- I feel bound to add, by way of postscript, that it was not argued before us that the judgment signed in default of appearance might be supported as an effective judgment for possession against Mr. Lewis as well as Mr. Wright, on the ground that in an action for possession against two or more joint tenants service
- E of the writ on one constitutes good service on the others or other of them: see the note to R.S.C., Ord. 9, r. 9, in the ANNUAL PRACTICE, 1956, to which we were not referred. This point (which does not affect the result in the present case) is therefore to be regarded as open in any future case in which it may arise.

- HODSON, L.J.: I agree. In my opinion, no question of relief against forfeiture arises, because I think that this case falls within the language of s. 212 of
- F the Common Law Procedure Act, 1852. It is true that judgment has been given against one of the tenants (who are the defendants here), but the judgment against him is not an effective judgment and not a judgment against both. That the judgment is ineffective is, I think, supported by the reasoning of MAUGHAM, J., in the case of *T. M. Fairclough & Sons, Ltd. v. Berliner* (1). The
- G position, therefore, is this, that (adapting the language of s. 212) the action is one for ejectment, that there has been no trial, and that before trial, or before effective trial, the tenants have paid or tendered to the landlords all the rent and arrears, with the costs. There is a reference in the section to payment into court where the cause is depending. This section covers this case, and the consequence laid down by the section is that all further proceedings on the
- H ejectment shall cease and be discontinued. In my judgment the order which should issue from this court ought to reflect the bidding of that section, and, accordingly, proceedings instituted by the landlords must be ordered to cease or be discontinued.

- If the question of relief had to be considered, the rule is, I think, clearly set out in a passage in 20 HALSBURY'S LAWS OF ENGLAND (2nd Edn.), p. 264,
- I para. 297:

“The proviso for re-entry on non-payment of rent is regarded in equity as merely a security for the rent, and accordingly, provided that the lessor and other persons interested can be put in the same position as before, the lessee is entitled to be relieved against the forfeiture on payment of the rent and any expenses to which the lessor has been put.”

In the footnote on that page reference is made to *Stanhope v. Haworth* (2), a decision of this court, where, the landlord having changed his position, it was

regarded by the court as "monstrous" that the tenant should be entitled to relief. A

Counsel for the tenants has drawn our attention to the fact that in *Stanhope v. Haworth* (2) and in many passages in the judgments to which JENKINS, L.J., has referred, this right to relief is referred to as a "right", as if it were an unfettered right; but the one exception to which I have made reference shows that the right is not unfettered; and indeed s. 210 of the Common Law Procedure Act, 1852, shows that the right to relief is (as it is described) a right to relief in equity. That being the case, it must necessarily follow that, as equity reserves to itself the right to refuse relief in an appropriate case, the only remaining question is whether this is an appropriate case. I am confirmed in the view I have formed by the observations of SIR JAMES WIGRAM, V.-C., in *Bowser v. Colby* (6) (1 Hare at p. 130 et seq.). Although I respectfully agree with what has fallen from JENKINS, L.J., and with his reference to the fact that breaches of covenant have to be read in the light of the present requirements of notice since the Conveyancing Act, 1881, the vice-chancellor clearly had in mind that which I think the court must always keep in mind, namely, that there may be cases where the court will refuse relief because the conduct of the applicant is such as to make it inequitable that relief should be given to him. Particularly must that be so where his conduct is in relation to the premises in question—as in the instance which JENKINS, L.J., gave, where a tenant is supposed to have been conducting the premises as a disorderly house; it could hardly be thought in such a case that the court would grant relief. B C D

I need not address myself at length to the facts of this case: the judge has considered those. I think that the question of the tenants having been bad payers in the past, and the fact that they have been elusive when attempts have been made to serve them, are irrelevant matters for consideration, and the only material fact is the matter of the conviction. That was considered by the learned judge who considered it as an isolated matter and not as a continuous course of conduct. On that I think that this court would not interfere with the exercise of his discretion, and would not take such a severe view of the matter that it ought for that reason to deprive the tenant of that which, on the face of it, he would expect to obtain, namely, relief against forfeiture. I agree that this appeal fails, save in so far as it may be necessary to make a correction of the order to show that this court is dealing with this matter on the footing that the proceedings should cease rather than that relief should be granted. E F

SINGLETON, L.J.: I agree.

Appeal dismissed.

Solicitors: *Pettiver & Pearkes* (for the landlords); *Green & Underhill* (for the tenants).

[Reported by PHILIPPA PRICE, Barrister-at-Law.]

A SMITH v. EAST ELLOE RURAL DISTRICT COUNCIL
AND OTHERS.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Radcliffe and Lord Somervell of Harrow), February 21, 22, 23, March 26, 1956.]

B *Compulsory Purchase—Compulsory purchase order—Jurisdiction to question validity of order—Bad faith alleged—Acquisition of Land (Authorisation Procedure) Act, 1946 (9 & 10 Geo. 6 c. 49), Sch. 1, Part 4, para. 15, para. 16.*

C The appellant was the owner of land and a dwelling-house in respect of which a compulsory purchase order was made and confirmed in 1948. In 1954 the appellant commenced an action against the rural district council who made the order, against P. the clerk to the rural district council and against the Ministry of Health who confirmed the order, and the Ministry's successors the Ministry of Housing and Local Government, claiming against the council and the Ministry declarations that the compulsory purchase order was made or confirmed wrongfully and in bad faith, and against P. a declaration that he wrongfully and in bad faith procured the compulsory purchase order and its confirmation, and damages. The defendants applied to have the writ and all subsequent proceedings set aside for lack of jurisdiction, on the ground that, under the Acquisition of Land (Authorisation Procedure) Act, 1946, Sch. 1, Part 4, para. 16*, the compulsory purchase order could not be questioned in any legal proceedings. Orders setting aside the writ having been made, the appellant appealed, contending that, as the compulsory purchase order was challenged on the ground that it had been made and confirmed wrongfully and in bad faith, para. 16 had no application.

E **Held:** (i) (LORD REID and LORD SOMERVELL OF HARROW dissenting) para. 16 ousted the jurisdiction of the courts to try issues whereby the validity of the compulsory purchase order was brought into question. //

F (ii) the court had jurisdiction to determine the claim against P. personally on the footing that, on that claim, the validity of the compulsory purchase was not open to question.

Decision of the COURT OF APPEAL ([1955] 2 All E.R. 19) varied to the extent of allowing the action to continue against P.

G [As to the right to question the validity of compulsory purchase orders, see 10 HALSBURY'S LAWS (3rd Edn.) 49, para. 79.

For the Acquisition of Land (Authorisation Procedure) Act, 1946, Sch. 1, Part 4, para. 15 and para. 16, see 3 HALSBURY'S STATUTES (2nd Edn.) 1079, 1080.]

Cases referred to:

- H (1) *Calder v. Halket*, (1839-40), 3 Moo. P.C.C. 28; 2 Moo. Ind. App. 293; 4 State Tr. N.S. 481; 13 E.R. 12; 38 Digest 84, 615.
(2) *Re Cowen, Ex p. Cowen*, (1867), 2 Ch. App. 563; 16 L.T. 469; 5 Digest 1120, 9115.
(3) *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corpn.*, [1947] 2 All E.R. 680; [1948] 1 K.B. 223; [1948] L.J.R. 190; 177 L.T. 641; 112 J.P. 55; 2nd Digest Supp.
- I (4) *Richardson v. Minister of Housing and Local Government*, (Feb. 24, 1956), *The Times*.
(5) *Re Ripon (Highfield) Housing Order, 1938, White & Collins Application*, [1939] 3 All E.R. 548; [1939] 2 K.B. 838; 108 L.J.K.B. 768; 161 L.T. 109; 103 J.P. 331; Digest Supp.
(6) *Short v. Poole Corpn.*, [1926] Ch. 66; 95 L.J.Ch. 110; 134 L.T. 110; 90 J.P. 25; Digest Supp.

* The terms of para. 16 are set out at p. 858, letter D, post.

(7) *Demetriades v. Glasgow Corpn.*, [1951] 1 All E.R. 457; 115 J.P. 171; A 2nd Digest Supp.

(8) *Carltona, Ltd. v. Works Comr.*, [1943] 2 All E.R. 560; 2nd Digest Supp.

Appeal.

Appeal by the owner of land and a dwelling-house from an order of the Court of Appeal, dated Mar. 4, 1955, and reported [1955] 2 All E.R. 19, affirming an order of HAVERS, J., dated Oct. 4, 1954, whereby it was ordered that the writ in an action by the appellant against the respondents, East Elloe Rural District Council, the Ministry of Health, the clerk to the East Elloe Rural District Council and the Ministry of Housing and Local Government, and all subsequent proceedings, be set aside. The facts are set out in the opinion of LORD MORTON OF HENRYTON, p. 860, post.

Roy Wilson, Q.C., and *F. H. Collier* for the appellant.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), *Rodger Winn* and *W. L. Roots* for the respondents.

The House took time for consideration.

Mar. 26. The following opinions were read.

VISCOUNT SIMONDS: My Lords, on July 6, 1954, the appellant, Kathleen Rose Smith, issued a writ against the East Elloe Rural District Council, Mr. Pywell the clerk to that council and the Ministry of Health, whose functions and obligations were subsequently transferred to the Ministry of Housing and Local Government, claiming, as against the council, (a) damages for trespass to the appellant's land at Hallgate Holbeach in the County of Lincoln, (b) an injunction against further trespass and (c) a declaration that a certain compulsory purchase order dated Aug. 26, 1948, was "wrongfully made and in bad faith", against the Ministry of Health a declaration that the said order "was wrongfully confirmed . . . and in bad faith", against the Ministry of Housing and Local Government that "the said compulsory purchase order and confirmation of the same are in bad faith", and against Mr. Pywell, a declaration that "he knowingly acted wrongfully and in bad faith in procuring the said order and confirmation of the same", and as against all the defendants further and other relief and damages. The Ministry of Health is no longer a party to the proceedings, and the present respondents are the council, Mr. Pywell and the Ministry of Housing and Local Government.

All the respondents entered conditional appearances to the writ and then applied to the master in chambers to have the writ set aside on the ground that

"the writ of summons in this action is invalid for lack of jurisdiction it being provided by para. 16 of Part 4 of Sch. 1 to the Acquisition of Land (Authorisation Procedure) Act, 1946, that save by the procedure specified in the said Schedule a compulsory purchase order confirmed in accordance with the provisions of the Act (as was here the case) shall not, either before or after it has been confirmed be questioned in any legal proceedings whatsoever by reason whereof this honourable court has no jurisdiction to grant the relief sought against the said defendants."

Two summonses in similar terms were, in fact, taken out, one by the two Ministries, the other by the council and their clerk, but nothing at this stage in my opinion turns on it. Orders as asked by the summonses having been made by the master and an appeal from them having been dismissed by the judge in chambers, an appeal was taken to the Court of Appeal. That court in turn dismissed the appeal. It is clear from the judgment of the court, which was delivered by PARKER, L.J., that the main question there argued was on a point of construction of the Schedule which was, in the proceedings before this House, relegated to the background. Before your Lordships, the argument was almost

A wholly devoted to what was justifiably described by leading counsel for the appellant as a matter of great public importance.

In my statement of the application to strike out the writ I have indicated the nature of the question. I must now be more specific. The compulsory purchase order challenged in these proceedings was made by the respondent council on Aug. 26, 1948, and authorised them, subject to its provisions, to acquire compulsorily a house and some eight and a half acres of land described in the schedule thereto, of which the appellant was the owner. The statutory public local inquiry having been duly held, the Minister of Health confirmed the order on Nov. 29, 1948, by an order cited as the East Elloe (Holbeach) Housing Confirmation Order, 1948, which was duly advertised on Dec. 13 and 20, 1948. A notice to treat and a notice of entry were duly served on the appellant, and in due course the compulsory purchase price for the said house and land was fixed by the Lands Tribunal at £3,000. The respondent council caused a firm of builders to demolish the house and to erect on its site and on the said land a number of houses. The writ in this action was, as I have said, issued on July 6, 1954.

I must now turn to a consideration of the provisions of the Acquisition of Land (Authorisation Procedure) Act, 1946; but I must preface it by two observations. First, I would remind your Lordships that the Act is applicable to a great variety of transactions, in which a large or small area of land is required by a national or local authority for public purposes, and, secondly, I do not forget that this Act is the last example of a long series of similar enactments, in which, by one provision or another, Parliament has sought to give finality and security from challenge to compulsory acquisitions of land. I have not myself been able to get any assistance from a comparison of the language of this enactment with that of its predecessors. Learned counsel on both sides craved such a comparison in aid. I shall be doing no injustice if I say it helps neither of them and base my opinion on the very words of the Act.

Section 1 (1) of the Act enacts that:

- F “The authorisation of any compulsory purchase of land—(a) by a local authority where, apart from this Act, power to authorise the authority to purchase land compulsorily is conferred by or under any enactment contained in a public general Act and in force immediately before the commencement of this Act, other than any enactment specified in sub-s. (4) of this section . . . shall, subject to the provisions of this and the next following section, be conferred by an order (in this Act referred to as a ‘compulsory purchase order’) in accordance with the provisions of Sch. 1 to this Act (being provisions which, subject to certain adaptations, modifications and exceptions, correspond with provisions as to the authorisation of the compulsory purchase of land of the Local Government Act, 1933).”
- G
- H Sub-section (2) of s. 1 made provision for a special procedure in relation to the purchase of land to which Part 3 of Sch. 1 to the Act applied. This does not affect the land the subject of this action. It has been observed that the language of sub-s. (1) is somewhat involved, but there appears to be no doubt that a local authority authorises its own authority to make a purchase. I need refer to no other section of the Act, and come to Sch. 1, which, after making the familiar provisions in regard to advertisements, notices to persons affected, objections, local inquiry and confirmation, provides as follows by para. 15 and para. 16 of Part 4.
- I

“15.—(1) If any person aggrieved by a compulsory purchase order desires to question the validity thereof, or of any provision contained therein on the ground that the authorisation of a compulsory purchase thereby granted is not empowered to be granted under this Act or any such enactment as is mentioned in sub-s. (1) of s. 1 of this Act, or if any person aggrieved

by a compulsory purchase order or a certificate under Part 3 of this Schedule desires to question the validity thereof on the ground that any requirement of this Act or of any regulation made thereunder has not been complied with in relation to the order or certificate, he may, within six weeks from the date on which notice of the confirmation or making of the order or of the giving of the certificate is first published in accordance with the provisions of this Schedule in that behalf, make an application to the High Court, and on any such application the court—(a) may by interim order suspend the operation of the compulsory purchase order or any provision contained therein, or of the certificate, either generally or in so far as it affects any property of the applicant, until the final determination of the proceedings; (b) if satisfied that the authorisation granted by the compulsory purchase order is not empowered to be granted as aforesaid, or that the interests of the applicant have been substantially prejudiced by any requirement of this Schedule or of any regulation made thereunder not having been complied with, may quash the compulsory purchase order or any provision contained therein, or the certificate, either generally or in so far as it affects any property of the applicant.

“16. Subject to the provisions of the last foregoing paragraph, a compulsory purchase order or a certificate under Part 3 of this Schedule shall not, either before or after it has been confirmed, made or given, be questioned in any legal proceedings whatsoever, and shall become operative on the date on which notice is first published as mentioned in the last foregoing paragraph.”

I will dispose at once of the short point of construction which was the main topic of argument and judgment in the Court of Appeal. It was urged that para. 16 was limited in its application to cases of compulsory acquisition of land to which Part 3 of the Schedule referred. Briefly, it was said that the words “under Part 3 of this Schedule” qualified not only “a certificate” but also “a compulsory purchase order”. It is clear to me not only that for the reasons given by PARKER, L.J., such a construction would produce results so absurd that it should be avoided if fairly avoidable, but also that it is grammatically unsound, in that the use of the indefinite article where it occurs for the second time indicates that the words “under Part 3” qualify only the words “a certificate.”

In this House a more serious argument was developed. It was that, as the compulsory purchase order was challenged on the ground that it had been made and confirmed “wrongfully” and “in bad faith”, para. 16 had no application. It was said that that paragraph, however general its language, must be construed so as not to oust the jurisdiction of the court where the good faith of the local authority or the Ministry was impugned and put in issue. Learned counsel for the appellant made his submission very clear. It was that, where the words “compulsory purchase order” occur in these paragraphs, they are to be read as if the words “made in good faith” were added to them.

My Lords, I think that any one bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal. But it is our plain duty to give the words of an Act their proper meaning and, for my part, I find it quite impossible to qualify the words of the paragraph in the manner suggested. It may be that the legislature had not in mind the possibility of an order being made by a local authority in bad faith, or even the possibility of an order made in good faith being mistakenly, capriciously or wantonly challenged. This is a matter of speculation. What is abundantly clear is that words are used which are wide enough to cover any kind of challenge which any aggrieved person may think fit to make. I cannot think of any wider words. Any addition would be mere tautology. But, it is said, let those general words

- A be given their full scope and effect, yet they are not applicable to an order made in bad faith. But, my Lords, no one can suppose that an order bears on its face the evidence of bad faith. It cannot be predicated of any order that it has been made in bad faith until it has been tested in legal proceedings, and it is just that test which para. 16 bars. How, then, can it be said that any qualification can be introduced to limit the meaning of the words? What else can "compulsory purchase order" mean but an act apparently valid in the law, formally authorised, made, and confirmed?

- It was urged by learned counsel for the appellant that there is a deep-rooted principle that the legislature cannot be assumed to oust the jurisdiction of the court, particularly where fraud is alleged, except by clear words, and a number of cases were cited in which the court has asserted its jurisdiction to examine into an alleged abuse of statutory power and, if necessary, correct it. Reference was made, too, to MAXWELL ON INTERPRETATION OF STATUTES (10th Edn.), to support the view, broadly stated, that a statute is, if possible, so to be construed as to avoid injustice. My Lords, I do not refer in detail to these authorities only because it appears to me that they do not override the first of all principles of construction that plain words must be given their plain meaning. There is nothing ambiguous about para. 16; there is no alternative construction that can be given to it; there is, in fact, no justification for the introduction of limiting words such as "if made in good faith", and there is the less reason for doing so when those words would have the effect of depriving the express words "in any legal proceedings whatsoever" of their full meaning and content.

- I have examined para. 16 by itself without reference to para. 15. But para. 16 opens with the words "Subject to the provisions of the last foregoing paragraph". It is necessary, therefore, to see whether the earlier has any bearing on the meaning of the later paragraph. I think that it has not, for, in my opinion, the width or narrowness of the grounds of challenge permitted by para. 15 does not touch the construction of para. 16. Be they wide or be they narrow, it is subject to them that the general bar to legal proceedings is imposed. I am, therefore, reluctant to express a final opinion on a matter much agitated at your Lordships' bar, whether the words "is not empowered" were apt to include a challenge not only on the ground of vires but also on the ground of bad faith or any other ground which would justify the court in setting aside a purported exercise of a statutory power. The inclination of my opinion is that they are, but I would prefer to keep the question open, until it arises in a case where the answer will be decisive, as it is not here.

- I come, then, to the conclusion that the court cannot entertain this action so far as it impugns the validity of the compulsory purchase order. It is no part of my present duty to attack or defend such a provision of an Act of Parliament, but two things may, I think, fairly be said. First, if the validity of such an order is open to challenge at any time within the period allowed by the ordinary Statute of Limitations with the consequence that it and all that has been done under it over a period of many years may be set aside, it is not, perhaps, unreasonable that Parliament should have thought fit to impose an absolute bar to proceedings, even at the risk of some injustice to individuals. Secondly, the injustice may not be so great as might appear. For the bad faith or fraud on which an aggrieved person relies is that of individuals, and this very case shows that, even if the validity of the order cannot be questioned and he cannot recover the land that has been taken from him, yet he may have a remedy in damages against those individuals. Here the appellant by her writ claims against the personal respondent a declaration that he knowingly acted wrongfully and in bad faith in procuring the order and its confirmation, and damages, and that is a claim which the court clearly has jurisdiction to entertain. I am far from saying that the claim has any merit. Of that I know nothing. But, because the court can entertain it, I think that the Court of Appeal, to whose

attention this particular aspect of the case appears not to have been called, were A
wrong in striking out the whole writ, and I propose that their order should be
varied by striking out the respondents other than Mr. Pywell and the claims
other than claims 3, 5, 6 and 7. Against Mr. Pywell the action may proceed,
but on the footing that the validity of the order cannot be questioned.

There will be no order as to costs.

LORD MORTON OF HENRYTON: My Lords, this appeal arises out B
of an action wherein the appellant was the plaintiff, and it raises a question of
general importance. The original defendants were the three respondents and the
Ministry of Health. By her writ issued on July 6, 1954, the plaintiff claimed—

“ 1. Against the [East Elloe Rural District Council]:—(a) Damages for C
trespass to the plaintiff's land of 8.613 acres situate at Hallgate Holbeach
in the County of Lincoln together with the dwelling-house known as ‘ Hall
Hill House ’ and other buildings on the said land or on some parts thereof.
(b) An injunction restraining them by their officers, servants and agents
and each and every of them from trespassing upon the aforesaid land
and premises of the plaintiff or any part thereof or from entering upon the D
said lands and premises without the consent of the plaintiff. (c) A declaration
that the compulsory purchase order dated Aug. 27, 1948, was wrongfully
made and in bad faith.

“ 2. Against the [Ministry of Health]:—A declaration that the said E
compulsory purchase order was wrongfully confirmed on Nov. 29, 1948,
and in bad faith.

“ 3. Against the [respondent J. C. Pywell, who was clerk to the said
rural district council at the relevant dates]:—A declaration that he knowingly
acted wrongfully and in bad faith in procuring the said order and confirma-
tion of the same.

“ 4. Against the [Ministry of Housing and Local Government]:—As F
having taken over the functions of the [Ministry of Health] a declaration
that the said compulsory purchase order and confirmation of the same are
in bad faith.

“ 5. Further and other relief.

“ 6. Damages.

“ 7. Costs.”

The compulsory purchase order referred to in the writ was made by the first G
named respondent on Aug. 26 (not Aug. 27), 1948, and purported to authorise
that respondent to purchase compulsorily the house and land mentioned in the
writ, whereof the appellant was the owner. After the statutory public local
inquiry had been held, the Minister of Health confirmed the said order on
Nov. 29, 1948, by an order (the East Elloe (Holbeach) Housing Confirmation H
Order, 1948), which was duly advertised. The relevant functions of the Minister
of Health and the obligations of the Ministry of Health were subsequently
transferred to the Minister and the Ministry of Housing and Local Government
by the Transfer of Functions (Minister of Health and Minister of Local Govern-
ment and Planning) (No. 1) Order, 1951 (S.I. 1951 No. 142).

All the respondents entered conditional appearances to the writ, and, on I
July 27, 1954, the respondents and the Minister of Health (who is no longer a
party to these proceedings) applied by two separate summonses to Master
CLAYTON under Ord. 12, r. 30, of the Rules of the Supreme Court for an order
that the writ and all subsequent proceedings in the action be set aside. The
grounds on which the claim in each summons was based were:

“ That the writ of summons in this action is invalid for lack of jurisdic-
tion it being provided by para. 16 of Part 4 of Sch. 1 to the Acquisition of

- A Land (Authorisation Procedure) Act, 1946, that save by the procedure specified in the said Schedule a compulsory purchase order confirmed in accordance with the provisions of the said Act (as was here the case) shall not, either before or after it has been confirmed be questioned in any legal proceedings whatsoever by reason whereof this honourable court has no jurisdiction to grant the relief sought against the said defendants.”
- B Master CLAYTON made an order on each summons setting aside the writ and all subsequent proceedings in the action, and his decision was affirmed by HAVERS, J., and by the Court of Appeal (HODSON and PARKER, L.J.J.)*. That court refused leave to appeal, but leave was subsequently granted by the Appeal Committee of your Lordships’ House.
- C My Lords, I think there can be no doubt that the respondents were never entitled to have the writ set aside so far as it claims relief against the respondent Pywell. The relief claimed by para. 3 of the writ and the further relief claimed by para. 5, para. 6 and para. 7, in so far as that relief affects the respondent Pywell, in no way call in question the validity of the compulsory purchase order of Aug. 26, 1948, or of its confirmation. It is simply alleged, as against D Mr. Pywell personally, that he knowingly acted wrongfully and in bad faith in procuring the order and the confirmation thereof. It is equally clear that claims 1, 2 and 4 do put in issue the validity of the order, and it would appear that this distinction between the claim against Mr. Pywell and the other claims was overlooked until the appeal was being argued in this House. No such point was taken in any of the courts below, or in the appellant’s reasons, but it is clear E that the appellant is entitled to proceed against Mr. Pywell, whatever view your Lordships take on the main question arising on this appeal, namely, whether para. 16 of Part 4 of Sch. 1 to the Act of 1946 deprives this House, and all courts, of jurisdiction to hear and determine this action, so far as it relates to the first and third respondents. The relevant portions of the Act of 1946 are as follows:—
- F By s. 1 (1), the Act makes provision for the compulsory purchase of certain lands in the following terms:—
- “The authorisation of any compulsory purchase of land—(a) by a local authority where, apart from this Act, power to authorise the authority to purchase land compulsorily is conferred by or under any enactment contained in a public general Act and in force immediately before the commencement of this Act, other than any enactment specified in sub-s. (4) of this section . . . shall, subject to the provisions of this and the next following section, G be conferred by an order (in this Act referred to as a ‘compulsory purchase order’) in accordance with the provisions of Sch. 1 to this Act (being provisions which, subject to certain adaptations, modifications and exceptions, correspond with provisions as to the authorisation of the compulsory purchase of land of the Local Government Act, 1933).”
- H Section 1 (2) of the said Act provides that a special procedure set out in Part 3 of Sch. 1 to the Act shall be followed in compulsory acquisition of such land as falls within its scope, viz., land:
- I “(a) which is the property of a local authority or which has been acquired by statutory undertakers for the purposes of their undertaking, (b) forming part of a common, open space or fuel or field garden allotment, or held inalienably by the National Trust, or (c) being, or being the site of, an ancient monument or other object of archaeological interest . . .”

It is plain that the land, the subject of this action, was not land affected by sub-s. (2) of s. 1.

[HIS LORDSHIP read para. 15 and para. 16 of Part 4 of Sch. 1 to the Act of 1946, which are set out at p. 857, letter I to p. 858, letter E, ante, and continued:] For

* Reported in [1955] 2 All E.R. 19.

the sake of brevity I shall hereafter refer to the paragraphs just quoted simply as "para. 15" or "para. 16".

Counsel for the appellant puts forward propositions which I summarise as follows:—(i) Paragraph 15 gives no opportunity to a person aggrieved to question the validity of a compulsory purchase order on the ground that it was made or confirmed in bad faith. (ii) Although, *prima facie*, para. 16 excludes the jurisdiction of the court in all cases, subject only to the provision of para. 15, it is inconceivable that the legislature can have intended wholly to exclude all courts from hearing and determining an allegation that such an order was made in bad faith. (iii) Therefore, para. 16 should be read as applying only to an order or a certificate made in good faith. In support of his second and third propositions, counsel relied on a general principle stated in *MAXWELL ON INTERPRETATION OF STATUTES* (10th Edn.), on observations made in a number of cases dealing with statutory powers, and on *Calder v. Halket* (1) (1839-40) (3 Moo. P.C.C. 28). Counsel on behalf of the respondents contends that the opportunity of objection given by para. 15 extends to cases where bad faith is alleged, but whether or not this is so, if the person aggrieved fails to apply to the court within the six weeks' period there mentioned, the jurisdiction of the court is completely ousted by para. 16, the terms whereof are unambiguous.

My Lords, I accept the first proposition of counsel for the appellant. I cannot construe para. 15 as covering a case in which all the requirements expressly laid down by statute have been observed, but the person aggrieved has discovered that, in carrying out the steps laid down by statute, the authority has been actuated by improper motives. It is to be observed that, both in the earlier and in the later part of para. 15, there is only one ground on which the validity of the order can be questioned. In the earlier part, that ground is

"that the authorisation of a compulsory purchase thereby granted is not empowered to be granted under this Act or any such enactment as is mentioned in sub-s. (1) of s. 1 of this Act . . ."

In the later part it is

"that any requirement of this Act or of any regulation made thereunder has not been complied with in relation to the order or certificate . . ."

These words seem to me to restrict the complainant to alleging non-compliance with some requirement to be found in the relevant statutes or regulations. If para. 15 had been intended to apply to cases of bad faith, surely the restrictive words "on the ground that", etc., would have been left out in both parts. If, however, the words of para. 15 leave the point in any doubt, that doubt is removed, to my mind, by comparing the words of s. 162 (1) of the Local Government Act, 1933, with the words of para. 15. It will be remembered that, in s. 1 (1) of the Act of 1946, already quoted, the provisions of Sch. 1 to that Act (which provisions include para. 15) are described as

"provisions which, subject to certain adaptations, modifications and exceptions, correspond with provisions as to the authorisation of the compulsory purchase of land of the Local Government Act, 1933."

The provision in the Act of 1933 which corresponds to para. 15 is contained in s. 162 (1) which begins as follows:

"If any person aggrieved by a compulsory purchase order . . . desires to question its validity, he may, within two months after the publication of the notice of confirmation . . . make an application for the purpose to the High Court . . ."

One "modification" of this provision which is made by para. 15 consists in altering the wide words, "desires to question its validity" to the strictly limited words already quoted. It is, I think, inconceivable that, if the legislature had intended para. 15 to cover cases where bad faith was alleged, it would have made

- A this striking alteration in the language of s. 162 of the Act of 1933. I would add that, if para. 15 had been intended to cover such cases, there would seem to be no good reason why the earlier part thereof should not have been applied to a certificate as well as to an order, since the later part applies to both. The reason for this difference was explained by PARKER, L.J., in the Court of Appeal*, and I agree with his explanation; but the difference remains wholly unexplained if
- B para. 15 covers cases where bad faith is alleged.

- My Lords, having accepted counsel's first proposition, for the reasons I have stated, I reject his second and third propositions, on the short and simple ground that the words of para. 16 are clear, and deprive all courts of any jurisdiction to try the issues raised by para. 1, para. 2 and para. 4 of the writ, whereby the appellant undoubtedly seeks to question the validity of the order of Aug. 26, 1948.
- C Turning first to counsel's second proposition, it does not seem to me inconceivable, though it does seem surprising, that the legislature should have intended to make it impossible for anyone to question in any court the validity of a compulsory purchase order on the ground that it was made in bad faith. It may have been thought that the procedure which has to be followed before such an order is made and confirmed affords sufficient opportunity for allegations of bad faith to be
- D ventilated, and it may have been thought essential, if building schemes were to be carried out, that persons alleging bad faith in the making of an order, after the order has been made, should be limited to claims sounding in damages against the persons who, in bad faith, caused or procured the order to be made. The present action started nearly six years after the order now in question was made and confirmed, and illustrates the difficulty which might arise if no such
- E limit were imposed, since houses have already been erected on the land which was the subject of the order. I fully realise that certain strange results follow if my construction of para. 15 and para. 16 is correct. For instance, a compulsory purchase order is made whereby a man is compelled to sell a house which has been his home, and the home of his family, for many years. After the order is made, evidence comes into his hands which shows that the order was made
- F because the local district council wished to gratify a grudge against him, or for other reasons even more sinister. That man is for ever precluded from going to any court to have the order set aside. However, it is, of course, within the powers of Parliament to achieve this result, and, in my opinion, it has been achieved by para. 15 and para. 16. In making this comment, I am not, of course, casting any reflection on any of the respondents to this appeal.
- G Effect can only be given to counsel's third proposition if some words are read into para. 16. Counsel suggested that the words "made in good faith" should be read in after "order" and also after "certificate". I cannot accept this suggestion. It would be impossible to predicate of any order or certificate that it was made in good faith until the court had inquired into the matter, and that is just what para. 16 prohibits. Counsel relied on certain passages in
- H MAXWELL ON INTERPRETATION OF STATUTES (10th Edn.), and especially on the following passage, which appears on p. 122 and also appeared, in substantially the same terms, in the first edition published in 1875:

- I "Enactments which confer powers are so construed as to meet all attempts to abuse them, either by exercising them in cases not intended by the statute, or by refusing to exercise them when the occasion for their exercise has arisen. Though the act done was ostensibly in execution of the statutory power and within its letter, it would nevertheless be held not to come within the power if done otherwise than honestly and in the spirit of the enactment."

My Lords, this is a well-known principle; it is illustrated by many cases, and counsel made an excellent selection of them, beginning with *Re Cowen, Ex p. Cowen* (2) (1867) (2 Ch. App. 563). In my opinion, however, neither the passage

* See [1955] 1 All E.R. at p. 21.

in MAXWELL nor this line of cases assists your Lordships in construing para. 16. A
That paragraph does not confer a power. If it did, I should apply the principle
stated in MAXWELL without any hesitation. What the paragraph does is to enact,
in terms which seem to me very clear, that, when a certain type of order or
certificate has been made, it shall not be questioned in any court, except in the
limited type of case and for the limited period specified in para. 15.

Counsel also relied on *Calder v. Halket* (1) (1839-40) (3 Moo. P.C.C. 28). In B
that case, the Judicial Committee had to construe s. 24 of the Act 21 Geo. 3 c. 70,
which was in the following terms:

"And whereas it is reasonable to render the provincial magistrates, as
well natives as British subjects, more safe in the execution of their office,
be it enacted, That no action for wrong or injury shall lie in the Supreme C
Court against any person whatsoever, exercising a judicial office in the
country courts, for any judgment, decree, or order of the said court, nor against
any person for any act done by or in virtue of the order of the said court."

PARKE, B., delivering the judgment of the Board, said (*ibid.*, at p. 74):

"Three meanings may be attributed to this clause.

"*First.* It may mean that no action should lie against one exercising D
a judicial office, in the country courts, for any judgment, decree, or order
of the court, whether in a matter in which the court had a jurisdiction or not,
or whether the judge wilfully and knowingly gave judgment or made an order
in a matter out of his jurisdiction or not; so that the fact of the existence of a
judgment, decree, or order, should preclude all inquiry.

"*Secondly.* It may mean to protect the judge only where he gives E
judgment, or makes an order, in the bona fide exercise of his office, and under
the belief of his having jurisdiction, though he may not have any.

"*Thirdly.* The object may have been to put the judges of the native F
courts on the footing of judges of the superior courts of record, or courts
having similar jurisdiction to the native courts here, protecting them from
actions for things done within their jurisdiction, though erroneously or
irregularly done, but leaving them liable for things done wholly without
jurisdiction.

"It seems to us, that the first of these constructions is inadmissible. G
It never could have been intended to give such unlimited power to the
judges of the native courts, and reason points out that the general words
of the clause must be qualified in the manner stated in one of the two latter
modes of construction.

"We think that the third is the right mode, and that the true meaning H
of the section in question was to put the judges of native courts of justice
on the same footing as those of English courts of similar jurisdiction.
There seems no reason why they should be more or less protected than
English judges of general or limited jurisdiction, under the like circum-
stances."

In that case it was possible, as a matter of construction, to read in the words
"made within its jurisdiction" after the words "the said court", and the
decision may have been justified, having regard to the context and the surround-
ing circumstances; but it is impossible to read the words "made in good faith" I
into para. 16, for the reasons I have already stated. I think that the decision in
Calder v. Halket (1) would have been different if the section had read "No
judgment decree or order of the said court shall be questioned in any legal
proceedings whatsoever". Such words would, I think, clearly "preclude all
inquiry" by preventing any complainant from raising the question whether the
order had, or had not, been made without jurisdiction.

The only other way of giving effect to counsel's third proposition would be
to insert after the word "whatsoever" in para. 16 some such words as "unless

A it is alleged that the order or certificate was made in bad faith"; but I can find no justification for inserting these words. To do so would be legislation, not interpretation. For these reasons, I am of opinion that para. 16 operates to oust the jurisdiction of the courts in the present case, except in regard to the claims against Mr. Pywell. I should add that junior counsel for the appellant submitted that, in para. 16, the words "under Part 3 of this Schedule" qualify "a compulsory order" as well as "a certificate", and, as the order in the present case was not made under Part 3 of Sch. 1, para. 16 has no application to the present case. That submission was rejected by the Court of Appeal, and I shall only say that, in my opinion, it was rightly rejected, for the reasons given by PARKER, L.J.

C I would allow the writ in this action to stand only in so far as it claims relief against the respondent Pywell, by claims 3, 5, 6 and 7. The writ should, in my view, be set aside for want of jurisdiction in so far as it claims relief against the other respondents. The appeal should, therefore, be allowed to the extent just mentioned.

D LORD REID: My Lords, in this action, the appellant sues the East Elloe Rural District Council and the Ministry of Health, now the Ministry of Housing and Local Government, and seeks declarations that a compulsory purchase order made by that local authority and confirmed by the Minister was made and confirmed wrongfully and in bad faith. The appellant also seeks consequential relief. The writ of summons had been set aside before a statement of claim was lodged, and so we do not know the nature of the bad faith alleged. But the argument for the respondents is that it matters not how serious the bad faith might be; even if conspiracy and corruption were involved, the action could not proceed, because Parliament has deprived the courts of jurisdiction to entertain it.

E The jurisdiction of the courts is said to be ousted by two paragraphs of Sch. 1 to the Acquisition of Land (Authorisation Procedure) Act, 1946. [His LORDSHIP read para. 15 and para. 16 of Sch. 1 to the Act of 1946 which are set out at p. 857, letter I, to p. 858, letter E, ante, and continued:]

F Compulsory purchase orders can be made under a number of different statutes and, before 1946, there was no uniform procedure; for example, the procedure under the Housing Act, 1936, differed in some respects from the procedure under the Local Government Act, 1933. Section 1 of the Act of 1946 provides for the authorisation of any compulsory purchase by a local authority being confirmed by order in accordance with the provisions of Sch. 1

G " (being provisions which, subject to certain adaptations, modifications and exceptions, correspond with provisions as to the authorisation of the compulsory purchase of land of the Local Government Act, 1933)."

H I shall have to refer to these words later. The provisions of the Act of 1946 now apply to a wide variety of orders made by many different types of authority, and the question how far the jurisdiction of the courts has been ousted by this Act is, therefore, of very great importance. The order by which the appellant is aggrieved was made under the Housing Act, 1936, but nothing turns on that.

I Paragraph 15 of Sch. 1 allows the validity of an order to be questioned on two grounds, first, that the authorisation of the compulsory purchase "is not empowered to be granted" under the Act under which the order is made, and, secondly, that any requirement of the Act of 1946 has not been complied with. In either case he may make application to the court within six weeks from publication of confirmation of the order. Paragraph 16 provides that, save as aforesaid, a compulsory purchase order shall not be questioned in any legal proceedings whatsoever, either before or after it has been confirmed. If the words of these paragraphs are held to have their ordinary meanings, then an order can never be questioned or attacked in any court on the ground that it has been obtained by corrupt or fraudulent means, no matter how serious the corruption

or how wide the conspiracy by which it has been obtained. Admittedly, no other tribunal is given jurisdiction to deal with such a case, and the Minister has no power to act if, after he has confirmed an order, it were found that the making of the order had been due to corruption or malice. The only reason suggested for depriving the subject of redress in such a case is administrative convenience, and I find it necessary to examine these paragraphs narrowly to see whether I am forced to reach the conclusion that that must be held to have been the intention of Parliament. I may say at once that I have found nothing in the Act beyond the phraseology of these two paragraphs to indicate that Parliament had such an intention. I shall, therefore, examine the phraseology of these paragraphs to see whether either of them is susceptible of an interpretation which would avoid that result.

I take a case like the present case where the purpose of the acquisition of the land is plainly stated in the order and is plainly *intra vires* and where all the required steps of procedure have been duly taken, and I must first examine para. 15 to see whether the present appellant could have questioned the order on any ground of bad faith, malice, corruption or conspiracy if she had raised her action within six weeks of the order being confirmed. It is not said that this could have been brought within the second of the grounds set out in para. 15, but it is argued that it could be brought within the first because an authorisation obtained in bad faith is not "empowered to be granted".

I have quoted the passage in s. 1 of the Act of 1946, which states that the provisions of Sch. 1 correspond to provisions of the Act of 1933, subject to adaptations and modifications, and I, therefore, begin by examining the provisions of the earlier Act which correspond to para. 15 and para. 16 of Sch. 1. Those provisions are contained in s. 162 of the Act of 1933. Sub-section (1) provides, with regard to a compulsory purchase order, that if a person aggrieved

"desires to question its validity, he may, within two months after the publication of the notice of confirmation . . . make an application for the purpose to the High Court . . ."

The court may then quash the order but, when the invalidity arises from procedural provisions, the court must be satisfied that the interests of the applicant have been substantially prejudiced. Sub-section (2) provides that, subject to the provisions which I have mentioned, an order shall not either before or after its confirmation be questioned by prohibition or certiorari or in any legal proceedings. The Act of 1933 does not in any way restrict the grounds on which a person may question the validity of an order, but the Act of 1946 specifies two grounds. I can see no other possible reason for this change and the more elaborate drafting which it entails, than an intention to limit the grounds on which a person aggrieved can make application to the court, and, in order to determine how far the Act of 1946 has limited the jurisdiction of the courts, I must see what were the grounds on which the court could give relief under the ordinary law of the Act of 1933. I think that in the past there has been some confusion about this, and I fear that I must try as best I can to unravel the matter. It seems to me that there were four grounds on which the courts could give relief. First, informality of procedure; where, for example, some essential step in procedure had been omitted. Secondly, *ultra vires* in the sense that what was authorised by the order went beyond what was authorised by the Act under which it was made. Thirdly, misuse of power in *bona fide*. And, fourthly, misuse of power in *mala fide*. In the last two classes the order is *intra vires* in the sense that what it authorises to be done is within the scope of the Act under which it is made, and every essential step in procedure may have been taken; what is challenged is something which lies behind the making of the order. I separate these two classes for this reason. There have been few cases where actual bad faith has even been alleged, but, in the numerous cases where misuse of power has been alleged, judges have

A been careful to point out that no questions of bad faith were involved and that bad faith stands in a class by itself.

B Misuse of power covers a wide variety of cases, and I am relieved from considering at length what amounts to misuse of power in bona fide because I agree with the analysis made by LORD GREENE, M.R., in *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corpn.* (3) ([1947] 2 All E.R. 680). There the local authority had power to grant licences for cinema performances "subject to such conditions as the authority think fit to impose". They allowed Sunday performances, subject to the condition that no child should be admitted and were held entitled to do this. I quote what seem to me the leading passages in LORD GREENE's judgment. He said (*ibid.*, at p. 682):

C "The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters . . . a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably' . . . Theoretically it is true to say . . . that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is right, but that would require overwhelming proof . . . the court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account or neglected to take into account matters which it ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that the local authority, nevertheless, have come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in it."

H None of those cases need involve mala fides. A local authority may have had regard to quite irrelevant considerations or may have acted quite unreasonably but yet be entirely innocent of dishonesty or malice.

I I can draw no other conclusion from the form in which para. 15 is now enacted than that Parliament intended to exclude from the scope of this paragraph the whole class of cases referred to in the passages which I have quoted. No doubt in one sense it might be said that in none of these cases is authority "empowered to be granted", but that would be a strained and unnatural reading of these words only to be accepted if there were in the Act some clear indication requiring it. But, to my mind, all the indications are the other way, and this part of the paragraph only refers to cases of ultra vires in the narrow sense in which I have used it.

If other cases of misuse of power in bona fide are excluded, can a distinction be made where mala fides is in question. As I shall explain when I come to para. 16, I am of opinion that cases involving mala fides are in a special position, in that mere general words will not deprive the court of jurisdiction to deal with them, and, if that is so, then no question would arise under para. 15. But if I am wrong

about cases of mala fides being in this special position, I do not see how there can be a distinction under para. 15 between cases of bona fide and mala fide misuse of power. I can see nothing to indicate any intention to that effect, and, if Parliament intended to treat bad faith as a special case, it would be very strange to introduce the exception here. The time limit under para. 15 is six weeks, which is appropriate for grounds which appear from the terms of the order but not appropriate for grounds based on facts lying behind the order which may not be discoverable for some time after it is confirmed; and I find another strong indication that the first ground of challenge was not intended to apply to such cases in the fact that that ground is not available to a person aggrieved by the granting of a certificate; only the second ground is available to him. This is intelligible if the first ground only applies to ultra vires, because I cannot see how a certificate could be ultra vires. But, if the first ground was intended to apply where mala fides is alleged, I cannot imagine any reason why it was not also made available when a certificate is challenged.

In my view, the question whether authority is empowered to be granted is intended to be capable of immediate answer; if it can depend on facts lying behind the order, then neither the Minister nor the owner could know for certain at the time of confirmation whether any order is empowered to be granted or not because facts showing misuse of power might subsequently emerge. Accordingly, in my opinion, the appellant could not have brought her case within para. 15 even if she had raised it immediately after the order was confirmed.

I turn to para. 16. Not only does it prevent recourse to the court after six weeks in cases to which para. 15 does apply but, on the face of it, it prevents any recourse to the court at all in cases to which para. 15 does not apply. It uses words which are general and emphatic and, to my mind, the question is whether this use of general words necessarily leads to the conclusion that the jurisdiction of the court is entirely excluded in all cases of misuse of powers in mala fide, where those acting in mala fide have been careful to see that the procedure was in order and the authority granted by the order was within the scope of the Act under which it was made. A person deliberately acting in bad faith would naturally be careful to do this. In my judgment, para. 16 is clearly intended to exclude, and does exclude, entirely all cases of misuse of power in bona fide. But does it also exclude the small minority of cases where deliberate dishonesty, corruption or malice is involved? In every class of case that I can think of, the courts have always held that general words are not to be read as enabling a deliberate wrongdoer to take advantage of his own dishonesty. Are the principles of statutory construction so rigid that these general words must be so read here? Of course, if there were any other indications in the statute of such an intention beyond the mere generality of the words that would be conclusive; but I can find none.

There are many cases where general words in a statute are given a limited meaning. That is done not only when there is something in the statute itself which requires it but also where to give general words their apparent meaning would lead to conflict with some fundamental principle. Where there is ample scope for the words to operate without any such conflict, it may very well be that the draftsman did not have in mind and Parliament did not realise that the words were so wide that, in some few cases, they could operate to subvert a fundamental principle. In general, of course, the intention of Parliament can only be inferred from the words of the statute, but it appears to me to be well established in certain cases that, without some specific indication of an intention to do so, the mere generality of words used will not be regarded as sufficient to show an intention to depart from fundamental principles. So general words by themselves do not bind the Crown, they are limited so as not to conflict with international law, they are commonly read so as to avoid retrospective infringement of rights, and it appears to me that they can equally well be read so as not

A to deprive the court of jurisdiction where bad faith is involved. If authority be needed for reading general words so as not to deprive the court of jurisdiction in such a case, I find it in *Calder v. Halket* (1) (1839-40) (3 Moo. P.C.C. 28), where general words in 21 Geo. 3 c. 70, s. 24, were even farther limited without there being anything in the statute to indicate that they should be read in a limited sense. The words were:

B “ . . . no action for wrong or injury shall lie in the Supreme Court against any person whatsoever, exercising a judicial office in the country courts, for any judgment, decree, or order of the said court, nor against any person for any act done by or in virtue of the order of the said court.”

C Two limited readings were suggested—to exclude acts in mala fide or to exclude proceedings wholly without jurisdiction. In their Lordships’ judgment (*ibid.*, at p. 75) it is said:

“ It never could have been intended to give such unlimited power to the judges of the native courts, and reason points out that the general words of the clause must be qualified in the manner stated in one of the two latter modes of construction.”

D I think that there is still room for reason to point out that the general words in this case must be limited so as to accord with the principle, of which Parliament cannot have been ignorant, that a wrongdoer cannot rely on general words to avoid the consequences of his own dishonesty. As I have said, we must take this case on the footing that the appellant might allege deliberate dishonesty of the grossest kind.

E It is said that Parliament may have intended that even cases of gross dishonesty should be excluded from redress, because otherwise it would be embarrassing to deal with allegations of this kind after a long interval, and, if the case were proved, a local authority, and ultimately the ratepayers, might be involved in grievous loss. I am not entirely satisfied that the law is powerless to deal justly with such a situation. But, even if that were a possible consequence, I would hesitate to attribute to Parliament the view that considerations of that kind justify hushing up a scandal.

F In my judgment, this appeal should be allowed.

G LORD RADCLIFFE: My Lords, I think that this appeal must fail except so far as the action against the respondent, Mr. Pywell, is concerned. As I understand that all your Lordships are agreed on the latter point, I will confine what I have to say to the case against the respondents, East Elloe Rural District Council, Ministry of Health and Ministry of Housing and Local Government. The relief that the appellant seeks against them in her action depends wholly on her ability to establish that a compulsory purchase order dated Aug. 26, 1948, made by the rural district council and confirmed by the Minister was invalid.

H I do not wish to beg any question by using the word “invalid”. I mean that she has to show that, in the eyes of the law, this compulsory purchase order was not effective to confer on the rural district council the authority to enter on her land, which they certainly would not have possessed without the making of the order. It follows, therefore, that her action must stand or fall by her ability to question this compulsory purchase order in the legal proceedings.

I But the act of questioning a compulsory purchase order in legal proceedings is what is dealt with under those very words in para. 15 and para. 16 of Part 4 of Sch. 1 to the Acquisition of Land (Authorisation Procedure) Act, 1946; and the respondents say that, having regard to the provisions of those paragraphs, it is not open to the appellant by a writ issued in July, 1954, to question a compulsory purchase order made in August, 1948. The provisions of the two paragraphs in question have been set out in full in the speech of the noble Lord on the Woolsack*,

* See p. 857, letter I to p. 858, letter E, ante.

and I do not repeat them. If, as is obvious, her proceedings are not within the brief measure of time allowed by para. 15, I am bound to say that I think that she faces a very great difficulty in showing that what appears to be the absolute prohibition "shall not . . . be questioned in any legal proceedings whatsoever" is to be understood in a court of law as amounting to something much less than such a prohibition. It is quite true, as is said, that these are merely general words; but then, unless there is some compelling reason to the contrary, I should be inclined to regard general words as the most apt to produce a corresponding general result. A B

Now the appellant says that the reason for an exception being made in her case lies in the fact that, as her writ shows, she intends to establish that the compulsory purchase order in question was made and confirmed "in bad faith"; and that, when such a plea is raised, it is the duty of a court of law so to interpret the apparently general words used by Parliament as not to apply them to legal proceedings that are designed to determine that issue. It is because I do not think that the law either requires or entitles us to adopt such a method of construing an Act of Parliament that, in my opinion, the appellant's action must be stopped. Of course, it is well known that courts of law have always exercised a certain authority to restrain the abuse of statutory powers. Such powers are not conferred for the private advantage of their holders. They are given for certain limited purposes, which the holders are not entitled to depart from; and, if the authority that confers them prescribes, explicitly or by implication, certain conditions as to their exercise, those conditions ought to be adhered to. It is, or may be, an abuse of power not to observe the conditions. It is certainly an abuse of power to seek to exercise it when the statute relied on does not truly confer it, and the invalidity of the act does not depend in any way on the question whether the person concerned knows or does not know that he is acting ultra vires. It is an abuse of power to exercise it for a purpose different from that for which it is entrusted to the holder, not the less because he may be acting ostensibly for the authorised purpose. Probably most of the recognised grounds of invalidity could be brought under this head: the introduction of illegitimate considerations, the rejection of legitimate ones, manifest unreasonableness, arbitrary or capricious conduct, the motive of personal advantage or the gratification of personal ill-will. However that may be, an exercise of power in bad faith does not seem to me to have any special pre-eminence of its own among the causes that make for invalidity. It is one of several instances of abuse of power and it may, or may not, be involved in several of the recognised grounds that I have mentioned. Indeed, I think it plain that the courts have often been content to allow such circumstances, if established, to speak for themselves, rather than to press the issue to a finding that the group of persons responsible for the exercise of the power have actually proceeded in bad faith. C D E F G

It must be assumed that the legislature which enacted the Acquisition of Land (Authorisation Procedure) Act, 1946, was aware that the law protected persons disturbed by an exercise of statutory powers in that it allowed them to come to the courts to challenge the validity of the exercise on any of such grounds. But, if so, I do not see how it is possible to treat the provisions of para. 15 and para. 16 of Part 4 of Sch. 1 to the Act as enacting anything less than a complete statutory code for regulating the extent to which and the conditions under which courts of law might be resorted to for the purpose of questioning the validity of a compulsory purchase order within the protection of the Act. I should, myself, read the words of para. 15 (1) H I

"on the ground that the authorisation of a compulsory purchase thereby granted is not empowered to be granted under this Act"

as covering any case in which the complainant sought to say that the order in question did not carry the statutory authority which it purported to. In other words, I should regard a challenge to the order on the ground that it had not been

A made in good faith as within the purview of para. 15. After all, the point which concerns the aggrieved person is the same in all cases: an order has been made constituting an ostensible exercise of statutory power, and his purpose in resorting to the courts is to show that there is no statutory authority behind the order. I do not see any need to pick and choose among the different reasons which may support the plea that the authorisation ostensibly granted does not carry the powers of the Act. But, even if I did not think that an order could be questioned under para. 15 on the ground that it had been exercised in bad faith and I thought, therefore, that the statutory code did not allow for an order being questioned on this ground at all, I should still think that para. 16 concluded the matter and that it did not leave to the courts any surviving jurisdiction.

C The appellant's argument for an exception rests on certain general reflections which do not seem to me to make up into any legal principle of construction as applied to an Act of Parliament. It is said that the six weeks which are all the grace that, on any view, para. 15 allows an aggrieved person for his taking action are pitifully inadequate as an allowance of time when bad faith, which may involve concealment or deception, is thought to be present. And, indeed, they are. Further, it is said that it would be an outrageous thing if a person D who, by ordinary legal principles, would have a right to upset an order affecting him were to be precluded from coming to the courts for his right, either absolutely or after six weeks, when the order is claimed by him to have been tainted by bad faith. And, perhaps, it is. But these reflections seem to me to be such as must, or should have, occurred to Parliament when it enacted para. 16. They are not reflections which are capable of determining the construction of the Act once it E has been passed, unless there is something that one can lay hold of in the context of the Act which justifies the introduction of the exception sought for. Merely to say that Parliament cannot be presumed to have intended to bring about a consequence which many people might think to be unjust is not, in my opinion, a principle of construction for this purpose. In point of fact, whatever innocence of view may have been allowable to the lawyers of the eighteenth and nineteenth F centuries, the twentieth century lawyer is entitled to few assumptions in this field. It is not open to him to ignore the fact that the legislature has often shown indifference to the assertion of rights which courts of law have been accustomed to recognise and enforce, and that it has often excluded the authority of courts of law in favour of other preferred tribunals.

G At one time the argument was shaped into the form of saying that an order made in bad faith was in law a nullity and that, consequently, all references to compulsory purchase orders in para. 15 and para. 16 must be treated as references to such orders only as had been made in good faith. But this argument is, in reality, a play on the meaning of the word nullity. An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to H establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders. And that brings us back to the question that determines this case: Has Parliament allowed the necessary proceedings to be taken? I am afraid that I have searched in vain for a principle of construction as applied to Acts of Parliament which would enable the appellant to succeed. On the other hand, it is difficult I not to recall in the respondents' favour the dictum of LORD BACON: "*non est interpretatio, sed divinatio, quæ recedit a litera.*"

LORD SOMERVELL OF HARROW: My Lords, objections to a compulsory purchase order by the vendor or other person aggrieved would I think normally fall under one or other of the following heads—(i) merits, (ii) ultra vires, or (iii) mala fides. There may be debatable frontiers. So far as the merits are concerned, the Acquisition of Land (Authorisation Procedure) Act, 1946, provides for publication, notices and objections, if any. Objections may be

heard before a local inquiry or individually, as provided in the Act. Subject to the procedures there laid down, the "merits" are finally decided by the local authority, subject to confirmation by the Minister. A

Ultra vires and mala fides are, prima facie, matters for the courts. If the jurisdiction of the courts is to be ousted it must be done by plain words. A good example of ultra vires came before the courts while this appeal was being argued. The Act of 1946 provides for a special parliamentary procedure if the land covered by the order is, inter alia, a common or open space. The local authority and the Minister had, bona fide, proceeded on the basis that the land was not a common or open space and had not, therefore, operated the special procedure. By the time the case came on, the Minister conceded that the land covered was an open space and the order was quashed (*Richardson v. Minister of Housing and Local Government* (4) (Feb. 24, 1956) "The Times"). Another example is *Re Ripon (Highfield) Housing Order, 1938, White & Collins Application* (5) ([1939] 3 All E.R. 548). There was no suggestion of bad faith. B C

Mala fides is a phrase often used in relation to the exercise of statutory powers. It has never been precisely defined, as its effects have happily remained mainly in the region of hypothetical cases. It covers fraud or corruption. As the respondents have moved before the bad faith has been particularised, one must assume the worst. It has been said that bad faith is an example of ultra vires and observations to this effect are relied on by the respondents in support of their submission that the words "not empowered to be granted" in para. 15 of Sch. 1 to the Act cover cases where fraud or corruption is relied on, although, on the face of it, there is no irregularity. The following passage from WARRINGTON, L.J., in *Short v. Poole Corpn.* (6) ([1926] Ch. 66 at p. 91), is perhaps the most favourable to this argument: D E

"My view then is that the only case in which the court can interfere with an act of a public body which is, on the face of it, regular and within its powers, is when it is proved to be in fact ultra vires, and that the references in the judgments in the several cases cited in argument to bad faith, corruption, alien and irrelevant motives, collateral and indirect objects, and so forth, are merely intended when properly understood as examples of matters which if proved to exist might establish the ultra vires character of the act in question." F

This way of describing the effect of bad faith should not be used to blur the distinction between an ultra vires act done bona fide and an act on the face of it regular but which will be held to be null and void if mala fides is discovered and brought before the court. The division in law is clear and deep. No party would be allowed to raise fraud under an allegation of ultra vires simpliciter. In *Demetriades v. Glasgow Corpn.* (7) ([1951] 1 All E.R. 457), the plaintiff complained of acts done on his land after requisition. He alleged, inter alia, that trees had been unlawfully cut. If there had been mala fides, the cutting would, as I follow it, have been unlawful, but the House would not consider the possibility of bad faith in the absence of an express averment. This is stated by LORD NORMAND at the end of his opinion (*ibid.*, at p. 460). My noble and learned friend, LORD MORTON OF HENRYTON (*ibid.*, at p. 461) said this: G H

"The position would be different if there were any allegation of fact that the competent authority, through his agents the respondents, had acted in bad faith and with some ulterior motive in carrying out this work on the trees. The truth or falsity of such an allegation could be investigated by a court of law." I

But no such investigation could take place in a case in which there was a claim for a declaration that the cutting had been unlawful.

In *Carltona, Ltd. v. Works Comr.* (8) ([1943] 2 All E.R. 560), the writ claimed a declaration that the Commissioner of Works was not entitled to take possession

- A of the plaintiffs' premises and that a notice on which the commissioner relied was invalid. LORD GREENE, M.R., held bad faith could not be raised under a writ in this form. The words of para. 15 are plainly appropriate to ultra vires in the ordinary sense. They do not, in their ordinary meaning, in my opinion, cover orders which "on the face of it" are proper and within the powers of the Act, but which are challengeable on the ground of bad faith. The wording of the paragraph itself supports this view. If mala fides is within the paragraph it must be within the earlier words "is not empowered to be granted under this Act". These words do not apply to a certificate under Part 3. If the paragraph was to cover mala fides, it would have covered it in relation to a certificate as well as to an order. It has not done so.

- C This construction is strengthened by the context. The jurisdiction of the court under para. 15 is ousted after six weeks. If Parliament had intended that this should apply in the case of a person defrauded it would have made it plain, and not left it to be derived from a doubtful syllogism which would certainly not occur to a layman and would not, I think, occur ordinarily to a lawyer unless he happened to have had recently to familiarise himself with passages such as that I have cited from WARRINGTON, L.J.

- D The limited right under para. 15, therefore, does not apply to applications based on bad faith. Pausing there, the victim of mala fides would have his ordinary right of resort to the courts. It is said, however, that para. 16 takes away this right. In other words, Parliament, without ever using words which would suggest that fraud was being dealt with, has deprived a victim of fraud of all right of resort to the courts while leaving the victim of a bona fide breach of a regulation with such a right. If Parliament has done this it could only be by inadvertence. The two paragraphs fall to be construed together. Mala fides being, in my opinion, clearly excluded from para. 15, it should not, I think, be regarded as within the general words of para. 16. Construing general words as not covering fraud is accepted as right in many contexts. This seems to me an appropriate context for that principle. The Act, having provided machinery for access to the courts in cases of ultra vires, cannot have intended to exclude altogether a person defrauded. General words, therefore, should not be construed as effecting such an exclusion.

- G The respondents sought to rely on the word "whatsoever". It is a word which, in certain contexts, may bring comfort to those who seek to include fraud under general words. Here it is applied not to the grounds of challenge but to the legal proceedings. Orders of this kind may be challenged in various ways, by injunction, by prerogative order or the procedure now substituted, or, as here, by an ordinary writ. The word "whatsoever" is apt to cover this multiplicity.

- H It is finally said there might be great inconvenience if after, say, houses had been built the validity could be challenged. There are two grounds which lead me to give little weight to this. First, there is a possibility of fraud in the subsequent proceedings following on a notice to treat. No one suggests there is any ouster or special limitation of jurisdiction in that case. Further, if there is a possibility of bad faith in matters of this kind, I would think it much more inconvenient to the administration, national and local, as a whole that a person defrauded should be deprived of any remedy in the courts. I, therefore, would allow the appeal.

Appeal allowed in part.

Solicitors: *A. E. Hamlin*, Sheringham (for the appellant); *Lees & Co.*, agents for *Mossop & Bowser*, Holbeach (for the respondents East Elloe Rural District Council and J. C. Pywell); *Solicitor, Ministry of Health* (for the respondent the Ministry of Housing and Local Government).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

PHILIPS v. WARD.

[COURT OF APPEAL (Denning, Morris and Romer, L.JJ.), February 28, 29, March 21, 1956.]

Negligence—Valuation and survey of landed property—Measure of damages—House purchased in reliance on surveyor's report.

In 1952 the plaintiff employed the defendant, a surveyor, to survey and advise him on the structural and general condition of a manor house which he proposed to buy. The defendant reported that the house was of very substantial construction and valued it with land and other buildings at between £25,000 and £27,000, but he negligently overlooked the fact that much of the timber in the house was badly affected by death-watch beetle and worm. The plaintiff bought the property for £25,000, and he subsequently brought an action for damages for negligence against the defendant. The work of repairing the house would have cost £7,000 in 1952, and at the time of the hearing of this action would have cost substantially more. It was found by the court that, having regard to the bad condition of the timber, the value of the property in 1952 was £21,000.

Held: (i) the measure of damages was the difference between the fair value of the property if it had been in the condition described in the defendant's report (£25,000) and its value in its actual condition (£21,000); accordingly the amount recoverable in damages was £4,000.

Dictum of VISCOUNT HALDANE, L.C., in *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Rys. Co. of London, Ltd.* ([1912] A.C. at p. 689) applied.

(ii) the damages should be assessed at the date when the damage occurred, viz., 1952, and accordingly allowance should not be made for the increase of the cost of executing the requisite work of repair between that time and the date of the hearing of the action.

Appeal dismissed.

[**Editorial Note.** Although in the present case the principle determining the amount of damages is that stated in holding (i) above, the measure may not be the same in other cases where there has been negligence in advising as surveyor; for example, if the valuation is made with a view to the advancing of money on the security of the property, the measure of damages may be the amount of the lender's expense and loss (see *Baxter v. Gapp & Co., Ltd.*, [1939] 2 All E.R. 752; see per HODSON, L.J., at p. 878, letter I, post).]

As to the liability of professional persons for want of due care and skill, see 23 HALSBURY'S LAWS (2nd Edn.) 577, para. 829; and for cases on the subject, see 36 DIGEST (Repl.) 27, 28, 113-120; 43 DIGEST 1044, 22 et seq.]

Cases referred to:

- 1) *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Rys. Co. of London, Ltd.*, [1912] A.C. 673; 81 L.J.K.B. 1132; 107 L.T. 325; 17 Digest (Repl.) 108, 226.
- 2) *Lukin v. Godsall*, (1795), Peake, Add. Cas. 15; 36 Digest (Repl.) 199, 1049.
- (3) *Hide v. Thornborough*, (1846), 2 Car. & Kir. 250; 19 Digest 194, 1469.
- (4) *Moss v. Christchurch Rural District Council*, *Rogers v. Same*, [1925] 2 K.B. 750; 95 L.J.K.B. 81; 17 Digest (Repl.) 80, 31.
- (5) *Murphy v. Wexford County Council*, [1921] 2 I.R. 230; Digest Supp.
- (6) *Morris v. Sands*, (July 15, 1955), Unreported; but see 105 L.Jo. 530 for an account of the case.
- (7) *Cummings v. London Bullion Co., Ltd.*, [1952] 1 All E.R. 383; [1952] 1 K.B. 325; 17 Digest (Repl.) 457, 184.
- (8) *Di Ferdinando v. Simon, Smits & Co.*, [1920] 3 K.B. 409; 89 L.J.K.B. 1039; 124 L.T. 117; 17 Digest (Repl.) 173, 686.

- A (9) *S.S. Celia v. S.S. Volturno*, [1921] 2 A.C. 544; 90 L.J.P. 385; 126 L.T. 1; 17 Digest (Repl.) 173, 685.
- (10) *Bishop v. Cunard White Star Co., Ltd., The Queen Mary*, [1950] 2 All E.R. 22; [1950] P. 240; 2nd Digest Supp.
- (11) *Baxter v. Gapp & Co., Ltd.*, [1939] 2 All E.R. 752; [1939] 2 K.B. 271; 108 L.J.K.B. 522; 160 L.T. 533; Digest Supp.

B

Appeal.

Appeal by the plaintiff from an order of His Honour W. K. CARTER, Q.C., Official Referee, dated Dec. 14, 1955, whereby the plaintiff was awarded £4,000 damages for the defendant's negligence in performing a contract to survey and report on property subsequently purchased by the plaintiff.

C

L. Lewis for the plaintiff.

Viscount Hailsham, Q.C., and *R. O. C. Stable* for the defendant.

Cur. adv. vult.

Mar. 21. The following judgments were read.

D

DENNING, L.J.: In 1952 the plaintiff wanted to buy a house and farm.

He saw Holmhurst Manor Farm, Burwash Common, in Sussex, which attracted him, and he employed the defendant, a surveyor, to survey it and advise him on the structural and general condition of the building. It is a manor house built in 1610, probably by one of the ironmasters of this area, with a stone base, mellow brick above, and stone mullioned windows. There were in addition

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two cottages, oasthouses and so forth and in addition 137 acres of land. The defendant went over it and made a report dated Feb. 4, 1952, in which he said that the house was of very substantial construction with the best materials and workmanship lavished on it, but that there were minor defects which he set out in the report. He put the value of the property at something between £25,000 and £27,000. On the faith of the report, the plaintiff in June, 1952,

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bought the place for £25,000. Unfortunately, the defendant had been negligent. He did not notice that the timbers of the house were badly affected by death-watch beetle and by worm. They were in fact so rotten that the only thing to do is to take off the roof and make it afresh with good timber, to re-build the timbers in the cellars, to put in new wall plates and so forth. This work will cost £7,000 at 1952 prices. The plaintiff claims that this expense is due

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to the defendant's negligence and that he should recover it, or nearly all of it, as damages. The Official Referee has found, however, that although it will cost £7,000 to repair, nevertheless the value of the house and farm is not to be found by deducting £7,000 from the price of £25,000. Even if a purchaser knew of the bad condition of the house, a fair price would be £21,000. Only £4,000 would be deducted on account of its condition, not £7,000. The reason

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is that many other factors come into play in fixing the price. The cost of repairing defects is only one of them. The Official Referee has held that in these circumstances the proper measure of damage is not the cost of repair, £7,000, but "the difference between the value of the house and farm in the condition described in the report and their value as they should have been described". He fixed this difference at £4,000 and gave judgment accordingly. The plaintiff

I

appeals, saying that it should be more.

I take it to be clear law that the proper measure of damage is the amount of money which will put the plaintiff into as good a position as if the surveying contract had been properly fulfilled: see *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Rys. Co. of London, Ltd.* (1) ([1912] A.C. 673 at p. 689, per VISCOUNT HALDANE, L.C.). Now if the defendant had carried out his contract, he would have reported the bad state of the timbers. On receiving that report, the plaintiff either would have refused to have anything to do with the house, in which case he would have suffered no damage,

or he would have bought it for a sum which represented its fair value in its bad condition, in which case he would pay so much less on that account. The proper measure of damages is therefore the difference between the value in its assumed good condition and the value in the bad condition which should have been reported to the client. A

We were referred to the cases where a house is damaged or destroyed by the fault of a tortfeasor. These cases are, I think, different. If the injured person reasonably goes to the expense of repairing the house, the tortfeasor may well be bound to pay the cost of repair, less an allowance because new work takes the place of old: see *Lukin v. Godsall* (2) (1795) (Peake, Add. Cas. 15); *Hide v. Thornborough* (3) (1846) (2 Car. & Kir. 250). In other cases, the tortfeasor may only have to pay the value of the house: see *Moss v. Christchurch Rural District Council* (4) ([1925] 2 K.B. 750). It all depends on the circumstances of the case: see *Murphy v. Wexford County Council* (5) ([1921] 2 I.R. 230). C
The general rule is that the injured person is to be fairly compensated for the damage he has sustained, neither more nor less.

We were also referred to the cases where a house is left out of repair by a tenant in breach of his covenant. These cases, too, are different, because a surveyor does not enter into a covenant to repair and he gives no warranty as to the condition of the premises. If those cases were relevant, however, they would go to show that the cost of repair was not nowadays the proper measure. D
We had a case not long ago, *Morris v. Sands* (6), where a purchaser bought a Georgian house and twenty-five acres for £6,250 and then sought to recover from the tenant £7,333 for dilapidations, because that was the cost of repair. That would mean that he got the place for nothing and £1,083 in pocket as well. E
The Official Referee awarded £7,333, but this court reversed him. I there said that the cost of repair

"is not the proper test in the case of a considerable estate. In such a case the purchase price is often not much affected by the want of repair, because a purchaser can turn it to his advantage in that, when he puts it into repair, he can get considerable tax relief. Further, when extensive land is included in the sale in addition to the house, the want of repair of the house does not influence the price so greatly as it otherwise would. So many factors come into play that the cost of repairs is not the test. The proper criterion is to take the difference in value between the premises as they ought to have been, delivered up in repair, and the value of the premises as they are, delivered up out of repair. The difference is the measure of damages to which the landlord is entitled." F
G

So also in this action, if the plaintiff were to recover from the surveyor £7,000, it would mean that the plaintiff would get for £18,000 (£25,000 paid less £7,000 received) a house and land which were worth £21,000. That cannot be right. H
The proper amount for him to recover is £4,000.

Another point arose about the time at which the damages should be assessed. The cost of repair has risen considerably since the house was bought, and it will cost the plaintiff a good deal more than £7,000 now to put his house right. The £7,000 is based on 1952 costs, not 1956 costs. The £4,000 is derived from that figure: and represents the difference in value at 1952 prices, not those ruling today. I think that it is right to assess the damages as at 1952 prices. I
The general principle of English law is that damages must be assessed as at the date when the damage occurs, which is usually the same day as the cause of action arises, but may be later: see *Cummings v. London Bullion Co., Ltd.* (7) ([1952] 1 All E.R. 383). A fall thereafter in the value of money does not in law affect the figure, for the simple reason that sterling is taken to be constant in value: see *Di Ferdinando v. Simon, Smits & Co.* (8) ([1920] 3 K.B. 409 at p. 414, per SCRUTTON, L.J.); *S.S. Celia v. S.S. Volturno* (9) ([1921] 2 A.C. 544

A at p. 563, per LORD WRENBURY); *Bishop v. Cunard White Star Co., Ltd., The Queen Mary* (10) ([1950] 2 All E.R. 22 at p. 25, per HODSON, J.). In the case of continuing damage (as in personal injury cases) the award for permanent disability can and usually does take into account the fall in the value of money since the accident: but that is because much of the damage has accrued and will accrue since that date.

B In my opinion the Official Referee was quite right, and I would dismiss the appeal.

C MORRIS, L.J.: When the plaintiff in 1952 was contemplating a purchase of a property known as Holmhurst Manor Farm in Sussex he employed the defendant to make a survey and to advise as to the structural and general condition of the buildings. The defendant made a full report which was dated Feb. 4, 1952. The learned Official Referee has held that this report was negligently made. He has found

D “that a reasonable and competent surveyor after making a careful examination of the residence in 1952 would have discovered, as was the fact, that the roof had reached the end of its life and required complete reconstruction, using the old timbers and tiles where they were still able to fulfil their original function; that the condition of the wall plate and exposed joists in the cellar was such that a complete renewal of the plate and repair or renewal of most of the joists was a virtual certainty; that the main timbers of the house were infected with death-watch beetle and required examination and treatment and renewal or repair where necessary.”

E The plaintiff purchased the property in June, 1952. In doing so, he placed reliance on the report of the defendant which left him in ignorance of the serious defects which in fact existed and which the defendant ought to have discovered and mentioned. The defects came to the knowledge of the plaintiff later in 1952. If the necessary work of restoration had been undertaken at the cost levels ruling in 1952, the cost of such work would have been £7,000. In fact, F the work of restoration has not yet been undertaken and cost levels are now higher. If damages are to be awarded by reference to the cost of executing the work, it was submitted that such cost should be computed by taking the cost levels ruling at the time of the hearing of the action. It was said that it was reasonable to postpone the execution of the work so that the state of the property should be available for inspection at the date of the hearing: it was G said that the learned Official Referee availed himself of the opportunity of inspecting the property and that this demonstrated that it was reasonable to have deferred the work of repair. I cannot accede to this view. If the measure of damages is to be fixed by reference to the cost of executing repairs, it should be the 1952 cost. There could have been inspections before putting work in hand, and witnesses could have testified as to what they had seen. If necessary, H also photographs could have been taken.

I The learned Official Referee has held that the plaintiff should recover £4,000 as being the difference between the value of the property in the condition described in the report and the value of it as it should have been described. The plaintiff, who appeals, submits that the award should have been on the basis of what at the date of the hearing in November, 1955, or alternatively what in 1952, it would have cost to do the work of restoration.

In his judgment, the learned Official Referee said:

“I direct myself that the proper measure of damages in this case is the difference between the value of the house and farm in the condition described in the report and their value as they should have been described.”

It was submitted on behalf of the defendant that no point of law arose and that the decision was one of fact as to the amount of the damages to be awarded to compensate the plaintiff. I think, however, that it is open to the plaintiff

to submit, if he can, that there was a wrong approach in law or that the basis of the finding was wrong in law and to succeed if this is shown. In his statement of claim, the plaintiff claimed his damages in alternative ways. First he claimed £16,000, approximately, on the basis that £25,000 was the value of the property without the unreported defects, whereas "by reason of such defects the said property was worth no more than about £9,000". Secondly, the plaintiff claimed an amount of between approximately £11,500 and £14,000 as being the expense which he would incur in order to put the property in tenable repair. A B

In my judgment, the damages to be assessed were such as could fairly and reasonably be considered as resulting naturally from the failure of the defendant to report as he should have done. I do not find any error of approach on the part of the learned Official Referee. It is said, however, that he was not warranted in proceeding on the basis which in fact constituted the first of the two alternative bases put forward in the statement of claim by the plaintiff, viz., the basis of the difference between the value of the property as it was described in the defendant's report and its value as it should have been described. In my view, however, that was the correct basis on the facts of this case. C

If the plaintiff had discovered the omissions or errors in the defendant's report before he had contracted to buy, then it may be that he would not have proceeded with his projected purchase. If he had wished to proceed and had received an estimate of £7,000 as being the cost of doing work of restoration, it may be that he would have offered £18,000 and would have urged that that was an appropriate figure to pay, having regard to the fact that he would have to spend £7,000. But the finding in this case shows that the property was, at the time of the sale, actually worth £21,000. Accordingly, the owner would not have been likely to sell for £18,000 property which was worth £21,000. It might at first seem surprising that the reduction in value below £25,000 should be less than the cost of executing the necessary work. Apart, however, from the fact that this was the finding of fact based on the general evidence given at the hearing in regard to valuations, it is to be remembered that property in which there is extensive new work by way of repair or restoration may have an increased life and may acquire an enhanced value. In the present case, if the repair work costing £7,000 had been done in 1952, it seems very likely that the roof would then have been put into a condition so that it would last longer than it would have lasted had it been an old roof, though an old roof not impaired by the ravages of the death-watch beetle. Similar considerations might apply in regard to the replacement of the main timbers of the house. Furthermore, the effecting of the repair work costing £7,000 would most probably have had the result that the annual cost of upkeep of the property would be diminished. The plaintiff must not be placed in a better position by the award of damages than he would have been in had the defendant given a proper report. If the plaintiff had received £7,000 damages in 1952 on the basis of what it would then cost him to do the repair work, and if the plaintiff instead of doing the work had sold the property for £21,000, which was its value, he would have profited to the extent of £3,000. The present case differs from *Baxter v. Gapp & Co., Ltd.* (11) ([1939] 2 All E.R. 752) where a negligently given valuation caused the plaintiff to advance money on mortgage to an unsatisfactory borrower, with the result that the plaintiff as mortgagee was put to expense and loss. The amount of such expense and loss was in that case the measure of the damage sustained by the plaintiff. In the present case, the plaintiff, being mindful to purchase a property and seeking advice as to its condition, paid £25,000 for it, which would have been its value if it had been in the condition described by the defendant, whereas its real value in its actual condition as it should have been described by the defendant was £21,000. In those circumstances, it seems to me that the figure of £4,000 represented the D E F G H I

A proper measure of the damage sustained by the plaintiff, and I see no error of law in the approach of the learned Official Referee.

ROMER, L.J. (read by **DENNING, L.J.**): It appears to me that in order to arrive at a correct solution of the problem in this case one has to compare the position into which the plaintiff was put by the defendant's failure to perform his duty with the position in which he would have been had the defendant performed it; and in so far as the first position is more unfavourable to the plaintiff than the second, and the difference can be assessed in terms of money, then *prima facie* that assessment is the measure of the defendant's liability to the plaintiff.

By reason of the defendant's inaccurate report, the plaintiff bought for £25,000 what he believed to be a property which was in good condition, only to discover after he had bought it and moved in that it would require an additional expenditure of some £7,000 to put the property into the state which the defendant had advised him that it was in already. The plaintiff accordingly contends that he is entitled to recover more than £7,000 if the cost of the necessary work to the property be taken at the date of the hearing before the Official Referee, which he submits it should be, instead of 1952. At first sight, there would seem to be much to be said in favour of the view that the extra expense with which the plaintiff was unexpectedly confronted is the proper measure of the damages recoverable from the defendant—subject, possibly, to some deduction for the fact that, as a result of the work being done, the plaintiff would have new material in the house instead of old. It is, however, as I have already suggested, necessary to consider not only what did in fact happen, but also what the plaintiff's position would have been if the defendant had performed his contract by sending in an accurate report as to the condition of the property; and this position has to be considered in the light of the Official Referee's finding that the market price of the property, after taking into account the defects which the defendant failed to disclose, was £21,000. If the plaintiff had received a report which revealed these defects, he would have known that he would have to spend £7,000 in addition to finding the purchase money for the house. With this knowledge, he might have decided that he would not buy the property at all, in which case he would have kept his money in his pocket and had no house. (On this hypothesis his ignorance of the defects may be said to have worsened his position to the extent of £4,000, for he parted with £25,000 and became the possessor of property worth only £21,000.) As an alternative to deciding not to buy the house, with knowledge of its defects, he might have made up his mind to purchase it at the reduced value of £21,000 and carry out the work which had to be done, at the cost of £7,000. In that event, he would have had to spend £28,000 instead of the £32,000 total expenditure which resulted from his buying the property on the faith of the defendant's report. On this hypothesis also, then, his position was worsened to the extent of £4,000, i.e., the difference between £28,000 and £32,000. On such facts as are before us, I can think of no action that the plaintiff might have taken, had he received a true report from the defendant, other than not buying the property at all, on the one hand, or buying it at its market price, on the other; and as he would have been £4,000 better off by taking either action than he became by acting on the defendant's report, it seems to me that that is the true sum which he is entitled to recover from the defendant. It may well be that if, on learning of the real condition of the house, he had decided to leave and re-sell, he would have been entitled to recover from the defendant, in addition to the £4,000, his costs and expenses of moving in and moving out and of the re-sale. As, however, he elected to stay, after all the facts had become known to him, this point does not arise.

I feel, accordingly, constrained to reject the plaintiff's claim to £7,000; and I would only add that even if I had been able to accept the principle on which

it was based, I can see no warrant for the plaintiff's submission that the sum should be increased so as to reflect the diminution in the value of the pound since 1952. A

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *B. A. Woolf & Co.* (for the plaintiff); *Oswald Hickson, Collier & Co.* (for the defendant). B

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

CHANCERY DIVISION.

PRACTICE NOTE.

Income Tax—Appeal—Case Stated—Appeal from Income Tax Commissioners—

Dismissal of appeals by consent.

The judges of the Chancery Division have decided that while the Revenue Paper is in their charge they will in connection with Cases Stated on appeal from the Income Tax Commissioners adopt the practice of the Court of Appeal for the dismissal of appeals by consent. This practice is stated in the ANNUAL PRACTICE, 1956, p. 1262, and is explained by LORD GREENE, M.R., in *Re Samuel* ([1945] 2 All E.R. 319 at p. 321; [1945] Ch. 364 at p. 368).

March 9, 1956.

[END OF VOLUME ONE.]



